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Is There a Life for Latin American Countries After Denouncing the ICSID Convention? by R. Polanco Lazo

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Is there a life for Latin American countries after denouncing the ICSID Convention?

Rodrigo Polanco Lazo^{*}

Summary

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Abstract

This paper studies the reasons why some Latin American States have recently decided to denounce and terminate international investment agreements and the ICSID Convention. It analyses the consequences of that choice, focused especially on the alternatives to treaty-based Investor-State arbitration that those countries are pursuing. After examining these new avenues for dispute settlement between the host State and foreign investors, the author concludes that this pathway will not necessarily achieve the purpose that inspired the denunciation and termination of investment treaties, unless the concerned countries appropriately manage their “newly” available choices that go beyond a merely return to sole domestic jurisdiction for investment disputes.

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I. INTRODUCTION

During the last decades, a regime of dispute settlement allowing foreign investors to arbitrate against host States has been established through International Investment Agreements (IIAs). This system enables foreign investors to directly challenge actions or inactions of the host State that could affect their substantive rights.¹

As the use of investor-state arbitration has increased spectacularly – notably in Latin America – the ability of foreign investors to choose this system has progressively come under more scrutiny. Critics of this regime often point out that it allows private arbitrators to decide the legality of sovereign acts of a State or public policies². There are concerns about forum shopping, high costs and time intensity of arbitral procedures, lack of transparency, impartiality and independence of arbitrators, lack of consistency between arbitral awards, erroneous arbitral decisions, and a growing perception of lack of legitimacy of the system.³

Latin America is leading the backlash against investment arbitration. On grounds of pro-investor bias and claims that the system puts sovereign legitimate policies at risk, especially in the areas of environmental, health, labor or indigenous rights, the ICSID Convention – the main forum for international investment arbitration – and some bilateral investment treaties have been denounced by Ecuador, Bolivia and more recently by Venezuela.⁴

This paper analyses why some States are denouncing investment treaties and the consequences on available choices after exiting the abovementioned system. Interestingly

¹ Susan D. Franck, Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law, *McGeorge Global Business and Development Law Journal*, Vol. 19, 2007, p. 341-343.

² See Gus Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press (2007); and Michael Waibel, Asha Kaushal, Kyo-Hwa Chung and Claire Balchin (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, Kluwer Law International (2010), among others.

³ UNCTAD, Reform of Investor-State Dispute Settlement: In Search of a Roadmap, IIA Issues Note N° 2, June 2013, p. 1, 2-4, at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf. (last visited Dec. 13, 2013).

⁴ Sergey Ripinsky, Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve, *IISD Investment Treaty News*, April 2012, at <http://www.iisd.org/itm/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/> (last visited Dec. 13, 2013).

the countries that have taken this path are not automatically proposing to go back to sole domestic jurisdiction for foreign investment disputes, and leave room for contract based arbitration and regional arbitration institutions.

II. Investor-State Dispute Settlement and Latin America

Historically, before the creation of Investor-State arbitration, foreign investment disputes were settled either through diplomatic protection or by the host State's domestic courts.⁵ Latin American countries were especially affected by the abuse of diplomatic protection and even faced armed intervention and occupation by military forces sent by the government of the investor's home State.⁶ That led the countries of the region to take the position that aliens had no greater rights than those recognized to the citizens of the host country,⁷ holding that domestic courts had a primary role in the settlement of foreign investment disputes and rejecting diplomatic protection except in cases of denial of justice or evident violation of principles of international law.⁸ This idea has been dubbed as the "Calvo Doctrine" and the "Calvo Clause" (when included provisions to renounce to diplomatic protection) following the writings of two prominent Latin American jurists: the Argentinian Carlos Calvo, and the Venezuelan Andres Bello, who was in fact the first one in advancing this principle.⁹

In that context, it is not a surprise that Latin American countries have reacted negatively to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965),¹⁰. The Convention is a multilateral agreement that created the International Centre for Settlement of Investment Disputes (ICSID), an entity of the World Bank Group that administers arbitration and conciliation procedures on

⁵ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, p. 211-220 (2008).

⁶ Ibrahim Shihata, *Towards a greater depoliticization of investment disputes: The roles of ICSID and MIGA*, 1 ICSID Rev. Foreign Investment L.J., p. 1 (1986).

⁷ Andreas Lowenfeld, *International Economic Law*, Oxford University Press, 2003, p. 395

⁸ Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*, Hart Publishing, p. 40-41 (2009)

⁹ *Id.*, p. 42; and Frank Griffith Dawson, "The Influence of Andres Bello on Latin-American perceptions of the non-intervention and State Responsibility", 57 *British Yearbook of International Law*, p. 273 (1986).

