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# LATIN AMERICA AND ICSID: DAVID VERSUS GOLIATH?

*Katia Fach Gómez*<sup>1</sup>

“Stranger and more pure than any hron is, at times, the ur:  
the object produced through suggestion, educed by hope”.  
Tlön, Uqbar, Orbis Tertius Ficciones  
Jorge Luis Borges

## I. INTRODUCTION

**I**N recent years, the International Center for the Settlement of Investment Disputes (ICSID) has witnessed a dramatic increase in the number of arbitration requests where Latin American countries are the respondents.<sup>2</sup> Today, out of almost 130 cases pending, over sixty involve states from the Latin American region.<sup>3</sup> This situation is paradigmatic, because Latin American countries initially showed a widespread rejection of the ICSID Convention. In the mid-sixties Latin America manifested its opposition, in bloc, to the World Bank’s project to create an international agency specializing in settling investment disputes.<sup>4</sup> This opposition was christened “El No de Tokyo.”<sup>5</sup> The Calvo Doctrine, named after Carlos Calvo, an Argentine jurist, was firmly established at

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1. This article was completed in July 2010, and all sources, including websites, are current to that date. The author is Professor of Private International Law at the University of Zaragoza (Spain), is a member of the Spanish Research Projects DER2009-11 702 (Sub JURI) and e-PROCIFIS (Ref S14 / 3), and can be reached at the following email address: [katiafachgomez@gmail.com](mailto:katiafachgomez@gmail.com). Professor Fach Gómez is grateful to Joseph T. McLaughlin for his suggestions, and would like to express her appreciation and admiration for Alejandro Garro, who always offers his abundant support and wisdom.
  2. ICSID CASELOAD STATISTICS, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES 7 (2010), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English12>.
  3. List of Pending Cases, Int’l Ctr. for Settlement of Inv. Disputes, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListPending> (last visited Sept. 18, 2010).
  4. See ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 540 (John H. Jackson ed., 2d ed., 2008); see also Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT’L & COMP. L. 47, 54 (2009).
  5. As Professor Lowenfeld reports: “[w]hen the report of the regional meetings on the proposed 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.” Lowenfeld, *supra* note 4, at 54.

the time, impeding foreign nationals from invoking the diplomatic protection to settle international disputes with Latin American states.<sup>6</sup> This doctrine, presented in the second half of the nineteenth century, is two-fold: (1) sovereign states should not suffer from interference by other states and (2) foreigners are placed on an equal footing with nationals; thus, they can only seek redress for grievances before local courts.<sup>7</sup> Applying this doctrine to the arbitration sphere means that international arbitration is precluded in favor of the forum's jurisdiction.<sup>8</sup> These theories were incorporated, under the form of "Calvo Clause requirements," by several Latin American States in their constitutions, statutes and international contractual practices.<sup>9</sup>

The eighties introduced a shift on the issue. Some Latin American countries privatized several of their energy and utility companies and at the same time began to sign bilateral investment treaties (BITs) in order to stimulate economic growth through direct investment.<sup>10</sup> BITs typically offer investors a group of substantive rights (*e.g.*, fair and equitable treatment to foreign investments, duty on host states to grant national and most-favored-nation treatment and a series of guarantees in case of expropriation).<sup>11</sup> BITs also include provisions for dealing with disputes between a state and investors from another state.<sup>12</sup> Some of these treaties allow private investors to resort to international arbitration, after exhausting efforts to comply with domestic judicial proceedings during a specific period of time.<sup>13</sup> This prerequisite is known as the "soft Calvo Clause."<sup>14</sup> Other treaties allow direct access to arbitration.<sup>15</sup> Almost always, BITs offer a menu of international arbitral forums where ICSID is one of the options.<sup>16</sup>

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6. Francesco Tamburini, *Historia y Destino de la Doctrina Calvo: Actualidad u Obsolescencia del Pensamiento de Carlos Calvo?* [*History and Fate of the Calvo Doctrine: Obsolescence of the Current Thinking of Carlos Calvo*], 24 *Revista de estudios histórico-jurídicos* (2002) (Chile), available at [http://www.scielo.cl/scielo.php?pid=s0716-54552002002400005&script=sci\\_arttext](http://www.scielo.cl/scielo.php?pid=s0716-54552002002400005&script=sci_arttext).
  7. Denise Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*, 26 *LAW & POL'Y INT'L BUS.* 1169, 1172-73 (1995).
  8. Bernardo M. Cremades, *Disputes Arising out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues*, 59 *DISP. RESOL. J.* 78, 80 (2004).
  9. *Id.*
  10. Manning-Cabrol, *supra* note 7, at 1191.
  11. *Bilateral Investment Treaties*, Office of the United States Trade Representative, <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties> (last visited Sept. 5, 2010).
  12. *Id.*
  13. Cremades, *supra* note 8, at 81.
  14. HECTOR A. MAIRAL, *EL SILENCIO DE LOS TRIBUNALES ARGENTINOS* [The Silence of Argentinian Courts] 7, 19 (2007), available at <http://www.ijl.org/GAL/documents/mairal.pdf>.
  15. Cremades, *supra* note 8, at 81.
  16. Elodie Dulac & John Savage, *China: BITS*, *Asia Pacific Arb. Rev.*, 2007, available at <http://www.globalarbitrationreview.com/reviews/2/sections/4/chapters/19/china-bits/>.

In the last decade, the financial crisis in Argentina and several nationalizations carried out by young leftist and populist governments in South America has spawned a large number of claims before ICSID, brought primarily by U.S. and European investors.<sup>17</sup> Developing countries and some scholars began to look at ICSID critically, formulating a list of complaints such as: ICSID's lack of financial and management structure to face its increasing workload;<sup>18</sup> ICSID's umbilical cord with the World Bank;<sup>19</sup> concerns by some Latin American states that hostility toward ICSID may hamper access to World Bank credit;<sup>20</sup> the pressure on developing countries to resort to assistance from extremely expensive foreign law firms;<sup>21</sup> non-commercial interests, such as health or environmental protection have not received adequate attention;<sup>22</sup> a lack of transparency by arbitration panels;<sup>23</sup> a shadow of arbitrator bias in favor of the investor, with different ad hoc tribunals analyzing similar cases reaching disparate results;<sup>24</sup> the absence of an appeals process, but only a limited annulment procedure;<sup>25</sup> failure to take into account situations of massive economic downturns;<sup>26</sup> cracks in its system of voluntary enforcement and compliance with the award, with some foreign investors losing their faith in Argentina's willingness to honor ICSID awards.<sup>27</sup>

In connection with the latter, Argentina is the most significant example of how a member state of ICSID is making use of the tools provided by

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17. ICSID CASELOAD STATISTICS, *supra* note 2, at 7.
  18. David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT'L L. 563, 610 (2008).
  19. See ABOUT ICSID, Int'l Ctr. for Settlement of Inv. Disputes, [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID\\_Home](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home) (last visited Sept. 5, 2010).
  20. Andres Rigo Sureda, *ICSID: An Overview*, 13 WORLD ARB. & MEDIATION REP. 166, 166-67 (2002).
  21. Eric Gottwald, *Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 Am. U. Int'l L. Rev. 237, 252-54 (2007); Azid Choudry, *Bilateral Trade and Investment Deals: A Serious Challenge to Global Justice Movements*, Grain.org, Dec. 2003, <http://www.grain.org/rights/tripsplus.cfm?id=2>.
  22. Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT'L L. J. 345, 385 (2007).
  23. Daniel Barstow Magraw Jr. & Niranjali Manel Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15 ILSA J INT'L & COMP L 337 (2009).
  24. Matthew C. Porterfield, *An International Common Law of Investor Rights?*, 27 U. PA. J. INT'L ECON. L. 79, 102 (2006).
  25. Christian J. Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure*, *Beitrag zum Transnationalen Wirtschaftsrecht, Heft 57* [Contributions to Transnational Commercial Law, Book 57] (2006), available at [www.economiclaw.uni-halle.de/Heft57.pdf](http://www.economiclaw.uni-halle.de/Heft57.pdf).
  26. Charity L. Goodman, *Unchartered Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449, 484 (2007); Paolo di Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 73 (2004).
  27. Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 L. & BUS. REV. AM. 885, 902-11 (2007).

the Convention for challenging awards rendered against the host country. In the Argentine case, many foreign investors had obtained licenses from local government to operate public services.<sup>28</sup> These licenses provided that the users' rates were to be calculated in U.S. dollars, converted to Argentine pesos at the time of invoicing, and adjusted every six months according to the U.S. producer price index.<sup>29</sup> These rates stopped being updated as a result of the economic crisis of 2001 and Argentina passed the Public Emergency and Currency Exchange Regulations Reform Act, which abolished the dollar-to-peso convertibility and devaluated the latter currency.<sup>30</sup> Emergency tariffs were henceforth fixed in pesos at the compulsory exchange rate of one peso per dollar, which became known as the "pesification" of tariffs.<sup>31</sup>

Under these circumstances, many investors turned to ICSID alleging BIT violations (*e.g.*, failure to honor commitments made by Argentina when it induced the claimants to make investments in Argentine industries; failure to accord fair and equitable treatment to claimants' investments; adoption of arbitrary measures that discriminate against the claimants on the basis of their foreign nationality; indirect expropriation of the claimants' investments without complying with the BIT's requirements).<sup>32</sup> In most of these cases, ICSID arbitral tribunals found Argentina liable, noting that the State had breached its obligations to give the investor fair and equitable treatment and also failed to respect other investment commitments in the BITs.<sup>33</sup> In a few cases the arbitral tribunals accepted the defense of necessity alleged by Argentina.<sup>34</sup> These awards generated great concern to the Argentine government, which has developed several strategies to prevent, or at least delay, the payment of compensation.<sup>35</sup> Thus, the government resorted to Article 52 of the ICSID

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28. DANIEL CHUDNOVSKY & ANDRÉS LOPEZ, FOREIGN INVESTMENT AND SUSTAINABLE DEV. IN ARGENTINA, 1, 11 (2008), available at [http://ase.tufts.edu/gdae/Pubs/rp/DPI2Chudnovsky\\_LopezApr08.pdf](http://ase.tufts.edu/gdae/Pubs/rp/DPI2Chudnovsky_LopezApr08.pdf).

29. Frederick R. Fucci, *Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts: Practical Considerations in Int'l Infrastructure Investment and Finance*, INST. OF INT'L COM. L., Apr. 2006, available at <http://www.cisg.law.pace.edu/cisg/biblio/fucci.html#29>.

30. Martin D. Manzano, *Political Risk in Argentina*, LEX MUNDI, Sept. 2003, [http://www.lexmundi.com/images/lexmundi/pdf/pg/article1\\_marval.pdf](http://www.lexmundi.com/images/lexmundi/pdf/pg/article1_marval.pdf).

31. *Id.*

32. CHUDNOVSKY & LOPEZ, *supra* note 28, at 13.

33. Jean E. Kalicki, *ICSID Arbitration in the Americas*, Arb. Rev. of the Americas, 1, 5, July 11, 2006, available at <http://www.arbitralwomen.org/files/publication/4911201000239.pdf>.

34. *Id.*

35. *See, e.g.*, *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Proceeding, ¶ 229 at 48 (June 29, 2010), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550\\_En&caseId=C8](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8).

Convention<sup>36</sup> to seek the annulment of awards,<sup>37</sup> requested a stay in the enforcement of the award based on Rule 54 of the ICSID Rules of Arbitration,<sup>38</sup> and in cases governed by the UNCITRAL Rules, challenged the awards before the courts of the seat if the tribunal had applied the UNCITRAL Rules.<sup>39</sup>

*Nicaragua v. Barceló* is another recent example of how the tables are now turning regarding the relationship between Latin America and ICSID. Host states are beginning to resort to ICSID for their own benefit, just as investors have been doing for decades. On June 25, 2008, the government of Nicaragua filed before ICSID a USD\$30 million lawsuit against the Spanish company Barceló.<sup>40</sup> The Nicaraguan government argued that Barceló did not comply with some yearly payments owed to the government regarding a Nicaraguan tourist center operated by Barceló.<sup>41</sup> It is the third time in the history of ICSID—an organization that has more than 300 claims arbitrated to its credit—that a state, rather than a private investor, filed a claim before this international institution.<sup>42</sup> In this case, the Spain-Nicaragua BIT was used as a “bargaining chip” by Nicaragua in order to force the investor to settle the case.<sup>43</sup> The strategy

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36. See ICSID Convention, Regulations and Rules: Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Ch. IV, art. 52, available at [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) [hereinafter ICSID Convention].
  37. Some of these maneuvers have been successful for Argentina. For example, the recent Decision on annulment in *Sempra v. Argentina* stated that: “In consideration of the foregoing, the Committee unanimously decides to: Annul the Award of 28 September 2007 on the ground of manifest excess of powers (Article 52(1)(b) of the Convention) owing to the failure of the Arbitral Tribunal to apply Article XI of the BIT between the United States and the Argentine Republic concerning Reciprocal Encouragement and Protection of Investment of 14 November 1991: such annulment applies necessarily to the Award in its entirety, pursuant to Article 52(3) of the Convention. Order *Sempra* to reimburse to the Argentine Republic all of the expenses incurred by the Centre in connection with the Annulment proceeding, including the fees and expenses of the arbitrators”. See *Sempra Energy Int’l*, *supra* note 35.
  38. ICSID Convention, Regulations, and Rules: Rules of Procedure for Arbitration Proceedings, Ch. VII, Rule 54, available at [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) [hereinafter ICSID Arbitration Rules]. Being aware of the Argentinean’s intentions, the ad hoc committees constituted for the annulment proceedings of the cases *Enron*, *Vivendi*, and *Sempra*, unsuccessfully ordered Argentina to provide enough economic security—under the form of an undertaking, bank guarantee, escrow, etc.—as a condition to grant the required stay of enforcement. *Sempra Energy Int’l*, *supra* note 35, at 3-5.
  39. Sylvia Noury & Caroline Richard, *International Arbitration in Latin America: Overview and Recent Developments in The International Comparative Legal Guide to International Arbitration 2008*, INT’L COMP. LEGAL GUIDE SERIES, 276 (2008), available at <http://www.iclg.co.uk/khadmin/Publications/pdf/2574.pdf>.
  40. Fernando Cabrera Diaz, *South American Alternative to ICSID in the Works as Governments Create an Energy Treaty*, INV. TREATY NEWS, Aug. 6, 2008, <http://www.investmenttreatynews.org/cms/news/archive/2008/08/06/south-american-alternative-to-icsid-in-the-works-as-governments-create-an-energy-treaty.aspx>.
  41. Luis Carlos Nino, *Nicaragua Takes Spanish Firm to Court over Tourist Centre Dispute*, Global Insight, June 26, 2008. <http://www.ihsglobalinsight.com/>.
  42. Fernando Cabrera Diaz, *supra* note 40.
  43. See generally Acuerdo Para la Promocion y Proteccion Reciproca de Inversiones Entre el Reino de Espana y la Republica de Nicaragua [Agreement between the

was successful. Nicaragua and Barceló reached an agreement, resulting in Barceló's reinvestment in Nicaraguan infrastructure.<sup>44</sup>

This introduction has focused on some actions undertaken by Latin American states within the framework of ICSID, which have reflected dissatisfaction with how this organization functions.<sup>45</sup> I will now turn my attention to a complementary issue which has remained unexplored by previous academic papers: the legal and political ways in which Latin American nations are opposing the ICSID system from outside of its framework. The aim of this paper is to provide a response to the following question: Is the current displeasure with ICSID in some Latin American countries likely to continue and spread to other countries throughout the region, and if so, why?

## II. LATIN AMERICA V. ICSID

A number of signs point to an increasing backlash in Latin America against ICSID. There are different ways in which Latin American nations are showing their reluctance to resort to ICSID arbitration and trying to "think out [sic] the ICSID box." The discussion will focus first on a series of initiatives undertaken individually by some Latin American countries and will subsequently turn to some projects developed in Latin America at the regional level.

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Kingdom of Spain and The Republic of Nicaragua on the Promotion and Reciprocal Protection of Investments], Spain-Nicar., Jun. 28, 1995, 1872 U.N.T.S. 31982, available at [http://untreaty.un.org/unts/120001\\_144071/9/4/00007086.pdf](http://untreaty.un.org/unts/120001_144071/9/4/00007086.pdf).

44. Interestingly, this Understanding provides that any disputes will be resolved, not resorting to ICSID arbitration but to the International Chamber of Commerce. Entendimiento Marco Entre el Gobierno de Nicaragua y el Grupo Barcelo [Understanding Between the Government of Nicaragua and the Barcelo Group], Nicar.-Barcelo Group, art. IV, June 2009, available at [http://www.cornap.gob.ni/imagenes\\_notas/caso\\_motelimar\\_cornap\\_2009.pdf](http://www.cornap.gob.ni/imagenes_notas/caso_motelimar_cornap_2009.pdf).
45. Following this trend, Latin America continues to generate new controversies regarding ICSID arbitration. To cite three recent examples, a Canadian company building an airport in Ecuador initiated ICSID arbitration proceedings, but it was suspended in January 2010 because the parties began to negotiate an agreement. See Fernando Cabrera Díaz, *Consortium Building New Quito Airport Takes Ecuador to ICSID*, *bilaterals.org*, Feb. 14, 2010, <http://www.bilaterals.org/spip.php?article16804>. In February 2010, the arbitrator appointed by Perenco, the Ecuadorian oil company, was removed from the case following a challenge by Ecuador, who questioned his independence after the arbitrator was interviewed about the case. Fernando Cabrera Díaz, *Perenco-nominated Arbitrator Disqualified for Interview Comments in ICSID Dispute with Ecuador*, *INV. TREATY NEWS*, Feb. 14, 2010, <http://www.investmenttreatynews.org/cms/news/archive/2010/02/10/perenco-nominated-arbitrator-disqualified-for-interview-comments-in-icsid-dispute-with-ecuador.aspx>. In addition, in March 2010 the U.S. oil service company, Tidewater Inc., filed a request for ICSID arbitration against Venezuela, alleging Venezuela's failure to pay any compensation for the expropriation of Tidewater's vessels. Arundhati Ramanathan, *Tidewater Seeks Arbitration for Disputes in Venezuela*, *REUTERS*, Feb. 17 2010, <http://www.reuters.com/article/idUKSGE61G0MK20100217?type=companyNews>.

A. RESORTING TO THE CONSTITUTION TO NOT COMPLY WITH  
ICSID AWARDS

Article 54 of the ICSID Convention states the following: “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”<sup>46</sup> Despite the clear wording requiring automatic enforcement, representatives of the Argentine government and several local academics consider that ICSID awards should be subject to judicial scrutiny in Argentina. Dr. Horacio Rosatti, the former Argentine Minister of Justice, is a staunch supporter of this approach, now called the “Rosatti Doctrine.”<sup>47</sup> His position is that ICSID favors foreign investors and therefore discriminates against local investors.<sup>48</sup> Believing that this situation violates the Argentine Constitution’s principle of equality before the law, he contends that courts should review ICSID awards.<sup>49</sup> From his point of view, Articles 27 and 75.22 of the Argentine Constitution lead to the conclusion that BITs and the ICSID Convention are subordinate to the Constitution.<sup>50</sup>

Although Rosetti’s tenets are considered unorthodox internationally,<sup>51</sup> the Argentine government continues to defend these ideas today. On June 1, 2004, the Argentine Supreme Court decided the domestic case *Jose Cartellone Construcciones Civiles S. A. v. Hidroelectrica Norpatagonica S.A.* This decision is cited by Argentine scholars who propose its findings should be extrapolated to ICSID awards.<sup>52</sup> In this case, the Supreme Court stressed that it is guardian of the Constitution and public policy and therefore it may review arbitral awards if it finds the awards “unconstitutional, unreasonable or illegal,” even when the parties involved had

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46. ICSID Convention, Ch. IV, art. 54.

47. Alvaro Torriaglia, *La Política de Servicios Públicos de un País no se Puede Dirimir en el Ciadi [A Country Cannot Settle the Politics of Public Services in the ICSID]*, LACAPITAL.COM, Feb. 6, 2005, [http://archivo.lacapital.com.ar/2005/02/06/economia/noticia\\_169607.shtml](http://archivo.lacapital.com.ar/2005/02/06/economia/noticia_169607.shtml).

48. *Id.*

49. *Id.*

50. Horacio D. Rosatti, *Los Tratados Bilaterales de Inversión, el Arbitraje Internacional Obligatorio y el Sistema Constitucional Argentino [Bilateral Investment Treaties, Binding International Arbitration and the Argentine Constitutional System]*, ECONOMIC COMM’N FOR LATIN AM., Sept. 26, 2003, <http://www.eclac.org/dmni/noticias/noticias/7/113167/12.pdf>; Horacio D. Rosatti, *La Política de Servicios Públicos de un País no se Puede Dirimir en el Ciadi [The Politics of Public Services a Country Cannot Settle in the ICSID]*, LACAPITAL.COM, Feb. 6, 2005, [http://archivo.lacapital.com.ar/2005/02/06/economia/noticia\\_169607.shtml](http://archivo.lacapital.com.ar/2005/02/06/economia/noticia_169607.shtml).

51. See generally Anibal Sabater, *The Weakness of the Rosatti Doctrine: Ten Reasons Why ICSID’s Standing Provisions Do Not Discriminate Against Local Investors*, 15 AM. REV. INT’L ARB. 465 (2004).

52. Javier Perotti, *Consideraciones Del Caso Argentino Ante la Jurisdicción del Ciadi [Considerations of the Argentine Case to the Jurisdiction of the ICSID]*, CENTRO ARGENTINO DE ESTUDIOS INTERNACIONALES (2008), <http://www.caei.com.ar/es/programas/ooii/08.pdf>.

previously agreed to waive the right to appeal.<sup>53</sup> The Argentine government made another argument to prove that ICSID awards generate constitutional violations. It asserted that the Argentine statutes on submitting disputes to ICSID are unconstitutional because they were approved without following the process established in the 1994 Constitutional reform.<sup>54</sup> In addition, Argentine senators have presented some bills, *Proyectos Capitanich*, Falú, Marino and Müller,<sup>55</sup> proclaiming that the country will not allow international awards that cannot be contested before the Supreme Court of Argentina.<sup>56</sup>

These types of constitutional arguments have also been raised in relation to the BITs in Colombian<sup>57</sup> and Bolivian courts.<sup>58</sup> Although in these

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53. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 01/06/2004, "José Cartellone Construcciones Civiles S.A. v. Hidroeléctrica Norpatagónica S.A. o Hidronor S.A./Arbitraje," *Jurisprudencia Argentina* [J.S.] (2004-III-48), available at <http://federacionuniversitaria14.blogspot.com/2008/04/jos-cartellone-construcciones-civiles.html>.
  54. Carlos E. Alfaro & Pedro M. Lorenti, *The Growing Opposition of Argentina to ICSID Arbitral Tribunals*, 6 J. WORLD INV. & TRADE 417, 426-27 (June 2005), available at <http://www.alfarolaw.com/ima/tapa/Pedro%20Alfaro.pdf>.
  55. Proyecto de Ley 4504/04 presentado por el Senador Capitanich [Bill 4505/04 submitted by Senator Capitanich], Feb. 14, 2005, [http://www.senado.gov.ar/web/proyectos/verExpe.php?origen=S&tipo=PL&numexp=4504/04&nro\\_comision=&tConsulta=1](http://www.senado.gov.ar/web/proyectos/verExpe.php?origen=S&tipo=PL&numexp=4504/04&nro_comision=&tConsulta=1); Proyecto de Ley 6928-D-05 presentado por los Diputados Falú y Marino [Bill 6928-D-05 submitted by Representatives Falú and Marino], Feb. 8., 2006, [http://www3.hcdn.gov.ar/folio/cgi-bin/om\\_isapi.dll?clientID=255409229&advquery=6928-D-05&infobase=tp.nfo&record={AFE3}&recordswithhits=on&softpage=proyecto](http://www3.hcdn.gov.ar/folio/cgi-bin/om_isapi.dll?clientID=255409229&advquery=6928-D-05&infobase=tp.nfo&record={AFE3}&recordswithhits=on&softpage=proyecto); Proyecto de Ley 378/05 presentado por la Sen. Müller [Bill 378/05 submitted by Senator Müller], Mar. 15, 2005, <http://www.senado.gov.ar/web/proyectos/verExpe.php?origen=S&numexp=378/05&tipo=PL&tConsulta=1>; Proyecto de Ley 532/05 presentado por la Sen. Müller [Bill 532/05 submitted by Senator Müller], Mar. 29, 2005, <http://www.senado.gov.ar/web/proyectos/verExpe.php?origen=S&numexp=532/05&tipo=PL&tConsulta=1>.
  56. Mariana Herz, *La Irrevisibilidad de Los Laudos Arbitrales Del CIADI Por Los Jueces Nacionales: La Doctrina Rosatti y Los Proyectos Legislativos* [ *Non-review of ICSID Awards: by national judges: Rosatti Doctrine and National Legislative Projects*], 214 EL DERECHO 799 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=917462](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917462).
  57. In this sense, the court stated that: "Las disposiciones del Acuerdo que aquí se analizan encajan también dentro de lo dispuesto por los artículos 226 y 227 de la Constitución, que ordenan al Estado promover la internacionalización de las relaciones políticas, económicas, sociales y ecológicas sobre bases de equidad, reciprocidad y conveniencia nacional, al igual que la integración económica, social y política con las demás naciones." ["These provisions discussed here fit well within the provisions of Articles 226 and 227 of the Constitution, which require the State to promote the internationalization of political, economic, social and ecological basis of equality, reciprocity and national interest, as the economic, social and political integration with other nations.,"] Sentencia de la Corte Constitucional C-294/02 (Colo.) available at [www.dmsjuridica.com/CODIGOS/LEGISLACION/Sentencias/C-294-02.rtf](http://www.dmsjuridica.com/CODIGOS/LEGISLACION/Sentencias/C-294-02.rtf).
  58. The court concluded that: "De acuerdo a los fundamentos del presente fallo, se concluye que las Leyes Ratificadoras sometidas a control de constitucionalidad a través de este recurso, no son contrarias a las normas contenidas en los arts. 135 y 228 de la CPE." ["According to the fundamentals of this ruling, we conclude that the ratification laws subject to constitutional review through this appeal is not contrary to rules found in arts. 135 and 228 of the CPE.,"] Sentencia Constitucional No. 0031/2006 (Colom.), (May 10, 2006), available at [http://www.ciac-iacac.org/documentos/2007\\_3\\_6\\_9\\_17\\_49\\_SENTENCIA%200031%20DEL%202006.pdf](http://www.ciac-iacac.org/documentos/2007_3_6_9_17_49_SENTENCIA%200031%20DEL%202006.pdf).

cases, the courts have concluded that bilateral investment treaties do not violate the Constitution, new Latin American constitutions have been enacted introducing a number of outright anti-arbitration provisions that will have an important impact on the future of investment arbitration in these countries. For example, Article 366 of the 2009 Bolivian Constitution states that, “[a]ll foreign companies operating in the oil and gas sector are subject to the sovereignty of the State and under no circumstances will a foreign tribunal be recognized nor can international arbitration or diplomatic interventions be resorted to.”<sup>59</sup> Article 422 of the 2008 Ecuadorian Constitution prohibits the enactment of treaties or international instruments in which Ecuador cedes sovereign jurisdiction to international arbitration.<sup>60</sup> Based on this article, the Ecuadorian Constitutional Court declared in July 2010 the unconstitutionality of a number of BITs and others, such as the U.S.-Ecuadorian BIT, are still in process of revision.<sup>61</sup>

### B. NATIONAL COURTS RESISTING ICSID

The Venezuelan Supreme Tribunal Decision 1541/2008<sup>62</sup> and its subtleties can be summarized by the Spanish saying: “When you see your neighbor’s beard burn, soak your own.” In this case, the Venezuelan Republic presented a request for interpretation of Article 258.2 of the 1999 Constitution. This article asserts broadly that, “[t]he law shall promote arbitration, conciliation, mediation and any other means of alternative dispute resolution.”<sup>63</sup> In a record time of four months, the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice issued a decision on the matter, which was extended and densely riddled with scholarly references.<sup>64</sup> Therein, the Court addresses several controversial issues of national and international arbitration, waiting until the end to deal with the issue that was possibly the most significant of all its reflections: Article 22 of the Law for the Promotion and Protection of Investment does not contain a unilateral general declaration of consent to ICSID arbitration.<sup>65</sup> This Venezuelan law of 1999, enacted during the Chavez era,

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59. Political Constitution of the Republic of Bolivia, art. 366 (Bol.), available at <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.htm>.

60. Eric Gillman, *The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008*, AM. REV. INT’L ARB. 269, 269 (2008); CONSTITUTION DE ECUADOR, art. 42 (Ecuador), available at <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html>.

61. Katia Fach Gomez, *La Corte Constitucional ecuatoriana declara la inconstitucionalidad de varios Tratados Bilaterales de Inversión [Ecuadorian Constitutional Court declares the Unconstitutionality of some Bilateral Investment Treaties]*, Sept. 2, 2010, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1670863](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670863).

62. El Tribunal Supremo de Justicia [The Supreme Tribunal of Justice], <http://www.tsj.gov.ve/decisiones/scon/Octubre/1541-171008-08-0763.htm> (last visited Aug. 23, 2010) [hereinafter El Tribunal Supremo].

63. CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA, art. 258 (Venez.), available at <http://pdba.georgetown.edu/Constitutions/Venezuela/ven1999.html>.

64. El Tribunal Supremo, *supra* note 62.

65. *Id.*

states that:

Any dispute between an international investor, whose home country has a treaty or agreement on promotion and protection of investments with Venezuela, or disputes falling within the provisions of the ICSID Convention, will be submitted to international arbitration under the terms of the respective treaty or agreement, if so this is established, subject to the possibility of using, where appropriate, the litigation option referred to in the current Venezuelan legislation.<sup>66</sup>

Important effects arise if we connect the court's interpretation that Article 22 does not contain a state offer to arbitrate<sup>67</sup> with another assertion from the tribunal that: "[t]he single subscription of the ICSID Convention shall not, ipso jure, link the respective resolution of controversies with the procedures contained in the Convention, without the existence of the oft-alluded written and unequivocal manifestation of will."<sup>68</sup> Specifically, it is interesting to compare how both statements contended in the decision will have future influence on the way foreign countries are going to solve their investment disputes with Venezuela. For instance, the 1997 Venezuela-Spain BIT contains a general offer to submit to ICSID in Article XI.2.b.<sup>69</sup> This means that a Spanish investor will be able to go to ICSID, even if the ICSID's denunciation has occurred, until the BIT's survival clause is no longer in force.<sup>70</sup> In contrast, the United States never signed a BIT with Venezuela.<sup>71</sup> Consequently, U.S. investors will need the concurrence of an additional Venezuelan consent, in the form of a contract, for example, in order to arbitrate under the rules of the ICSID Convention. Considering the current state of the bilateral political relations between these States, it seems doubtful that Chavez's government will be willing to enter into such binding contracts.<sup>72</sup>

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66. Ley Sobre Promocion y Proteccion de Inversiones, [*Law on Promotion and Protection of Investments*], art. 22 (Venez.), available at <http://www.venezuelaencuba.co.cu/comercial/proteccion.html>.