¹⁰ International Centre for Settlement of Investment Disputes (ICSID), created by 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 17 UST 1270, TIAS 6090, 575 UNTS 159 [hereinafter, ICSID Convention].

investment disputes of a legal nature, between a national of a State party to the Convention and a host State party to the Convention, if written consent to its jurisdiction is granted.¹¹ Although the idea of providing direct access of individuals to international dispute settlement was not a new one, this was the first multilateral agreement that gave foreign investors the right to sue a sovereign State outside of its territory, creating a new forum for these disputes outside domestic courts.¹²

That was one of the reasons why, although the ICSID Convention expressly excluded diplomatic protection, its draft was rejected by all 19 Latin American countries members of the World Bank.¹³ Speaking on behalf of the region, the Governor for Chile expressed the opposition to the resolution of the Board of Governors of the World Bank that instructed the development of the Convention, in a Preparatory Meeting held in Tokyo in 1964. This refusal known as the “No of Tokyo” was founded essentially on the basis that the legal and constitutional systems of all Latin American countries offered to foreign investors the same rights and protection as their own nationals, and that conferring such privilege of an alternative jurisdiction on the foreign investor, placed the nationals of the home State in a position of inferiority.¹⁴ Finally, the Convention was opened for signature in March 1965, and in the American region was initially signed only by the U.S. and two Caribbean countries, Jamaica (1965) and Trinidad and Tobago (1966).¹⁵

By the end of the ‘80s and early ‘90s major reversal of this policy took place in Latin America, as some countries began to sign bilateral investment treaties (BITs) in order to stimulate economic growth through foreign direct investment (FDI) and at the same time privatized their energy and utility companies,¹⁶ in pursuit of their economic interests to

¹¹ Dolzer and Schreuer, *op. cit.*, p. 223.

¹² See Francisco Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization*, Cambridge University Press, p. 48-62 (2004).

¹³ Other authors point out as causes of the rejection, the ideological and political insights and concepts of sovereignty prevailing in this region in that era. See Aron Broches, “The Convention on the Settlement of Investment Disputes between States and nationals of other States”, in: *Recueil de Cours*, Vol. II, Leyden, 1972, p. 348.

¹⁴ Antonio Parra, *The History of ICSID*, Oxford University Press p. 67-68 (2012),

¹⁵ Parra, *op. cit.*, p. 95.

¹⁶ Katia Fach Gómez, *Latin America and ICSID: David versus Goliath?* (November 12, 2010), p. 2, *at* SSRN: <http://ssrn.com/abstract=1708325> or <http://dx.doi.org/10.2139/ssrn.1708325> (last visited Dec. 13, 2013).

become an attractive location to potential foreign investors.¹⁷ A Bilateral Investment Treaty is defined as “a reciprocal legal agreement concluded between two sovereign States for the promotion and protection of investments by investors of the one State (‘home State’) in the territory of the other State (‘host State’)”.¹⁸

Although initially, BITs were concluded between a developing country and a developed country, usually at the initiative of the latter,¹⁹ with the increasing integration of the world economy and trade liberalization, this pattern changed especially during the ‘90s, when developing countries and economies in transition started signing bilateral investment treaties among themselves and in large numbers.²⁰ Also, only some years later, investment chapters began to be included within certain free trade agreements (FTAs), following the example of the North American Free Trade Agreement (NAFTA)²¹ which Chapter 11 is in many respects, based on BITs.²² In fact, NAFTA placed the regime in a new context, and we can consider its Chapter 11 as the first non-bilateral investment treaty and the first agreement of this kind signed between two developed countries, Canada and the United States.²³ After NAFTA, other regional agreements followed the same trend of including investment chapters, notably in Latin America with the “Group of Three”²⁴ between México, Colombia and Venezuela, and in the Protocol of Colonia²⁵ at MERCOSUR.²⁶

¹⁷ Andrew. T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 *Virginia Journal Of International Law*, p. 643-644 (1997-1998).

¹⁸ Marc Jacob, *Max Planck Encyclopedia of Public International Law*, May 2011, Oxford Public International Law, at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1061>.

¹⁹ Pakistan and Germany signed the first BIT on November 25, 1959. Other European countries soon followed the German example.

²⁰ See UNCTAD, *South-South Cooperation in International Investment Agreements*, 2005.

²¹ North American Free Trade Agreement, Dic. 17, 1992, 32 *I.L.M.* 289 (1993), Chapter 11.

²² Lowenfeld, *op. cit.*, p. 473 (2002).

²³ American Society of International Law, *International Law in Ferment: Recent Developments in Private International Law*, 94 *Am. Soc'y Int'l L. Proc.* 11, 14 (2000) (remarks by Charles H. Brower II).