67. Ramon Alvis et al., *Venezuelan Supreme Tribunal Issues Fundamental Decision on Arbitration*, Macleod Dixon, Oct. 23, 2008, available at [http://www.macleoddixon.com/documents/Bulletin\\_\\_TSJ\\_issues\\_fundamental\\_decision\\_on\\_arbitration\\_\\_Oct\\_23\\_2008.pdf](http://www.macleoddixon.com/documents/Bulletin__TSJ_issues_fundamental_decision_on_arbitration__Oct_23_2008.pdf) (criticizing that this conclusion is founded only on Venezuelan law and not on international law).

68. *El Tribunal Supremo*, supra note 62.

69. Acuerdo Para la Promocion y Proteccion Reciproca de Inversiones Entre el Reino de Espana y la Republica de Venezuela [*Agreement between the Kingdom of Spain and The Republic of Venezuela for the Promotion and Reciprocal Protection of Investments*], art. 11, Spain-Venez., Nov. 2, 1995, available at <http://www.comercio.mityc.es/NR/rdonlyres/8F6BA107-CFC5-459B-A3FA-2468ED972F84/0/VENEZUELA.pdf>.

70. Francisco J. Pascual Vives, *El Arbitraje de Inversiones en Los Recientes APPRI Espanoles* [*Spanish investment arbitration in recent BITs*], 18 *Revista Electronica de Estudios Internacionales* 1, 14 (2009) (Sp).

71. FERNANDO CABRERA DIAZ, *American Gas Services Firm Exterran Files for Arbitration Against Venezuela Over Nationalized Assets*, *Inv. Treaty News*, May 11, 2010, <http://www.investmenttreatynews.org/cms/news/archive/2010/05/11/american-gas-services-firm-exterran-files-for-arbitration-against-venezuela-over-nationalized-assets.aspx>.

72. Discussed further in the next section of this paper.

In these last months, Venezuela has continued its process of “preventive soaking.”<sup>73</sup> Once upon a time, Venezuelan courts showed, through decisions such as the *Exploration Round* case, support for international arbitration.<sup>74</sup> Nevertheless, as an illustration of the present situation, the Supreme Court of Justice issued on June 15, 2009 a press release stressing its rejection of the classical configuration of international investment arbitration.<sup>75</sup> Under the title of “Venezuela’s immunity against foreign courts is consolidating,” this public declaration, which theoretically has no legal validity,<sup>76</sup> states unequivocally that:

[T]he submission of disputes related to investment arbitration or any other matter to international mechanisms must be approved by the President of Venezuela and the Treaty must be ratified by the National Assembly; on the basis of sovereignty, the state may denounce or modify those international Treaties where Venezuela was subject to a foreign jurisdiction; the enforcement of decisions rendered by foreign tribunals against Venezuela will depend on the national verification that the decision is not breaching the sovereignty of the country.<sup>77</sup>

Focusing on the exigency of this national control, there are presently two pending cases in ICSID against Venezuela: *Brandes Inv. Partners v. Bolivarian Republic of Venezuela* and *CEMEX Caracas II Invs. B.V. v. Bolivarian Republic of Venezuela*.<sup>78</sup> In the future, Venezuela may resort to this “internal test” argument, borrowed from Argentina, to avoid complying with any award ICSID renders against it.<sup>79</sup> If this happens, ICSID will be forced to address another legitimacy crisis. Taking into account the Venezuelan environment, the access to diplomatic protection stated in Article 27. 1 of the ICSID Convention will not be effective. Therefore, foreign investors will probably see first-hand that Venezuela has managed to effectively shield itself from ICSID awards.

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73. *Se Consolida la Inmunidad de Venezuela Frente a Tribunales Extranjeros [Venezuela’s Immunity in Relation to Foreign Tribunals is Consolidated]*, Tribunal Supremo de Justicia, June 15, 2009, available at [http://eanzola.com/images/uploads/Nota\\_de\\_Prensa\\_-\\_TSJ\\_-\\_15\\_junio\\_09.pdf](http://eanzola.com/images/uploads/Nota_de_Prensa_-_TSJ_-_15_junio_09.pdf) [hereinafter *Venezuela’s Immunity*].

74. Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 L. & BUS. REV. AM. 885, 908 (2007) (noting that in August 1999, the Venezuelan Supreme Court held that arbitration clauses contended in exploration agreements were constitutional).

75. *Venezuela’s Immunity*, *supra* note 73.

76. J. Eloy Anzola, *Comentarios a Una Nota de Prensa del TSJ Venezolano [Comments to a Press Release of the Venezuelan Supreme Court]*, [www.eanzola.com](http://eanzola.com), June 17, 2009, [http://eanzola.com/images/uploads/Comentarios\\_a\\_una\\_nota\\_de\\_prensa\\_del\\_TSJ\\_venezolano.pdf](http://eanzola.com/images/uploads/Comentarios_a_una_nota_de_prensa_del_TSJ_venezolano.pdf).

77. *Venezuela’s Immunity*, *supra* note 73.

78. ICSID Case No. ARB/08/3 & ICSID Case No. ARB/08/15, available at <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited Aug. 24, 2010).

79. *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Proceeding, ¶ 33 (Mar. 5, 2009), available at <http://icsid.worldbank.org/ICSID/FrontServlet> (Decision on the Argentine Republic’s request for a continued stay of enforcement of the award according to Rule 54 of the ICSID Arbitration Rules).

## C. CONTRACTS AVOIDING ICSID ARBITRATION

Some Latin American countries have in recent years made a clear shift towards a so-called “resource nationalism,” which involves placing the world’s oil reserves under the control of national oil companies, out of the reach of international oil companies.<sup>80</sup> This concerns countries like the United States that have a strong energy dependence on oil and natural gas from Latin America.<sup>81</sup>

Bolivia serves as an example of this trend. The nationalization of the hydrocarbons sector undertaken in the last century had been viewed negatively in the international arena.<sup>82</sup> Trying to change this situation, the Bolivian Congress passed Law Number 1689 in 1996, which sought to attract foreign investment by allowing mining exploration through joint venture contracts.<sup>83</sup> These contracts granted rights to foreign companies for a period of forty years and included a clause to submit to international arbitration processes whose awards would be final and binding.<sup>84</sup>

But, a few years later Evo Morales became President and approved the nationalization of these sectors through Decree Number 28701.<sup>85</sup> This decree provides that the state assumes control of these resources and that if foreign companies want to continue operations in Bolivia, they would have to sign new contracts with the public company Yacimientos Petrolíferos Fiscales Bolivianos.<sup>86</sup> The enactment of this Act generated a “psychological impact” on foreign companies that were forced to negotiate new, less profitable contracts—under which they have to pay up to eighty-two percent of profits to the state in taxes—that eliminated ICSID arbitration as a recourse.<sup>87</sup>

The evolution of the hydrocarbons sector in Venezuela has been very similar to that of Bolivia. After the Hydrocarbons Law of 1943, which nationalized the concessions granted to foreign companies in the past, the nineties in Venezuela were known as the “Petroleum Opening” (*Aperatura Petrolera*).<sup>88</sup> During that time, the country promoted the creation of joint ventures with large foreign investors.<sup>89</sup> But with the coming to power of Hugo Chavez in 1999, the energy policy of Venezuela changed and it focused on signing energy cooperation and integration agreements

80. Alexia Brunet & Juan Agustin Lentini, *Arbitration of International Oil, Gas, and Energy Disputes in Latin America*, 27 *Nw. J. INT’L L. & BUS.* 591, 622 (2007).

81. *Id.* at 620.

82. Lindsay Sykes Pinto, *Resolving the Bolivian Gas Crisis: Lessons from Bolivia’s Brush with International Arbitration*, 39 *GEO. WASH. INT’L L. REV.* 947, 948 (2007).

83. *Id.* at 947, n. 4.

84. *Id.* at 948; Kathryn B. Botham, *Bolivia’s Legal Gamble: Negotiating Nationalization*, 26 *Wis. INT’L L.J.* 507 (2008).

85. *Bolivia: Presidential Supreme Decree 28701 (Nationalization of Hydrocarbons Sector)*, *AM. SOC. OF INT’L L.*, May 1, 2006, <http://www.asil.org/ilib060525.cfm#11>.

86. *Id.*

87. *Id.*

88. Michael J. Economides et al., *The History of PDVSA and Venezuela*, *ENERGY TRIB.*, Jan. 17, 2007, <http://www.energytribune.com/articles.cfm?aid=347&idli=1>.

89. *Id.*

within Latin America and the Caribbean, bringing this key economic sector under state control.<sup>90</sup> For example, in 2006, Venezuela adopted the Terms and Conditions for the Establishment and Operation of Mixed Enterprises.<sup>91</sup> The government submitted this model contract, based on Article 151 of the Venezuelan Constitution,<sup>92</sup> to the foreign oil companies working in Venezuela.<sup>93</sup> It introduces a clause, which stressed that the “amicable settlement” is the preferred method to resolve future conflicts and if it is not possible, only the Venezuelan courts, and not international arbitrators, are the competent venues for resolution.<sup>94</sup> This text, along with the Regularization Law of April 18, 2006, which makes foreign investors minority shareholders of a mixed company, and other rules contained in Venezuela’s new provisions mean that the “Petroleum Opening” has been completely reversed.<sup>95</sup>

The current legal landscape in these countries has resulted in the rejection of ICSID as a means to resolve many of the latest disputes over natural resources. In recent years, there has been a significant increase in the recourse to direct negotiation between the state and the foreign investor (for example, in cases such as: Petrobras-Ecuador,<sup>96</sup> Andes Petroleum-Ecuador,<sup>97</sup> Perenco-Ecuador,<sup>98</sup> Glencore-Bolivia,<sup>99</sup> Aguas del Illimani S.A - Bolivia,<sup>100</sup> Repsol YPF-Bolivia,<sup>101</sup> Pluspetrol-Bolivia, Brit-

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90. Stacy Rentner, *Venezuela: How a Hydrocarbons Law Crippled an Oil Giant*, 27 HASTINGS INT’L & COMP. L. REV. 351, 361 (2004).
  91. Gaceta Oficial de la República Bolivariana de Venezuela [Official Gazette of the Bolivarian Republic of Venezuela], Mar. 31 2006, available at <http://www.tsj.gov.ve/gaceta/Marzo/310306/310306-38410-00.html> [hereinafter Gaceta].
  92. *Id.*; Constitution of the Bolivarian Republic of Venezuela, art. 151 (Bol.), available at [http://www.analitica.com/bitbliblioteca/venezuela/constitucion\\_ingles.pdf](http://www.analitica.com/bitbliblioteca/venezuela/constitucion_ingles.pdf).
  93. Rentner, *supra* note 90, at 361-62.
  94. Gaceta, *supra* note 91.
  95. Elisabeth Eljuri & Victorino J. Tejera Perez, *21st-Century Transformation of the Venezuelan Oil Industry*, 26 J. ENERGY NAT. RES. & ENVTL. L. 475, 488 (2008), available at [http://www.macleoddxon.com/documents/Eljuri\\_Perez\\_article.pdf](http://www.macleoddxon.com/documents/Eljuri_Perez_article.pdf).
  96. *Petrobras Aceptó Entregar Más Recursos Petroleros a Ecuador* [Petrobras Agreed to Hand Over Oil Resources to Ecuador], EL UNIVERSO, Oct. 21, 2008, <http://www.eluniverso.com/2008/10/21/0001/9/FF9DD328FB6D4A9E924A43BB2A19573E.html>.
  97. Katerine Erazo, *Ecuador, Andes Petroleum Likely to Sign New Production Contract*, RIGZONE, July 28, 2008, [http://www.rigzone.com/news/article.asp?a\\_id=64777](http://www.rigzone.com/news/article.asp?a_id=64777).
  98. *Ecuador: Perenco Acepta Todas Las Condiciones y Firma Nuevo Contrato Petrolero* [Perenco Accepts All Conditions and Signs New Energy Contract], ECUADOR INMEDIATO, Oct. 6, 2008, <http://www.ecuadorinmediato.com/noticias/89030>.
  99. *Bolivia Nationalizes Glencore Antimony Smelter*, REUTERS, May 2, 2010, <http://www.reuters.com/article/idUSN0216873420100502>.
  100. *No Hay Pausa en la Campaña Contra el CIADI y en Solidaridad con Bolivia* [There Is No Pause to the Campaign Against the ICSID and in Solidarity in Bolivia] FUNDACIÓN SOLON, [http://funsolon.civiblog.org/blog/\\_archives/2008/2/25/3544351.html](http://funsolon.civiblog.org/blog/_archives/2008/2/25/3544351.html) (Feb. 25, 2008, 10:47 AM BOT).
  101. *Bolivia Firma el Nuevo Contrato Con Vintage y Total, Repsol YPF y Pretrobras lo Harán Hoy* [Bolivia Signed a New Contract with Vintage, and Total, Repsol YPF and Pretrobras Will Do So Today], EL ECONOMISTA, Oct. 28, 2006, <http://www.eleconomista.es/mercados-cotizaciones/noticias/93558/10/06/Economia-EmpresasAmp-Bolivia-firma-el-nuevo-contrato-con-Vintage-y-Total-Repsol-YPF-y-Pretrobras-lo-haran-hoy.html>.

ish Gas-Bolivia, Matpetrol-Bolivia,<sup>102</sup> Total SA-Venezuela,<sup>103</sup> Statoil-Venezuela,<sup>104</sup> BP PLC-Venezuela,<sup>105</sup> and Eni-Venezuela,<sup>106</sup> etc.).

The fact that the major oil companies are not choosing the option to go to ICSID arbitration when this institution's awards have given them major financial backing on numerous occasions can be evaluated from different perspectives. Perhaps it is an indication that these Latin American countries are achieving an equal footing with large companies. Or perhaps foreign investors have seen that contract renegotiation is a process that can benefit both parties of the dispute.<sup>107</sup> Investors are aware that the materials extracted in Latin America are scarce resources that will remain in high demand by the industry in the future. Therefore, it may be advisable, despite the reduction of profit margins, for these companies to continue to cooperate with the state in the medium and long term and to decline compensation in a particular arbitration.<sup>108</sup>

There is a question as to what will happen in the Latin American energy sector in the coming years. While a country like Venezuela may have strained relations with many first-world countries, it remains an important oil exporter to countries like the United States.<sup>109</sup> Thus, while political relations between these two particular countries are deteriorating, bilateral economic interests are still intense.<sup>110</sup> As highlighted in this paper, the rising price of oil in recent years has led some countries in Latin America to impose unilateral changes to the drilling contracts, with the aim of taking control of this attractive sector.<sup>111</sup> Many foreign investors have accepted a more secondary role and have opted not to resort to

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102. Franz Chavez, *Oil Companies Decide to Stay-on Morales' Terms*, IPS NEWS, Oct. 30, 2006, <http://ipsnews.net/news.asp?idnews=35299>.
  103. TOTAL S.A.: *Venezuela: Sincor Officially Transformed into a Mixed Company*, REUTERS, Feb. 8, 2008, <http://www.reuters.com/article/pressRelease/idUS157827+08-Feb-2008+BW20080208>.
  104. Statoil, *Total Agree Venezuela Compensation*, OIL DAILY, Feb. 1, 2008, [http://goliath.ecnext.com/coms2/gi\\_0199-8007566/Statoil-Total-agree-Venezuela-compensation.html#abstract](http://goliath.ecnext.com/coms2/gi_0199-8007566/Statoil-Total-agree-Venezuela-compensation.html#abstract).
  105. Chevron, BP PLC, Total y Statoil Firman Acuerdos con Venezuela y ConocoPhillips y Exxon los Rechazan [Chevron, BP PLC, Total, and Statoil Sign Agreements with Venezuela and Exxon and ConocoPhillips Rejected It], LUKOR, May 26, 2007, <http://www.lukor.com/not-neg/empresas/0706/26215431.htm>.
  106. Damon Vis-Dunbar, *Venezuela Signs Contentious New Contracts with Foreign Oil Companies*, INV. TREATY NEWS, Apr. 1, 2006, [http://www.iisd.org/pdf/2006/itn\\_april11\\_2006.pdf](http://www.iisd.org/pdf/2006/itn_april11_2006.pdf); Press Release, Eni, Eni Reaches Settlement Agreement with Venezuela on Dacion Field (Feb. 15, 2008), available at [http://www.eni.it/en\\_IT/media/press-releases/2008/02/2008-02-15-eni-reaches-settlement-agreement.shtml?menu2=media-archive&menu3=press-releases](http://www.eni.it/en_IT/media/press-releases/2008/02/2008-02-15-eni-reaches-settlement-agreement.shtml?menu2=media-archive&menu3=press-releases).
  107. Mercedes Ales, Leonardo Granato & Carlos Nahuel Oddone, *Argentina Facing International Claims over Foreign Investments*, 14 LAW & BUS. REV. AM. 481, 492 (2008).
  108. George K. Foster, *Recent Setbacks for Foreign Investors in Latin America and what they mean for the Future of Investment Treaty arbitration in the Region*, 1 Latin Am. Arb. Rev., 1 (2006).
  109. Cesar Alvarez & Stephanie Hanson, *Venezuela's Oil-Based Economy*, Council on Foreign Relations, Feb. 9, 2009, [http://www.cfr.org/publication/12089/venezuelas\\_oilbased\\_economy.html](http://www.cfr.org/publication/12089/venezuelas_oilbased_economy.html).
  110. *Id.*
  111. *Id.*

ICSID, as they have considered it economically preferable to continue in the country on a long-term basis. If oil prices decline in the future, these Latin American countries may have to face a complicated situation: incomes will fall, foreign investors will struggle to survive in the country and will fail to make any new investments, and the technical and financial efficiency of the state-owned oil company will be questioned.<sup>112</sup> If this situation occurs, it is possible that resource nationalism will fade again.

#### D. WITHDRAWING FROM THE ICSID CONVENTION

During its fifth Summit on May 29, 2007, the countries which at the time constituted the Bolivarian Alliance for the Peoples of Our America (ALBA-Bolivia, Venezuela and Nicaragua) agreed to denounce the ICSID Convention.<sup>113</sup> As President Evo Morales held, this decision was taken in order to “. . . guarantee the sovereign right of countries to regulate foreign investment in their national territories.”<sup>114</sup> In line with this decision, on February 13, 2008, the President of the Energy Commission in the Venezuelan National Assembly asked the government for an ICSID withdrawal.<sup>115</sup> On April 14, 2008, Nicaragua’s Attorney General announced that the country was also pondering denouncing the ICSID Convention.<sup>116</sup> Nevertheless, these two threats have not come to fruition since neither of the two states has officially begun the process required to denounce ICSID.

Bolivia and Ecuador, however, carried out the threat. On May 2, 2007, the World Bank received a written notice of denunciation of the ICSID

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112. Larry B. Pascal, *Developments in the Venezuelan Hydrocarbon Sector*, 15 *LAW & BUS. REV. AM.* 531, 572-573 (2009).

113. Cuba was also an ALBA member, but not an ICSID member State. Fernando Cabrera Diaz, *ALBA Moves Forward with Plan to Create Regional Investment Arbitration Alternative to ICSID at 7th Summit*, *INV. TREATY NEWS*, Nov. 3, 2009, <http://www.investmenttreatynews.org/cms/news/archive/2009/11/01/alba-moves-forward-with-plan-to-create-regional-investment-arbitration-alternative-to-icsid-at-7th-summit.aspx>.

114. ALBA countries “vigorously reject legal, media, and diplomatic pressures from certain multinational companies, which having violated constitutional rules; domestic legislation; contractual agreements; and regulatory, environmental, and labour provisions; resist the application of sovereign decisions of the countries by threatening with arbitration and commencing international arbitration proceedings against the States before institutions such as ICSID.” Fernando Peláez-Pier et al., *Venezuela*, *ARB. REV. AM.*, 2008, available at <http://www.globalarbitrationreview.com/reviews/4/sections/8/chapters/49/venezuela/>; *Latin America Ponders Pullout of ICSID*, *DISP. RESOL. J.*, May-Jul. 2007, available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_200705](http://findarticles.com/p/articles/mi_qa3923/is_200705).

115. Fernando Cabrera Diaz, *South American Alternative to ICSID in the Works as Governments Create an Energy*, *INV. TREATY NEWS*, Aug. 6 2008, <http://www.investmenttreatynews.org/cms/news/archive/2008/08/06/south-american-alternative-to-icsid-in-the-works-as-governments-create-an-energy-treaty.aspx>.

116. *AN Exhorta Abrir Investigación Sobre Constitución de Apertura Petrolera [AN Exhorts to Open Investigation on Constitution of Petroleum Opening]*, *RADIO NACIONAL DE VENEZUELA*, Feb.13, 2008, <http://www.rnv.gov.ve/noticias/index.php?act=ST&f=2&t=60618>.

Convention from the Republic of Bolivia.<sup>117</sup> In the official note sent to President of the World Bank, Bolivia criticized a number of aspects of ICSID such as its complexity, opacity, lack of neutrality, high cost, no appeal of the award, and also emphasized Articles 24 and 135 of the Bolivian Constitution,<sup>118</sup> arguably calling for a Bolivian withdrawal.<sup>119</sup> Pursuant to Article 71 of this Convention, the denunciation took effect on November 3, 2007, six months after receipt of such notice.<sup>120</sup>

The effects of denouncing this Convention have been broadly discussed by scholars. The starting point of this debate is the wording of Article 72 of the ICSID Convention, which reads:

[n]otice 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.<sup>121</sup>

Academics are divided as to the effects of this notice and to the effects of consent. The debate can be summarized as follows: from a chronological standpoint, there are three possible moments when a foreign investor may not raise a claim before ICSID: (1) the date on which the Center receives the denunciation of the country, (2) the end of the six-months period cited in Article 71, or (3) the expiration date of the BIT for both parties, regardless of the State previously denouncing of the ICSID Convention.<sup>122</sup> The first option implies that Bolivian BITs are a mere offer to consent that should be completed with a written acceptance given by the investor before May 2, 2007. The second option would allow investors to

117. Press Release, ICSID, Bolivia Submits a Notice under Article 71 of the ICSID Convention, May 16, 2007, available at <http://ICSID.worldbank.org/ICSID/StaticFiles/Announcement3.html>; *Bolivia Solo Tiene un Caso Pendiente en el CIADI* [*Bolivia Has only a Pending Case at ICSID*], El Banco Mundial, <http://web.worldbank.org/WBSITE/EXTERNAL/BANCOMUNDIAL/EXTSPPAISES/LACINSPANISHEXT/BOLIVIAINSPANISHEXT/0,,contentMDK:21567378~pagePK:141137~piPK:141127~theSitePK:500410,00.html> (last visited Sept. 1, 2010).

118. "Articles of the 1967 Constitution with 1994 reforms, agreed text of 1995 and reforms of 2002, 2004 and 2005. In 2009, Bolivia passed a new constitution that reinforces these approaches." POLITICAL CONSTITUTION OF THE REPUBLIC OF BOLIVIA, arts. 24, 135.

119. María Urturi, *Bolivia Se Retira Del CIADI* [*Bolivia Withdraws from the ICSID*], Vigilancia Social de los Procesos de Integración y Las Negociaciones Comerciales, <http://www.inpade.org.ar/boletin/boletinvigilancia/vigilancia3.htm> (last visited Aug. 28, 2010).

120. "Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice." See ICSID Convention, Regulations and Rules, Ch. X, art. 71.

121. *Id.* art. 72.

122. See Christian Tietje, Karsten Nowrot & Clamens Wackernagel, *Once and Forever? The Legal Effects of a Denunciation of ICSID*, BEITRAGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT, Mar. 8-9, 2008, available at <http://www.wirtschaftsrecht.uni-halle.de/Heft74.pdf>.

file a claim with ICSID until November 2, 2007. The third option would permit the investor to file a claim with ICSID as long as the relevant BIT remains in force.

On October 31, 2007, that is, four days before the end of the six-month period under Article 71 of ICSID Convention, ICSID Secretary General registered a request for arbitration against Bolivia by E.T.I. Euro Telecom International N.V. Despite Bolivian objections to this registration, the arbitral tribunal was constituted and held a first session and a later hearing.<sup>123</sup> It was expected that the resolution of this case would address the questions noted above,<sup>124</sup> but on October 21, 2009, the arbitral tribunal ordered the discontinuance of the proceeding<sup>125</sup> pursuant to ICSID Arbitration Rule 44.<sup>126</sup> Referencing the information provided by the U.S. law firm that represented Bolivia in this arbitration, it was the investor who unilaterally terminated the arbitration.<sup>127</sup> But, Bolivia's triumph in this case was marred by a somewhat bizarre epilogue: a former Bolivian Minister, the Minister of Legal Defense of the State, is now being investigated for corruption, after signing two arbitration agreements in 2009 with ETI governed by the UNCITRAL Rules.<sup>128</sup>

Ecuador's break with ICSID was less aggressive. In 2007, Ecuador sought to escape ICSID's jurisdiction by resorting to Article 25.4 of the ICSID Convention, providing for the exclusion of ". . . differences arising on matters concerning the treatment of an investment, resulting from economic activities concerning the use of natural resources such as oil, gas, minerals or other . . ." from ICSID's jurisdiction.<sup>129</sup> On July 6, 2009, Ecuador notified its withdrawal from the ICSID Convention. Ecuador's withdrawal was decided in an Ecuadorian Executive Decree<sup>130</sup> in which President Correa referred to the aforementioned Article 422 of the 2008

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123. *Id.*

124. In 2009, the Russian Federation announced that it would withdraw from the Energy Charter Treaty. But, similarly, scholars have noted that this State will possibly remain bound by the Treaty for a long period of time, even after effectively withdrawing from the Energy Charter Treaty. Skadden: 2010 Insights 137 (Thomas H. Kennedy, ed., 2010), available at [http://www.skadden.com/Cimages/siteFile/Compendium%202010\\_Web%20Only\\_F.pdf](http://www.skadden.com/Cimages/siteFile/Compendium%202010_Web%20Only_F.pdf).

125. Procedural Details, ICSID, <http://ICSID.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C257&actionVal=viewCase> (last visited Aug. 28, 2010).

126. See ICSID Arbitration Rules, ch. V, Rule 44.

127. Arbitration before the International Centre for Settlement of Investment Disputes, Foley Hoag LLP, <http://www.foleyhoag.com/Services/International-Litigation-and-Arbitration/experience.aspx> (last visited Aug. 28, 2010).

128. *Acusan a ex Ministra Rocabado de Corrupción y Ella se Defiende [Former Minister Rocabado Accused of Corruption and She Defends]*, NOTICIASBOLIVIA, Jan. 19, 2010, <http://boliviabb.com/2010/01/acusan-a-ex-ministra-rocabado-de-corrupcion-y-ella-se-defiende/>.

129. *El Mercurio (Cuenca): No va Más la Competencia del CIADI [ICSID Competence is over]*, ECUADORINMEDIATO, Dec. 15, 2007, [http://www.ecuadorinmediato.com/Noticias/news\\_user\\_view/ecuadorinmediato\\_noticias—67075](http://www.ecuadorinmediato.com/Noticias/news_user_view/ecuadorinmediato_noticias—67075).

130. *Registro Oficial No. 632*, REVISTA JUDICIAL, Jul.13, 2009, [http://www.derechoecuator.com/index.php?option=com\\_content&task=view&id=5048&Itemid=540#No1823](http://www.derechoecuator.com/index.php?option=com_content&task=view&id=5048&Itemid=540#No1823).

Ecuadorian Constitution prohibiting Ecuador from concluding treaties or international instruments that submit the State of Ecuador to international arbitration.<sup>131</sup> Ecuadorian denunciation took effect on January 7, 2010, pursuant to Article 71 of the Convention.<sup>132</sup>

Law firms are trying to protect first-world investors from these Ecuadorian maneuvers. Before the deadline of six months provided in Article 71 of the Convention, investment lawyers advised their clients to carry out actions of a different nature, including the following: (1) perfect Ecuador's general consent to ICSID jurisdiction by submitting a letter to the Ecuadorian government which accepts this consent measure of questionable efficacy taking into account the case of ETI Euro Telecom, (2) transfer the investment to an affiliate in a country that has a BIT with Ecuador which offers an effective dispute resolution mechanism, and (3) check the company's political risk insurance coverage.<sup>133</sup>

It goes without saying that foreign investors will do everything possible to shield themselves against Ecuadorian anti-ICSID animosity. But, there are more international arbitration mechanisms to solve disputes arising from investments and they are still in use for investors despite the ICSID withdrawal. For example, pursuant to Article VI of the Ecuadorian-U.S. BIT, investors may choose to submit their dispute in addition to ICSID to an ad hoc tribunal under the UNCITRAL Rules.<sup>134</sup> Alternatively, both parties may choose a different arbitral institution or arbitral rules.<sup>135</sup> This last alternative would also allow investors to begin arbitration under the ICSID Additional Facility rules (AF) against a non-signatory-ICSID State.<sup>136</sup> Even investors whose BITs do not contain as many arbitral options may eventually benefit from arbitration if the most-favored-nation clause is to be applied to dispute settlement mechanisms.<sup>137</sup> The elimination of these remaining options requires more laborious interventions from the Latin American states.

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131. Republic of Ecuador: Constitution of 2008 art. 422, (Ecuador) available at <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html>.

132. LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES 4-5 (2010), available at <http://ICSID.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>.

133. *Ecuador Moves Closer to Its Withdrawal from World Bank Arbitration*, Crowell & Moring, Jun. 23, 2009, <http://www.crowell.com/NewsEvents/Newsletter.aspx?id=1251>.

134. Ecuador Bilateral Investment Treaty, U.S.-Ecuador, art. VI, Aug. 27, 1993, S. Treaty Doc. No. 103-15 (1997).

135. *Id.*

136. Fernando Cabrera Diaz, *Ecuador Prepares for Life After ICSID, While Debate Continues over Effect of Its Exit from the Center*, INV. TREATY NEWS, Sept. 2 2009, <http://www.investmenttreatynews.org/cms/news/archive/2009/08/28/ecuador-prepares-for-life-after-ICSID-while-debate-continues-over-effect-of-its-exit-from-the-centre.aspx>.

137. See Ignacio Vincentelli, *The Uncertain Future of ICSID in Latin America 42* (Working Paper, 2009) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1348016](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348016).

## E. BITs AS A TOOL AGAINST ICSID

1. *Ostracizing ICSID in a new era of Latin American BITs?*

It is interesting to study the most recent BITs adopted by several Latin American countries in order to assess the extent to which some of these countries have changed their policies about the settlement of international disputes. Inconclusive research suggests that the vast majority of Latin American states are still loyal to ICSID and therefore their BITs continue to reference this international institution as a possible option for investors willing to submit their disputes to a non-national organization.

In particular, these are some of the options included in recently adopted BITs: the complaining party may begin an investment arbitration either under ICSID or pursuant to ad hoc arbitration according to UNCITRAL rules (Chile/Iceland 2006);<sup>138</sup> ICSID, ad hoc arbitration following UNCITRAL rules or the International Chamber of Commerce in Paris (Nicaragua/Belgo-Luxemburg Economic Union 2005 and Paraguay/Belgo-Luxemburg Economic Union 2005);<sup>139</sup> ICSID or ad hoc arbitration (Guyana/China 2004 and Uruguay/Armenia 2008);<sup>140</sup> State courts, ad hoc arbitration UNCITRAL, ICSID or ICSID Additional Facility (Colombia/Spain 2007);<sup>141</sup> ad hoc arbitration UNCITRAL, ICSID or ICSID AF (Guatemala/Israel 2009);<sup>142</sup> ICSID, ICSID AF, ad hoc arbitra-

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138. Se Promulga el Convenio Entre el Gobierno de la Republica de Chile y el Gobierno de la Republica de Islandia para la Promocion y Proteccion Reciproca de las Inversiones [The Convention Between the Government of the Republic of Chile and the Government of the Republic of Iceland for the Reciprocal Promotion and Protection of Investments is adopted], Biblioteca del Congreso Nacional (Aug. 12, 2006), [http://www.sice.oas.org/Investment/BITSbyCountry/BITS/CHI\\_Iceland\\_s.pdf](http://www.sice.oas.org/Investment/BITSbyCountry/BITS/CHI_Iceland_s.pdf).
139. Agreement Between the Belgo-Luxembourg Economic Union, on the one Hand, and the Republic of Nicaragua, on the other Hand, on the Reciprocal Promotion and Protection of Investments, Belg.-Lux.-Nicar., art. 12, ¶ 3, May 27, 2005, available at <http://www.unctad.org/sections/dite/ia/docs/bits/BLEU-Nicaragua-eng.pdf>; Accord Entre l'Union Economique Belgo-Luxembourgeoise et la Re'publique du Paraguay Concernant l'Encouragement et la Protection Re'ciproques Des Investissements [Agreement Between the Belgo-Luxembourg Economic Union and the Republic of Paraguay on the Promotion and Reciprocal Protection of Investments], Belg.-Lux.-Para., art. 11, ¶ 2, Oct. 6, 1992, 2239 U.N.T.S. 339, available at [http://www.unctad.org/sections/dite/ia/docs/bits/belg\\_lux\\_paraguay\\_fr.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/belg_lux_paraguay_fr.pdf).
140. Agreement Between the Government of the People's Republic of China and the Government of the Republic of Guyana on the Promotion and Protection of Investments, P.R.C.-Guy., art. 9, ¶ 4, Mar. 27, 2003, available at [http://www.unctad.org/sections/dite/ia/docs/bits/china\\_guyana.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_guyana.pdf); Armenia-Uruguay: Promoción y Protección Recíproca de Inversiones [Armenia-Uruguay: Promotion and Reciprocal Protection of Investments], Arm.-Uru., art. 7, ¶ 3, May 6, 2002, available at <http://www.parlamento.gub.uy/htmlstat/pl/acuerdos/acue18277.htm>.
141. Acuerdo Para la Promocio'n y Proteccio'n Recíproca de Inversiones entre la Repu'blica de Colombia y el Reino de Espan~a [Agreement for the Promotion and Reciprocal Protection of Investments Between the Republic of Colombia and the Kingdom of Spain], Colom.-Spain, art. XI, ¶ 2, June 9, 1995, available at [http://www.unctad.org/sections/dite/ia/docs/bits/spain\\_colombia\\_sp.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/spain_colombia_sp.pdf).
142. Agreement Between the Government of the State of Israel and the Government of the Republic of Guatemala for the Reciprocal Promotion and Protection of Investments, Guat.-Isr., Nov. 7, 2006, (U.N. Registration # I-46618), available at <http://www.consortiumlegal.com/Treaty%20Guatemala-Israel.asp>.

tion UNCITRAL or any other arbitration (Peru/Japan 2008);<sup>143</sup> State courts, ad hoc arbitration UNCITRAL, ICSID or ICSID AF (Panama/Dominican Republic 2006);<sup>144</sup> and only ICSID and ICSID AF (Suriname/Netherlands 2005).<sup>145</sup>

Even Argentina, after its economic crisis, signed a BIT with Panama where both parties agreed to accept ICSID's jurisdiction.<sup>146</sup> This BIT provision relying on ICSID is likely to have been negotiated before ICSID commenced rendering the many awards against Argentina. Or even if Argentina's reluctance towards the ICSID had already existed, Argentina did not want to show it with a "sister State" such as Panama.<sup>147</sup>

It has not been easy to find updated information on BITs signed by Ecuador and Bolivia in recent years. The last references to these countries refer to BITs signed when Presidents Correa and Morales were not in power.<sup>148</sup> Probably for this reason, these texts also maintain that ICSID is an appropriate mechanism for solving disputes between one contracting party and an investor of the other contracting party (Bolivia/Belgo-Luxemburg Economic Union 2004 or Ecuador/Italy 2005).<sup>149</sup>

Hugo Chavez's policy on this issue has been much more explicit. Previously, Venezuelan BITs referred to ICSID (for example, Venezuela/UK

143. Agreement Between Japan and the Republic of Peru for the Promotion, Protection, and Liberalisation of Investment, Japan-Peru, art. 18, ¶ 4, Nov. 21, 2008, available at [http://www.unctad.org/sections/dite/ia/docs/bits/japan\\_peru.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/japan_peru.pdf).

144. Acuerdo Para la Promoción y Protección Recíproca de las Inversiones Entre la República de Panamá y la República Dominicana [Agreement for the Promotion and Reciprocal Protection of Investments Between the Republic of Panama and the Dominican Republic], Dom. Rep.-Pan., art. IX, ¶ 2, Feb. 6, 2003, available at [http://www.unctad.org/sections/dite/ia/docs/bits/panama\\_repdominicana.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/panama_repdominicana.pdf).

145. Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Suriname, Neth.-Sur., art. 9, ¶ 1, Mar. 31, 2005, (U.N. Registration # I-43652), available at [http://www.unctad.org/sections/dite/ia/docs/bits/netherlands\\_suriname.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/netherlands_suriname.pdf).

146. Convenio Entre la República Argentina y la República de Panamá para la Promoción y Protección de las Inversiones [Agreement Between the Republic of Argentina and the Republic of Panama for the Promotion and Reciprocal Protection of Investments], Arg.-Pan., art. 9, ¶ 3, May 10, 1996, available at [http://www.unctad.org/sections/dite/ia/docs/bits/argentina\\_panama\\_sp.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/argentina_panama_sp.pdf).

147. See ICSID Database of Bilateral Investment Treaties, ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main> (last visited Sept. 18, 2010).

148. President Morales of Bolivia was first elected in 2005; President Correa of Ecuador was first elected in 2006.

149. Accord Entre l'Union Economique Belgo-Luxembourgeoise et le Gouvernement de la Re'publique de Bolivie Concernant l'Encouragement et la Protection Re'ciproques Des Investissements [Agreement Between the Belgo-Luxemburg Economic Union and the Government of the Republic of Bolivia for the Encouragement and Reciprocal Protection of Investments], Belg.-Bol.-Lux., art. 11, ¶ 3, Apr. 25, 1990, 2240 U.N.T.S. 159, available at [http://www.unctad.org/sections/dite/ia/docs/bits/belg\\_lux\\_bolivia\\_fr.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/belg_lux_bolivia_fr.pdf); Convenio Entre el Gobierno de la República del Ecuador y el Gobierno de la República Italiana Sobre la Promoción y Protección de Inversiones [Agreement Between the Government of the Republic of Ecuador and the Government of the Italian Republic About the Promotion and Protection of Investments], Ecuador-Italy, art.9, ¶ 3, available at [http://www.derechoecuador.com/index.php?option=com\\_content&task=view&id=524&Itemid=99999999#anchor460171](http://www.derechoecuador.com/index.php?option=com_content&task=view&id=524&Itemid=99999999#anchor460171).

1996).<sup>150</sup> In the last few years, the Bolivarian Republic has signed BITs with Cuba, Iran, the Russian Federation, and Belarus.<sup>151</sup> These foreign states, apart from being key oil and gas producing countries, are also well known for not having a harmonious relationship with the United States. All of these BITs include a provision regarding the settlement of investor-state disputes, which eliminates the ICSID option in favor of other combinations: (1) state courts or ad hoc arbitration under the UNCITRAL Rules (Venezuela/Cuba 2004);<sup>152</sup> (2) the third additional option of a Stockholm Chamber of Commerce arbitration (Venezuela/Russian Federation 2008);<sup>153</sup> and (3) in the case of Venezuela/Iran 2006, the option between ad hoc UNCITRAL arbitration and International Chamber of Commerce in Paris followed by the reference to ICSID “if both parties are members of this Convention.”<sup>154</sup>

As to the role that ICSID may develop in the prospective investment controversies with Latin American nations, Venezuela currently has the most firmly promoted anti-ICSID stance regarding new bilateral investment treaties. Time will tell if other countries in Latin America decide to follow this policy. Even if they do not, the same results may be obtained without negotiating new BITs with developed countries. In recent years, there has been a worldwide deceleration in the number of signatories of new BITs.<sup>155</sup> These BITs are giving way to other types of agreements, such as free trade agreements among countries, which are supposed to

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150. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, U.K.-Venez., art. 8, ¶ 2, Mar. 15, 1995, available at [http://www.unctad.org/sections/dite/ia/docs/bits/uk\\_venezuela.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/uk_venezuela.pdf).
151. See, e.g., Acuerdo Sobre la Promoción y Protección Recíproca de Inversiones Entre el Gobierno de la República Bolivariana de Venezuela y el Gobierno de la República Islámica de Irán [Agreement About the Promotion and Reciprocal Protection of Investments Between the Bolivarian Republic of Venezuela and the Islamic Republic of Iran], Iran-Venez., *Sumario: Asamblea Nacional*, GACETA OFICIAL NÚMERO 38.389 (Caracas, Venez.), Mar. 2, 2006, at 2-3, available at <http://www.tsj.gov.ve/gaceta/marzo/020306/020306-38389-01.html> (use the numbered links to flip pages) [hereinafter Iran-Venez. BIT].
152. Acuerdo Sobre Promoción y Protección Recíproca de Inversiones entre el República Bolivariana de Venezuela y el Gobierno de la República de Cuba [Agreement About the Promotion and Reciprocal Protection of Investments Between the Bolivarian Republic of Venezuela and the Republic of Cuba], Cuba-Venez., Dec. 11, 1996.
153. Acuerdo Entre el Gobierno de la República Bolivariana de Venezuela y el Gobierno de la Federación de Rusia Sobre la Promoción y Protección Recíproca de Inversiones [Agreement Between the Bolivarian Republic of Venezuela and the Government of the Russian Federation About the Promotion and Reciprocal Protection of Investments], Russ.-Venez., art. 9, ¶ 2, Nov. 7, 2008, available at [http://www.asambleanacional.gob.ve/index2.php?option=com\\_docman&task=doc\\_view&gid=1528&Itemid=1](http://www.asambleanacional.gob.ve/index2.php?option=com_docman&task=doc_view&gid=1528&Itemid=1).
154. Iran-Venez. BIT, *supra* note 151, art. 11, ¶ 2. In reality, this is illusory because Iran is a non-member State and the future of Venezuela as a member of ICSID is quite dubious.
155. Emmanuel Gaillard, *Anti-Arbitration Trends in Latin America*, 239 N.Y.L.J. \*1, at \*1 (2008), available at [http://www.shearman.com/files/Publication/33b80659-ac58-4ffd-8217-2af9205ff1c2/Presentation/PublicationAttachment/db188d5f-038b-4950-a9cf-2b7a752cd94b/1A\\_070208\\_03.pdf](http://www.shearman.com/files/Publication/33b80659-ac58-4ffd-8217-2af9205ff1c2/Presentation/PublicationAttachment/db188d5f-038b-4950-a9cf-2b7a752cd94b/1A_070208_03.pdf).

have more bargaining power to avoid the imposition of ICSID arbitration.<sup>156</sup>

## 2. Widespread termination of BITs

In addition to this eventual ICSID ostracism, Venezuela and Ecuador have initiated another striking mechanism for reducing ICSID's power—the formal termination of preexisting BITs.

In May 2008, Venezuela gave the Netherlands notice of termination of their BIT.<sup>157</sup> The Venezuelan-Dutch BIT, which entered into force on November 1, 1993, had been highly criticized by the Venezuelan government, which argued that non-Dutch companies incorporated in Holland had fraudulently intended to profit from it.<sup>158</sup> The breaking point was a claim filed on October 10, 2007, by the Exxon Mobil Corporation (Exxon) against Venezuela.<sup>159</sup> Despite its U.S. origin, Exxon invoked ICSID protection under the Netherlands-Venezuela BIT, arguing that the oil project in Venezuela was meant to be developed by a Dutch shell company.<sup>160</sup> It seems that Venezuela's misgivings are not unfounded if one takes into account the professional practice of law firms specializing in international investment.<sup>161</sup> One of the tips for drafting investor friendly arbitration clauses is to structure those claims in such a way so as to gain access to the arbitral jurisdiction provided under international investment treaties: if the investor is not located in a country that has signed an investment treaty with the host state, the client is advised to structure its investments through other countries, which have signed such a treaty with

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156. The Australia-United States Free Trade Agreement is a recent example of an Agreement that does not foresee the current application of any investor-state dispute settlement mechanisms. U.S.-Australia Free Trade Agreement, U.S.-Austl., May 18, 2004, 2004 U.S.T. LEXIS 162; see generally David Richardson, *Foreign Investment and the Australia United States Free Trade Agreement*, CURRENT ISSUES BRIEF NO. 7 2003-04, 1, (Information and Research Services Parliamentary Library, March 8, 2004)(Austl.), available at <http://www.aph.gov.au/library/pubs/cib/2003-04/04cib07.htm>.

157. Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela, Neth.-Venez., art. 9, ¶¶ 1-2, available at [http://www.sice.oas.org/Investment/BITSbyCountry/BITs/VEN\\_Netherlands.pdf](http://www.sice.oas.org/Investment/BITSbyCountry/BITs/VEN_Netherlands.pdf) [hereinafter Neth.-Venez. BIT].

158. *Venezuela Denunciará a Finales de Abril Acuerdo de Protección de Inversiones Con Países Bajos* [Venezuela Will Denounce the Investment Protection Agreement with the Netherlands at the End of April], VENEZOLANA DE TELEVISION, April 21, 2008, <http://www.vtv.gov.ve/noticias-económicas/10131>; *Venezuela Denunciará Acuerdo en Holanda Por "Abuso" de Exxon y Otras Empresas* [Venezuela Will Denounce Agreement in Holland Because of Abuse by Exxon and Other Companies], EL ECONOMISTA, Apr. 21, 2008, <http://www.economista.es/empresas-finanzas/noticias/489075/04/08/Venezuela-denunciara-acuerdo-en-Holanda-por-abuso-de-Exxon-y-otras-empresas.html>.

159. *Mobil Corp. v. Bolivarian Republic of Venezuela* (U.S. & Neth. v. Venez.), ICSID (W. Bank) Case No. ARB/07/27 (2010).

160. *Id.* at 13.

161. *Id.* at 5-10.

the host state.<sup>162</sup>

In 2009, President Correa from Ecuador asked the National Assembly to authorize the denunciation of thirteen of its BITs.<sup>163</sup> The debate within the legislative branch has been based on the new 2008 Constitution. Without much concern for the retroactivity issue, the Ecuadorian National Assembly declared recently that these BITs violate Articles 416.12, 419 and 422 of the Constitution and that, therefore, the denunciation should be made.<sup>164</sup>

The measures taken by Venezuela and Ecuador have had a deep political impact.<sup>165</sup> Yet, the legal effect of these denunciations remains unknown, as bilateral investment treaties usually contain a survival clause.<sup>166</sup> This clause allows investments made before the BIT termination date to remain protected by the same text during an ample period of

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162. Rafael Llano Oddone, *Arbitration Clauses for Cross-Border Contracts with Latin American Countries*, INT'L DISPS. Q., Fall 2007, at 20, available at [http://www.whitecase.com/idq/fall\\_2007/tips/](http://www.whitecase.com/idq/fall_2007/tips/).

163. Decio Machado, *Ecuador y la Denuncia de Los Tratados Bilaterales de Inversión [Ecuador and the Denunciation of Bilateral Investment Treaties]* \*4 (2009), available at [http://www.cadtm.org/spip.php?page=article\\_pdf&id\\_article=5095](http://www.cadtm.org/spip.php?page=article_pdf&id_article=5095). See generally BITs with USA, Switzerland, Venezuela, Chile, Argentina, Canada, China, Netherlands, Germany, France, Finland and Sweden.

164. Republic of Ecuador: Constitution of 2008 art. 416, ¶ 12 (“Las relaciones del Ecuador con la comunidad internacional responderán a los intereses del pueblo ecuatoriano, al que le rendirán cuenta sus responsables y ejecutores, y en consecuencia: Fomenta un nuevo sistema de comercio e inversión entre los Estados que se sustente en la justicia, la solidaridad, la complementariedad, la creación de mecanismos de control internacional a las corporaciones multinacionales y el establecimiento de un sistema financiero internacional, justo, transparente y equitativo”); *Id.* art. 419, ¶¶ 5-6 (“La ratificación o denuncia de los tratados internacionales requerirá la aprobación previa de la Asamblea Nacional en los casos que: 5. Comprometan la política económica del Estado establecida en su Plan Nacional de Desarrollo a condiciones de instituciones financieras internacionales o empresas transnacionales. 6. Comprometan al país en acuerdos de integración y de comercio”); *Id.* art. 422 (No se podrá celebrar tratados o instrumentos internacionales en los que el Estado ecuatoriano ceda jurisdicción soberana a instancias de arbitraje internacional, en controversias contractuales o de índole comercial, entre el Estado y personas naturales o jurídicas privadas. . .”); see generally Kate Joynes, *Ecuador to Follow Bolivia, Amend All Bilateral Investment Treaties*, GLOBAL INSIGHT, May 15, 2007, at 2, <http://www.ihsglobalinsight.com/>; Posting of Dr. Vethowen Chica Arévalo, to Asamblea Nacional República del Ecuador [National Assembly of the Republic of Ecuador], [http://asambleanacional.gov.ec/blogs/vethowen\\_chica/2009/10/29/la-denuncia-de-instrumentos-internacionales/](http://asambleanacional.gov.ec/blogs/vethowen_chica/2009/10/29/la-denuncia-de-instrumentos-internacionales/) (Oct. 29, 2009); Boletines de Prensa [Press Release], Intensifican debate sobre denuncia de Tratados de Protección Recíproca de Inversiones [Intensifying debate over denunciation of Reciprocal Investment Protection], Asamblea Nacional República del Ecuador [National Assembly of the Republic of Ecuador], (Nov. 5, 2009, 12:44 ECT) <http://www.asambleanacional.gov.ec/200911051406/noticias/boletines/intensifican-debate-sobre-denuncia-de-tratados-de-proteccion-reciproca-de-inversiones.html>.

165. Gillman, *supra* note 60.

166. See, e.g., Accord Entre la Confédération Suisse et la République de l'Equateur relatif à la Protection et à l'Encouragement des Investissements [Agreement Between the Swiss Confederation and the Republic of Ecuador Regarding the Protection and Encouragement of Investments], Ecuador-Switz., art. 8, ¶ 3, [http://www.unctad.org/sections/dite/ia/docs/bits/ecuador\\_switzerland\\_fr.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/ecuador_switzerland_fr.pdf) [hereinafter Ecuador-Switz. BIT]; Neth.-Venez. BIT, *supra* note 157, art. 14, ¶ 3.

time (for example, 10 years in the Ecuador-Switzerland BIT or fifteen years in the case of the Venezuela-Netherlands BIT).<sup>167</sup> Hence, the effects of these decisions will only be felt in the next decade.

It is possible that other Latin American nations will follow this trend in the near future. For many years, the states of this region have envied the position of Brazil, which has received abundant foreign investment despite its complete lack of involvement in the international network of BITs.<sup>168</sup> Consequently, Latin America will probably turn back the clock to a time when the Calvo doctrine will be reborn, or rather, will reawaken from lethargy. The ultimate goal is no longer to be obliged by this kind of BIT, which Latin American countries consider unfair.

### 3. *Drafting New Model BITs*

In their quest to encourage foreign investments, Latin American countries have signed BITs that have not been advantageous for them. But moving forward, Latin American nations have realized that the content of the BIT should better balance the rights and obligations of both parties.<sup>169</sup> This is important because ICSID arbitral tribunals base their decisions on a detailed analysis of the contents of the BITs and “a word, or an absence of one, can make the difference between an arbitration won or lost.”<sup>170</sup>

As U.S. legal scholars report and as many of their Latin American counterpart have noted, the United States has used BITs to introduce substantial legal transplants in Latin America. BITs with Latin American countries contain dispute resolution mechanisms reflecting U.S. common law concepts that do not exist in the legal system of the host States.<sup>171</sup> These legal transfers constitute a new form of unilateralism.<sup>172</sup> From this perspective, the growing disappointment of the nations of Latin America with ICSID is understandable because the transfers of law contained in the BITs are “externally dictated transplants”, which are unlikely to grow “in its new body.”<sup>173</sup>

167. *Id.*

168. Brazil has signed fourteen BITs, but none of them has been ratified. Total Number of Bilateral Investment Treaties Concluded, United Nations Conference on Trade & Dev., June 1, 2010, [http://www.unctad.org/sections/dite\\_pccb/docs/bits\\_brazil.pdf](http://www.unctad.org/sections/dite_pccb/docs/bits_brazil.pdf) (last visited Aug. 28, 2010).

169. See Sara Lidia Feldstein de Cardenas, *Arbitraje e Inversiones Extranjeras [Arbitration and Foreign Investments]*, CENTRO ARGENTINO DE ESTUDIOS INTERNACIONALES 23 (2005), available at [www.caei.com.ar/es/programas/di/d14.pdf](http://www.caei.com.ar/es/programas/di/d14.pdf) (indicating that the authorities have to weigh the implications that the signing of BITs can have for the future of the country).

170. Damon Vis-Dunbar, *Analysis: Latin America's New Model Bilateral Investment Treaties*, Inv. Treaty News, July 17, 2008, <http://www.investmenttreatynews.org/cms/news/archive/2008/07/17/in-depth-latin-america-s-new-model-bilateral-investment-treaties.aspx>.

171. See, e.g., Eric Gillman, *Legal Transplants in Trade and Investment Agreements: Understanding the Exportation of U. S. Law to Latin America*, 41 GEO. J. INT'L L. 263, 294-96 (2009).

172. *Id.* at 267.

173. *Id.* at 286-87.

Some Latin American countries have recently announced their willingness to create new Model BITs that are more favorable to developing countries. The text of the new Model BITs that are currently being drafted is unknown, but sparse information gathered from various sources provide forecast of the most outstanding characteristics of the future Model BITs.<sup>174</sup>

In 2006, the Bolivian government presented some guidelines for a fair trade and cooperation treaty with the United States.<sup>175</sup> This proposal, untenable from the United States' perspective, underscores Bolivia's disadvantaged situation as "the history of Bolivia is one of an impoverished country that for centuries has been an exporter of raw materials" to the United States.<sup>176</sup> Today, there is an enormous asymmetry between both countries where "the GNP of the U.S. is 1,200 times greater than the GNP of Bolivia."<sup>177</sup> Thus, any BIT between both nations should take the asymmetry into account.

Bolivia's claims for a fair BIT should help Bolivia ensure poverty reduction and a healthy environment; promote the ecological and indigenous farming that is valued and supported for its contribution to cultural diversity; strengthen its "productive base and market systems so that Bolivian producers can take practical advantage of the new U.S. markets"; "preserve the property rights of the Bolivian State over its natural resources"; "secure effective revenues for the country"; "promote stability and sustainable growth"; "design trade rules based on special and differential treatment that take into consideration Bolivia's economic reality"; "respect Bolivian sovereign rights to guarantee access to affordable generic medicines and to essential services"; "and protect Bolivia's wealth of traditional knowledge and rich biodiversity."<sup>178</sup>

Consistent with this framework, the Bolivian government has stated that mechanisms for setting international investment disputes must be transparent, accessible, efficient and effective in addition to respecting the framework established by the Bolivian Constitution and national laws.<sup>179</sup> After this Bolivian proposal was referred to the United States, both countries did not conclude a BIT and in June 2009, President Evo Morales declared his wish to conclude a "Peoples Trade Agreement" with the United States, rather than a traditional "classical" free trade agreement.<sup>180</sup> Nevertheless, President Morales acknowledged this process as a

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174. Damon Vis-Dunbar, *supra* note 170.

175. *Bolivian Government Guidelines for a Fair Trade and Cooperation Treaty with the US*, Sept. 12, 2006, [http://www.boliviasonberana.org/blog/\\_archives/2006/9/12/2320093.html](http://www.boliviasonberana.org/blog/_archives/2006/9/12/2320093.html).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Morales Quiere Firmar un "Tratado de Comercio de los Pueblos" Con EEUU [Morales Wants to Sign a "Treaty of Commerce of the People" with the U.S.]*, June 26, 2009, <http://www.bilaterals.org/spip.php?article1544>.

difficult and slow-evolving objective.<sup>181</sup>

There are three innovative aspects of the 2007 Colombian BIT Model.<sup>182</sup> First, the model states that the “sole fact of a measure or series of measures having adverse effects on the economic value of an investment does not necessarily imply that an indirect expropriation has occurred.”<sup>183</sup> Second, the settlement of disputes section establishes a “fork-in-the road” between national courts and national or international arbitration.<sup>184</sup> Third, the new BIT condemns frivolous claims and does not include an umbrella clause, precluding that a breach of a contract between a state and a foreign investor becomes a breach of the BIT.<sup>185</sup>

The BIT Model that is being developed by Ecuador has been predetermined by the content of the new Constitution of 2008. For example, priority will be given to national investment over foreign investment, rigid rules on sovereignty over strategic resources and special sectors should be set and international disputes will not be solved in extra-regional forums.<sup>186</sup>

In the preparation of these new models, Latin American countries should take into account the Model of International Agreement on Investment for Sustainable Development (IISD Model) developed by the International Institute for Sustainable Development (IISD).<sup>187</sup> This 2005 text presents itself as a living model aiming to “foster international investment that is supportive of sustainable development aspirations and requirements in both the North and South.”<sup>188</sup> The IISD Model “develops provisions that balance the rights and obligations of investors, host states and home states.”<sup>189</sup> The institutional mechanism for the settlement of disputes included in the IISD Model is very different from the ICSID system.<sup>190</sup>

The United States has not remained immune to this revisionist trend. In 2004, several U.S. civil society groups presented a set of alternatives to the bilateral investment treaty model.<sup>191</sup> Among them is a proposal to

181. *Id.*

182. Bilateral Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and \_\_, Colombian Model August 2007, arts. VI, IX, [http://www.iisd.org/pdf/2007/inv\\_model\\_bit\\_colombia.pdf](http://www.iisd.org/pdf/2007/inv_model_bit_colombia.pdf).

183. *See id.* art. VI.

184. *See id.* art. IX.

185. *See id.*

186. Gustavo Guerra, *Ecuador Investment Policy*, [http://www.iisd.org/investment/capacity/dci\\_forum\\_2008.asp](http://www.iisd.org/investment/capacity/dci_forum_2008.asp) (last visited Sept. 12, 2010).

187. Howard Mann, et al., IISD Model International Agreement on Investment (2005), available at [http://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf).

188. *Id.*

189. *Id.*

190. This model does not allow recourse to arbitral institutions such as ICSID and creates a new system of arbitration inspired by the WTO system. Konrad von Moltke, A Model International Investment Agreement for the Promotion of Sustainable Development 28 (2004), available at [http://www.iisd.org/pdf/2004/trade\\_model\\_inv.pdf](http://www.iisd.org/pdf/2004/trade_model_inv.pdf).

191. Letter from Jake Caldwell et al., Trade & Environment Program Manager, National Wildlife Federation to Wesley Scholz, U.S. Department of State, Office of

require the exhaustion of local remedies before going to international arbitration, which is a stark reminder of the Calvo doctrine.<sup>192</sup> In relation to this issue, Latin American scholars acknowledge that if national courts want to substitute ICSID tribunals in deciding these claims on international investments, the legal systems of these countries must be improved considerably.<sup>193</sup> Ultimately, the deficiencies currently attributed to Latin American legal systems (weak judiciary, culture of impunity, absence of the rule of law culture, etc.) must be overcome.<sup>194</sup> Being aware that it is a long-term aspiration, along with a modernization of the substantive laws, entire justice systems must be modernized, making them faster, more transparent and more effective in order to avert the threat of a denial of justice.<sup>195</sup>

#### F. CREATION OF SPECIALIZED PUBLIC AGENCIES TO PROTECT DEVELOPING COUNTRIES FROM ICSID ARBITRATIONS

In recent years, several Latin American governments have created groups specializing in addressing the legal aspects of the complaints filed by foreign investors in international arbitration forums. A pioneering initiative in this area was the “Argentine Assistance Unit for the Arbitral Defense,” established on October 24, 2003.<sup>196</sup> The Unit aimed to develop and implement strategies both at the stage of amicable negotiation of disputes arising from foreign investors and also in the arbitration proceedings arising from the BITs. The effectiveness of this Unit has been questioned in Argentina, since the cases before ICSID seem to be still partially managed by foreign law firms.<sup>197</sup> Nevertheless, this governmental structure has inspired other countries in the region.

On April 10, 2007, Nicaragua created the “Interinstitutional Commission for the Defense of the Nicaraguan State against Investment Disputes.”<sup>198</sup> The objective of this entity is to coordinate actions among

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Investment Affairs and James Mendenhall, Office of the U.S. Trade Representative, Office of Services, Investment, and IPR (Jan. 16, 2004), available at [http://ciel.org/Publications/BIT\\_Comments\\_Jan1604.pdf](http://ciel.org/Publications/BIT_Comments_Jan1604.pdf).

192. Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, Int'l Courts & Tribunals 1 (2005) (Neth.), available at [http://www.univie.ac.at/intlaw/pdf/cspubl\\_75.pdf](http://www.univie.ac.at/intlaw/pdf/cspubl_75.pdf).

193. Carlos G. Garcia, *All The Other Dirty Little Secrets: Investment Treaties, Latin America, & The Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 322-23 (2004).

194. *Id.* at 323-27.

195. Hector A. Mairal, *The Silence of the Argentine Courts*, Inst. for Int'l Law & Justice 23, available at <http://www.iilj.org/GAL/documents/HectorMairal.TheSilenceoftheArgentineCourts.pdf> (last visited Sept. 3, 2010).

196. Procuring the Treasure of the Nation, Decree No. 965 (2003), [ptn.gov.ar/Institucional/DECRETO%20965\\_2003.pdf](http://ptn.gov.ar/Institucional/DECRETO%20965_2003.pdf).

197. *Guglielmino Leave the Country Without Official Defense ICSID*, lapoliticaonline, July 31, 2009, <http://www.lapoliticaonline.com.ar/noticias/val/59090/guglielmino-deja-al-pais-sin-defensa-oficial-ante-el-ciadi.html> (referring to the outsourcing of this legal defense).

198. Decreto No. 28-2007, 9 Mar. 2007, Decreto creador de la comisión interinstitucional para la defensa del Estado de Nicaragua por diferencias relativas a inver-

different public administrations involved in the defense of Nicaragua in international processes of alternative dispute resolution between the state and foreign investors.<sup>199</sup> On June 5, 2008, the Bolivian Government created a new Ministry, responsible for the legal defense of the state (“Ministerio Sin Cartera Responsable de la Defensa Legal de las Recuperaciones Estatales”).<sup>200</sup> Under the motto, “la patria no se vende, se defiende” (the motherland is not for sale, but to be defended),<sup>201</sup> its current head, Ms. Elizabeth Arismendi Chumacero, declared on January 25, 2010, “her commitment to work with honesty and responsibility in defending national interests, dealing with international arbitrations, so as to obtain clear answers on behalf of Bolivia.”<sup>202</sup> Peru has also developed a series of measures to react in a coordinated manner against international investment disputes.<sup>203</sup> It has created a committee that will represent the state during the whole process of the investment claim.<sup>204</sup> This entity will also be responsible for managing and communicating public information about contracts containing clauses on international disputes settlement.<sup>205</sup>

#### G. REGIONAL INITIATIVES

In recent times, states in Latin America are pointing to the possibility of different national Model BITs being replaced by a regional template. Countries want a Model BIT to give them greater protection by, for example, restoring the principles of the Calvo doctrine.<sup>206</sup> Governmental experts from various Latin American countries have proposed to adopt a “Latin American Agreement on Investments Promotion and Protection” (Acuerdo Latinoamericano de Promoción y Protección de Inversiones).<sup>207</sup> The purpose of this Agreement is to create “the most extensive area of uniform treatment of foreign investment, because the geographic area will span from Mexico to Tierra del Fuego and give coherence to the region in its approach.”<sup>208</sup> To obtain consensus on

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sions [Creation of the Interdepartmental Commission for the Defense of the State of Nicaragua of Investment Disputes] La Gaceta [L.G.] Apr. 10, 2007 (Nicar.).

199. *Id.*

200. Its first head was Mr. Victor Arce, former Viceminister of the Presidency. *Hector Arce is Already Minister of Defense*, Diariocritico de Bolivia, June 6, 2008, <http://www.diariocritico.com/bolivia/2008/Junio/noticias/79429/hector-arce.html>.

201. Informacion Institucional, Ministerio de Defensa Legal del Estado, [http://www.defensalegal.gob.bo/index.php?option=com\\_content&view=article&id=4&Itemid=6](http://www.defensalegal.gob.bo/index.php?option=com_content&view=article&id=4&Itemid=6) (last visited Oct. 12, 2010).

202. *Id.*

203. Veronica Maseda, *Indirect Expropriation*, [http://www.iisd.org/investment/capacity/dci\\_forum\\_2008.asp](http://www.iisd.org/investment/capacity/dci_forum_2008.asp) (last visited Sept. 22, 2010).

204. *Id.*

205. *Id.*

206. See Christoph Schreuer, *supra* note 192.

207. Juan Banderas, *Acuerdo Latinoamericano de Promocion y Proteccion de Inversiones: Una Propuesta Integradora [Latin American Agreement on Investment Promotion and Protection: A Proposal]*, <http://www.metabase.net/docs/procomer/06441.html> (last visited Sept. 3, 2010).

208. *See id.*

projects such as a supranational Model BIT, states need the support of a regional organization that enables them to carry out this type of joint initiatives.

In this sense, we must take into account the existence of the “Bolivarian Alternative for the Americas” (ALBA).<sup>209</sup> This regional organization, currently consisting of nine countries, presents itself as a scheme of integration based on principles of cooperation, solidarity and complementarity.<sup>210</sup> ALBA looks to overcome the obstacles that prevent true integration, such as poverty, aiming to compensate for the existing asymmetries between its members.<sup>211</sup> Following upon a proposal of Hugo Chavez in 2001, ALBA has promoted some initiatives in the field of international investment, like the creation of a regional petroleum company called Petroamérica or the establishment of a Society of Latin American Reciprocal Guarantees to reduce the dependency on foreign investment.<sup>212</sup>

In the area of international dispute resolution, the seventh ALBA summit of 2009 proposed the creation of a regional center to replace ICSID arbitration, instructing a dispute resolution group to work on this issue.<sup>213</sup> This working group has made the objectives underlying the creation of this regional body public by setting up a dispute settlement mechanism that is fair, equitable, impartial and able to understand the social, economic and political realities of the peoples of Latin America. This entity would achieve a breakthrough in the consolidation of ALBA, the region would also shield itself legally and socially and Latin America could dispense with international entities, such as ICSID, that ignore the primacy of public interest over private interest.<sup>214</sup>

Together with this proposal by ALBA, similar initiatives are being developed in Latin America. For some time, the region wanted to have an organization that encompasses all of the states in South America. Thus, in May 2008, the “Constitutive Treaty of the Union of South American Nations” (UNASUR) was created for the purpose of merging the Andean Community, MERCOSUR and Chile, together with Guyana and

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209. See Shannon D. Williams, *The Bolivarian Alternative for the Americas: Rethinking Economic Integration After the Failures of Neoliberalism*, 2009 (Master's Thesis, University of Tennessee), available at [http://trace.tennessee.edu/utk\\_gradthes/82](http://trace.tennessee.edu/utk_gradthes/82).

210. See *id.*

211. *Id.*

212. Michael Fox, *Defining the Bolivarian Alternative for the Americas-ALBA*, Venezuela Analysis, Aug. 4, 2006, <http://venezuelanalysis.com/analysis/1870>.

213. Fernando Cabrera Diaz, *Alba Forward With Plan to Create Regional Investment Arbitration Alternative to ICSID at 7th Summit*, Inv. Treaty News, Nov. 3, 2009, <http://www.investmenttreatynews.org/cms/news/archive/2009/11/01/alba-moves-forward-with-plan-to-create-regional-investment-arbitration-alternative-to-icsid-at-7th-summit.aspx>.

214. *En la Procuraduría General de la República, Representantes Del Alba-TPC Trabajaron Sobre la Instancia de Resolución de Controversias [In the Attorney General of the Republic, Representatives of the Alba-TPC Instance Worked on the Resolution of Disputes]*, Gobierno Bolivariano de Venezuela <http://www.pgr.gob.ve/biblioteca.htm> (last visited Sept. 12, 2010).

Suriname.<sup>215</sup> In June 2009, at the thirty-ninth Session of the General Assembly of the Organization of American States, Ecuador's Foreign Minister Fander Falconí proposed that UNASUR create an arbitration center, which would allow Latin America to free itself from any foreign tutelage.<sup>216</sup> During his term as temporary president of UNASUR, Rafael Correa has endeavored to promote this project that limits dispute resolution proceedings to regional forums.<sup>217</sup> On June 25th, 2009, President Correa declared at the U.N., "if a system has failed, we cannot expect a solution from those who created that system. Instead, we have to look to others like our own people."<sup>218</sup> Therefore, UNASUR shares the objectives of ALBA on resolution of disputes arising from international investment and advocates the creation of conciliation and arbitration tribunals. They should be composed of jurists of each country in the region<sup>219</sup> and deal with "the leniency [for] transnational capital [that] has [been] able to exercise [greater] rights than people."<sup>220</sup> From a sectorial perspective, in April 2007, the first South American Energy Summit took place.<sup>221</sup> It established the South American Energy Council and set out to create an Energy Security Treaty, which would establish, among other things, an entity to resolve energy disputes in the region.<sup>222</sup>

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215. Jackson Bennett, *The Union of South American Nations: The New(est) Regionalism in Latin America*, 32 SUFFOLK TRANSNAT'L L. R. 103, 123-24 (2008); see also Union of South American Nations [UNASAR], <http://www.comunidadandina.org/ingles/sudamericano.htm> (last visited Sept. 12, 2010).
216. *Ecuador Propoundra un Nuevo Sistema de Arbitraje Durante su Presidencia en la Unasur* [Ecuador Will Propose a New System of Arbitration During its Presidency of UNASUR], hoy.com, July 8, 2009, <http://www.hoy.com.ec/noticias-ecuador/ecuador-propoundra-nuevo-sistema-de-arbitraje-durante-su-presidencia-en-unasur-357247.html>.
217. *Ecuador Agita Foros Internacionales* [Ecuador Stirred International Forums], International Centre for Trade and Sustainable Development, Aug. 5, 2009, <http://ictsd.org/i/news/puentes/52300/>.
218. Melissa Draper, *President Correa speaks at U.N. event 'Peoples Rights not Corporate Profits'*, NJGI, July 8, 2009, <http://justinvestment.org/2009/07/president-correa-speaks-at-u-n-event-%e2%80%98peoples-rights-not-corporate-profits%e2%80%99-by-melissa-draper>.
219. Interview by Juan Francisco Alonso with Luisa Estella Morales, President, Supreme Tribunal of Justice of Venezuela, *For the TSJ, All Cases Are Relevant, We do Not Discriminate* (Oct. 16, 2008), available at [http://www.eluniversal.com/2008/10/16/en\\_pol\\_esp\\_for-the-tsj-all-ca\\_16A2073343.shtml](http://www.eluniversal.com/2008/10/16/en_pol_esp_for-the-tsj-all-ca_16A2073343.shtml).
220. Intervencion del Canciller ecuatoriano, Dr. Fander Falconí, en la sesion de la OEA de 2 de junio de 2009 [Intervention of the Ecuadorian Chancellor, Dr. Fander Falconí, at the session of the OAS, June 2, 2009], [www.scm.oas.org/idms\\_public/SPANISH/Hist\\_09/ac01392t04.doc](http://www.scm.oas.org/idms_public/SPANISH/Hist_09/ac01392t04.doc).
221. Carlos Malamud, *La Cumbre Energetica de America Del Sur y la Intergracion Regional: un Camino de Buenas (y no Tan Buenas) Intenciones* [Energy Summit of South America and Regional Integration Division: A Path of Good (and Not So Good) Intentions], Informe Uruguay, [http://www.uruguayinforme.com/news/27072007/27072007\\_carlos\\_malamud.php](http://www.uruguayinforme.com/news/27072007/27072007_carlos_malamud.php) (last visited Sept. 22, 2010).
222. Fernando Cabrera Diaz, *South American Alternative to ICSID in the Works as Governments Create an Energy Treaty*, Inv. Treaty News, Aug. 6, 2008, <http://www.investmenttreatynews.org/cms/news/archive/2008/08/06/south-american-alternative-to-icsid-in-the-works-as-governments-create-an-energy-treaty.aspx>; *Ministros Suramericanos Acuerdan Que Unasur Solucione Disputas* [South American

A few months ago, leaders of more than thirty Latin American states have announced that they will create a new regional bloc, including every country in the Americas except for the United States and Canada. It is debatable that this proposal, presented at the Rio Group Summit in Mexico in late February 2010, aims to reduce the power of the Organization of American States, to which the United States and Canada belong.<sup>223</sup>

### III. CONCLUSION

As it has been pointed out throughout this paper, Latin America<sup>224</sup> is currently going back to approaches that belong to the Calvo doctrine.<sup>225</sup> This stance is considered to be beneficial by these countries, as the Calvo doctrine fosters the region's independence from the United States and strengthens Latin American sovereignty and regionalism. Nevertheless, it must be taken into account that Latin America is not a harmonious bloc.<sup>226</sup> This is demonstrated through a number of factors, including its

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Ministers Agree that Unasur will resolve Disputes], Nacionales, May 9, 2008, <http://elobservador.rctv.net/Noticias/VerNoticia.aspx?NoticiaId=236731&Tipo=14>.

223. *Rio Group Agrees to Form New Regional Bloc With Exception of Canada, U.S.*, CCTV, Feb. 24, 2010, <http://english.cctv.com/program/newshour/20100224/103900.shtml>; Michael Toiba, *Rio Group Pitches New Latin American Body*, Americas Society, Feb. 23, 2010, <http://www.as-coa.org/article.php?id=2178>.
224. It is interesting to note that nowadays this Calvo doctrine is also starting to develop in countries that were traditionally opposed to it, like the United States. In recent years, NAFTA has given rise to some international arbitration cases where the respondent was the U.S. government. From the defendant's perspective, a recent example of how the United States is supporting the reduction of the protection-level granted to foreign investors is the case *Glamis Gold Ltd. v. United States of America*. The arbitral tribunal held that: "to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1)." *Glamis Gold, Ltd. v. United States*, ICSID (W. Bank) 10 (2009), available at [http://ita.law.uvic.ca/documents/Glamis\\_Award.pdf](http://ita.law.uvic.ca/documents/Glamis_Award.pdf). Furthermore, in the process of reform of the U.S. Model BIT which started in 2009, one of the crucial issues for discussion is whether foreign investors in the United States can enjoy a better legal status than domestic entrepreneurs. Press Release, United States Department of Justice, Public Meeting Regarding the Public Meeting Regarding the U.S. Model Bilateral Investment Treaty Review (July 22, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/july/126304.htm>; U.S. Model Bilateral Investment Treaty Review (July 22, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/july/126304.htm>.
225. Santiago Montt, *What International Investment Law and Latin America Can and Should Demand from Each Other. Updating the Bello/Calvo Doctrine in the BIT Generation*, Paper presented at the Global Administrative Law Buenos Aires Workshop, Oct. 16-17, 2009, available at <http://www.iilj.org/GAL/documents/SantiagoMontt.GAL.pdf>; Wenhua Shan, *From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 Nw. J. INT'L L. & BUS. 631, 649-651 (2007); Jose C. Fernandez Rozas, *América Latina y el Arbitraje de Inversiones: Matrimonio de Amor o Matrimonio de Conveniencia? [America and the Arbitration Investment: Marriage of Love or Marriage of Convenience?]*, 24 REVISTA DE LA CORTE ESPAÑOLA DE ARBITRAJE [Journal of Spanish Court of Arbitration] 13, 34 (2009).
226. Rozas, *supra* note 225.

level of development, its political allies and its economic policies.<sup>227</sup> While some countries of Latin America continue to develop liberal economic policies (Chile, Costa Rica, Dominican Republic, and Colombia), others (Venezuela, Bolivia, and Ecuador) have shown their reluctance to conform to this model, and are adopting a different model of economic regulation.<sup>228</sup> The first set of neo-liberal proposals is based on free market access, institutional efficiency, and investor protection, while, on the other hand, the anti-Free Trade Agreement countries rely on a strong state, capable of creating wealth through its control over natural resources and the economy.<sup>229</sup> A clear example of the important differences that exist within this region are the many recent clashes between Hugo Chavez and Alvaro Uribe, president of Venezuela and former president of Colombia, respectively.<sup>230</sup> Both leaders represent the various tendencies that coexist, and sometimes collide, within Latin America.

Similar conclusions can be drawn if we analyze the specific sector of investment arbitration in Latin America. On the one hand, this paper has shown that in recent years there have been many conflicts in this field. Due to a wide number of cited reasons, the system established by ICSID has been considered detrimental by the countries of Latin America. On the other hand, despite this general anti-ICSID sentiment in Latin America, each nation is developing its own position according to its socio-political characteristics.

The countries examined most thoroughly in this paper are: Argentina, Venezuela, Ecuador and Bolivia. Argentina's resistance to ICSID is a result of a series of ICSID awards issued against the country as a consequence of an economic crisis that Argentina has considered to be a state of necessity.<sup>231</sup> On the other hand, Venezuela, Ecuador, and Bolivia have leftist regimes, which can be considered politically volatile<sup>232</sup> by powers

227. *Id.*

228. *Id.*

229. See Stephen M. Siptroth, *Welcoming All to a Table of Plenty: The Free Trade Area and the Bolivarian Alternative as Competing Means for Economic Integration in the Americas*, 12 UCLA J. INT'L L. & FOREIGN AFF. 359, 388-90 (2007); see generally Mauricio Baquero Herrera, *Latin American Update: Something is Going on in Latin America*, 12 LAW & BUS. REV. AM. 613 (2006).

230. *Chávez-Uribe Clash at the Unity Summit in Cancun*, EL UNIVERSAL, Feb. 26, 2010, [http://archivo.eluniversal.com/2010/02/26/en\\_ing\\_esp\\_chavez-uribe-clash\\_26A3495731.shtml](http://archivo.eluniversal.com/2010/02/26/en_ing_esp_chavez-uribe-clash_26A3495731.shtml); *Might Chávez-Uribe Fight Kickstart Solutions?*, Stabroek News, Feb. 28, 2010, <http://www.stabroeknews.com/2010/features/02/28/might-chavez-uribe-fight-kickstart-solutions>; *Chavez Breaks Off Relations With Colombia, Tension Increases Along Border*, AOL Noticias [AOL News], July 22, 2010, <http://noticias.aol.com/2010/07/22/chavez-breaks-off-relations-with-colombia/>.

231. Arbitraje de inversiones (CIADI y UNCITRAL). *Novedades en los casos de Argentina [Arbitration Investment Disputes (ICSID and UNCITRAL). Developments in the cases of Argentina]*, DIPr Argentina, June 16, 2008, <http://www.diprargentina.com/2008/06/arbitraje-de-inversiones-ciadi-y.html> (analyzing Argentina's defenses in these cases).

232. In relation to this volatility, consider for example the recent failed coup in Ecuador. Simon Romero, *Ecuador's Police Chief Resigns After Uprising*, N.Y. TIMES, Oct. 2, 2010, at A6.

like the United States.<sup>233</sup> The control of valuable natural resources has become a national issue in these countries.<sup>234</sup> From their perspective, the exploitation of these resources by foreign companies shows the abuse committed by the first world in Latin America.

As a part of their “retaliation campaign”, Venezuela, Ecuador, and Bolivia are developing a series of initiatives aimed at eliminating ICSID as a forum for resolving international investment disputes.<sup>235</sup> This paper has analyzed in detail these initiatives and their legal implications including the following: (1) resorting to the Constitution to ignore ICSID awards, (2) promoting national courts’ reactions against ICSID, (3) drafting international contracts that avoid ICSID arbitration, (4) withdrawing from the ICSID Convention, (5) using Bilateral Investment Treaties to combat ICSID, (6) creating national agencies to react against ICSID arbitrations, and (7) developing a regional arbitration center aimed at replacing ICSID.

Within this more reactionary bloc, there are also differences in the intensity of the nations’ responses and there is some precedent for international investment disputes between South American countries that, theoretically, share approaches.<sup>236</sup> At this time, the most radical position is that taken by Venezuela.<sup>237</sup> In recent months, President Chavez expropriated several foreign companies operating in key sectors of the country,<sup>238</sup> “and created a joint venture with Russia to drill for heavy crude oil in Venezuela’s Orinoco River Basin.”<sup>239</sup> Chavez also announced his intention to withdraw Venezuela from the Inter-American Commission on Human Rights after this organization accused him of endangering democracy in Venezuela.<sup>240</sup> This kind of news certainly worries the interna-

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233. Eric Toussaint, *Characteristics of the Experiences Underway in Ecuador, Venezuela, and Bolivia*, INT’L VIEWPOINT, July 2008, <http://www.internationalviewpoint.org/spip.php?article1502>.

234. *Id.*

235. Emmanuel Gaillard, *Anti-Arbitration Trends in Latin America*, 239 N.Y.L.J. 1-2, (2008).

236. In 2007, Brazil’s president demanded a hefty compensation from his Bolivian counterpart, as a consequence of the nationalization of two Petrobras refineries in Bolivia. *Lula Disipo Las Dudas Sobre Sus “Aliados” Chavez y Evo Morales [Lula Dispels Doubts About His “Allies” Chavez and Evo Morales]*, La Nación, Apr. 26, 2007, available at <http://www.oceba.gba.gov.ar/prensa/modules.php?name=News&file=article&sid=11806>.

237. In Ecuador, however, the international political and economic press considers that, during his second presidential term, Correa will deploy a more radical rhetoric, but his policies will be more moderate and are going to try to approach the United States. Christian Volkel, *President Promises Swift Changes in Ecuador Ahead of Inaugural Ceremony*, Global Insight, Aug. 2009, [www.ihsglobalinsight.com](http://www.ihsglobalinsight.com).

238. Posting of Simon Lester to Int’l Economic L. & Pol’y Blog, *A Peaceful Expropriation*, <http://worldtradelaw.typepad.com/ielpblog/2010/02/a-peaceful-expropriation.html> (Feb. 19, 2010, 14:05).

239. *Venezuela, Russia in Joint Crude-Oil Venture*, Radio Free Eur. Radio Liberty, Apr. 1, 2010, [http://www.rferl.org/content/Venezuela\\_Russia\\_In\\_Joint\\_Crude\\_Oil\\_Venture/1999536.html](http://www.rferl.org/content/Venezuela_Russia_In_Joint_Crude_Oil_Venture/1999536.html)

240. Rory Carroll, *Chavez Furious as OAS Rights Watchdog Accuses Him of Endangering Democracy*, Guardian, Feb. 26, 2010, <http://www.guardian.co.uk/world/2010/feb/25/oas-report-chavez-human-rights>.

tional community and investors, particularly those in the United States and Europe.

Additionally, the possible negative effects of reviving some aspects of the Calvo doctrine should not be ignored. The leaders of these Latin American countries are introducing abrupt changes in legislation, making their legal systems unstable. Foreign investors reject this lack of clarity because, from their perspective, it raises their investment's risks. Other actions of these Latin American governments, such as unilateral modification or forced renegotiation of oil contracts with foreign companies as well as the elimination of the ICSID reference in new BITs, lead to the same conclusion: the loss of security will possibly decrease foreign direct investment in Latin America in the coming years. Currently, production and trade are global phenomena. If Latin America becomes a difficult region for investors, they will go to other developing countries located in Asia or Africa that are eager to attract foreign investments.

Furthermore, the consolidation of this anti-ICSID policy generates fear from the perspective of social development in the region. There are historical precedents in Latin America showing that the reduction of foreign investments in the region has negative effects on the welfare of the general population.<sup>241</sup> Many of these countries have alarming rates of poverty, unemployment, life expectancy, and illiteracy. Assuming that direct foreign investments generate revenues in the host states<sup>242</sup> and that it is appropriately used to support the development of the country,<sup>243</sup> the loss of this financial support would make Latin American countries fall under desirable international standards of development.<sup>244</sup>

To avoid this undesirable situation, Latin American political leaders must be able to foresee the potential costs of their actions and act with historical responsibility. Populist measures can ingratiate the ruling political party with the electorate and facilitate these leaders' re-election. But if these kinds of measures are not beneficial globally, in the medium-to-long term, their personal interests will harm the community. Recently, different sectors have been demanding that investment arbitration take into account the collective interests that are involved in such international operations. If the arbitration system represented by ICSID is heavily criticized by some Latin America countries, the introduction of a new and more balanced system of international investment must be espe-

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241. See U.N. Econ. & Soc. Comm'n for Asia & the Pacific (ESCAP), *Interregional Cooperation in Trade & Investment*, 184-85, U.N. Doc. ST/ESCAP/2069, [http://www.unescap.org/tid/publication/chap5\\_2069.pdf](http://www.unescap.org/tid/publication/chap5_2069.pdf).

242. This issue is still being discussed by scholars. See generally Jason W. Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, University of Wisconsin Legal Studies Research, Paper No. 1114 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1594887](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887).

243. See generally Gus van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 *TRADE L. & DEV.* 1, 45 (2010).

244. Miguel D. Ramirez, *Foreign Direct Investment in Mexico During the 1990s: An Empirical Assessment*, 28 *E. ECON. J.* 409, 411-12 n.3 (2002).

cially careful in protecting the future welfare of developing countries. Only if this requirement is met will it be possible to say that the advantages of a “new order” outweigh any disadvantages.

Therefore, recent proposals made from the “first world” to improve the current system -such as the elaboration of a Multilateral Agreement on Foreign Investment<sup>245</sup> or a Restatement of International Investment Law<sup>246</sup> will probably be rejected by Latin Americans, since they assume that these proposals will, like previous ones, be opposed to their interests. On the other hand, more development-oriented proposals, such as “the creation of an Advisory Center for International Investment Law to provide a range of services to under resourced developing countries,” the foundation of a permanent roster of arbitrators in which developing countries would be prominently represented, and/or greater intervention from the Inter-American Development Bank may be interesting to the Latin American states, but it is unlikely that they will be considered sufficient by all Latin American countries.<sup>247</sup>

Upon analyzing Latin America’s past, it seems that its relationship with foreign investments is tilting and a phase of market opening is being followed by abrupt nationalization measures and vice versa. It would be good if Latin America finds a more measured and steady approach. Latin American countries have to make a serious effort to first assume that if they want to improve their rates of development, they have to let foreign companies invest and develop their business in their territory. On the other hand, they should be aware that there are certain types of investments that can harm their countries such as investments, which are detrimental to the citizens’ health as well as the environment and may deplete nonrenewable resources. Therefore, Latin American countries have to work intensively to develop a set of tools, including legal ones, which would ultimately allow them to refuse unwanted investments. Thus, it is essential that the international investment laws be reconstructed in order to take into account the wishes and needs of the host states.

To achieve this goal, Latin America could implement measures such as the creation of a regional center for the settlement of international investment disputes. This possible organization, located in Latin America and built on more favorable principles for developing countries, would be able to oppose ICSID’s influence in the region, especially if there are many countries that are politically, economically, and legally involved in this project, and if they are determined to develop a common strategy.

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245. Efraim Chalamish, *The Future of Bilateral Investment Treaties: A de Facto Multilateral Agreement*, 34 *BROOK. J. INT’L L.* 303, 334 (2009).

246. Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 *HARV. INT’L L. J.* 491, 495 (2009).

247. Memorandum from author to Office of the President, *Improving the International Investment Regime: priorities for the new U.S. Administration* (Jan. 29, 2009), available at <http://www.vcc.columbia.edu/events/documents/MemoonImprovingIntlInvestmentRegime-2Feb09.pdf>.

An essential aspect of this future arbitral court is that it must be able to help these developing States to free themselves from a “trap of low-quality institutions.”<sup>248</sup> The legal status of some Latin American institutions has been criticized from the outside and it is a fact that the dispute settlement bodies of MERCOSUR and the Andean Community have not been successful.<sup>249</sup> Therefore, a new organization that serves as a genuine alternative to ICSID must meet a number of difficult requirements in order to be universally considered superior to its predecessor. This new organization should, for example, establish a fast, economical, and transparent system. Moreover, these features should not be incompatible with the possibility of offering an appeal to the losing party. It can’t be forgotten that member states of this regional entity must perform a Herculean task: generally withdraw from ICSID, denounce their BITS referring to ICSID, and refer to this new arbitral court in their BITS, international contracts, or even constitutions.<sup>250</sup> Therefore, time will tell if the proposals outlined above will eventually become a Latin American entity, capable of providing answers that satisfy both parties to an international investment dispute.

In the future, together with this renewed system of international investment arbitration, it would be very beneficial to increase the use of ADR mechanisms such as mediation, conciliation, or negotiation. If they are used from the beginning of the investment project, they will reduce the number of conflicts requiring arbitration, and thus also avoid the implementation of expropriatory measures that are in vogue today in some Latin American countries.<sup>251</sup> If Latin American states decide in the future to cede their sovereignty to a regional arbitration center, which is able to replace and improve the ICSID system, the same institutional structure would also be able to accommodate wider purposes, advantageous for the region. For this proposal to succeed, it will be necessary for these measures to be applied by ADR neutral entities which are immune from political influences and which maintain their independence and stability, regardless of political changes that may occur in different countries in the region.

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248. Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT’L REV. L. & ECON. 107, 123 (2005).

249. See Herrera, *supra* note 229.

250. For example, Article 422 of the Ecuadorian Constitution 2008 already states that the government is not authorized to cede its sovereignty to international arbitral tribunals, but that the government can be subject to regional arbitral panels. CONSTITUTION DE ECUADOR, art. 422.

251. –Bolivia’s president recently decreed the nationalization of three power-generating companies owned by international partners (Corani, owned fifty percent by Ecoenergy International subsidiary France’s GDF Suez, Guaracachi, whose principal-partner is the British Rurelec PLC, and Valle Hermoso). To this extent, the Bolivian government now controls eighty-percent of energy generation in the country. *Bolivia Nacionaliza Tres Empresas Eléctricas* [Bolivia Nationalizes Three Utilities], EL PAIS, May 1, 2010, available at [http://www.elpais.com/articulo/internacional/Bolivia/nacionaliza/empresas/electricas/elpepuint/20100501elpepuint\\_6/Tes](http://www.elpais.com/articulo/internacional/Bolivia/nacionaliza/empresas/electricas/elpepuint/20100501elpepuint_6/Tes).