²⁴ Free Trade Agreement between Mexico, Colombia and Venezuela, Abr. 5, 1994, at: <http://ptas.mcgill.ca/Agreements%20pdfs/Mexico-Colombia-Venezuela.pdf> (last visited Dec. 13, 2013).

However, Venezuela withdrew from this trade bloc on 2006.

²⁵ Protocol of Colonia for the Reciprocal Promotion and Protection of Investments, Jan. 17, 1994, at <http://www.cvm.gov.br/ingl/inter/mercosul/coloni-e.asp> (last visited Dec. 13, 2013).

²⁶ Treaty between Argentina – Brazil – Paraguay – Uruguay establishing a common market (Mercado Común del Sur or Mercosur) (done in Asunción, March 26, 1991), 30 *I.L.M.* 1041 (1991).

All these treaties have one important common feature: they provide recourse to third-party dispute settlement mechanisms, excluding the use of diplomatic protection and allowing investors to avoid the submission to domestic courts (as most of them do not require exhaustion of local remedies).²⁷ With several variations, the majoritarian trend is to give investors a choice of arbitral mechanisms, ICSID being the most relevant choice as possible forum and being the most frequently referred to in a larger number of IIAs,²⁸ followed by *ad hoc* tribunals established according to UNCITRAL rules.²⁹

Thus, reversing the resistance of previous decades, during the 80's and early 90's almost all Latin American countries that rejected the creation of ICSID, including Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic,³⁰ Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela, became signatories of the ICSID Convention, with the notable exception of Mexico and Brazil.³¹ However, Mexico has accepted the use of ICSID's Additional Facility in Investor-State arbitration cases under NAFTA Chapter 11 procedures (Article 1120).³²

But ICSID membership is not enough to create jurisdiction for the Centre. Consent by the parties to the dispute (investor and State) is the cornerstone of ICSID's jurisdiction.³³ Article 25 (1) of the ICSID Convention provides that the jurisdiction of the

²⁷ Americo Beviglia-Zampetti and Pierre Sauvé, "International Investment", in Alan O. Sykes, and Andrew Guzman (eds.), *Research Handbook in International Economic Law*, London: Edward Elgar, p. 227-228 (2007).

²⁸ J. Pohl, K. Mashigo and A. Nohen, "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", OECD Working Papers on International Investment, 2012/02, OECD Publishing (2012), at: <http://dx.doi.org/10.1787/5k8xb71nf628-en> (last visited Dec. 13, 2013).

²⁹ U.N. GAOR, 21st Sess. Supp. No. 17, U.N. Doc. A/RES/31/98 (1976) [hereinafter UNCITRAL Rules].

³⁰ However, to-date the Dominican Republic has not ratified the ICSID Convention. See Nicolas Boeglin, *ICSID and Latin America: Criticisms, withdrawals and regional alternatives*, in [bilaterals.org](http://www.bilaterals.org), June 2013 available at: <http://www.bilaterals.org/spip.php?article23378&lang=en> (last visited Dec. 13, 2013).

³¹ Lowenfeld, *op. cit.* p, 460-461.

³² ICSID's Additional Facility, since 1978 allows the Center to administer arbitration proceedings in cases where the disputes fall outside the scope of the ICSID Convention, because one of the parties is not a Contracting State or a national of a Contracting State or because the dispute does not directly arise out of an investment. Ibrahim F. I. Shihata, *The Settlement Of Disputes Regarding Foreign Investment: The Role Of The World Bank, With Particular Reference To ICSID and MIGA*, 1 *Am. U. J. Int'l L. & Pol'y* 97, p. 106 (1986).

³³ ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, § 23, ICSID Reports – Vol. 1, Reports of Cases Decided

Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which both parties *consent in writing to submit to ICSID*. It also adds that the consent given by the parties cannot be unilaterally withdrawn.³⁴

In practice, this consent is given in three ways: by direct agreement between the parties (usually in a contract or investment agreement), through host State legislation (although not every reference in domestic legislation amounts to a jurisdictional consent) and through international investment agreements (either bilateral or multilateral).³⁵ It is precisely the consent through BITs or investment chapters of PTAs which has given rise to an unexpected evolution. The end of the '80s and early '90s witnessed an exponential growth in the conclusion of BITs³⁶. The vast majority of these treaties contain clauses providing for investment arbitration.³⁷ Not all references to Investor-State arbitration in an IIA constitute binding offers by the host State. Some BITs only contain commitments to give a future consent in case of a dispute, so it is necessary to clearly identify the relevant provisions on each IIA before interpreting this point.³⁸

In this context, Investor-State arbitration proliferated during the past 15 years and by the end of 2012, States have been facing an overall number of 514 known treaty-based cases and a record of 58 new international Investor-State claims initiated the same year, the highest number ever filed on a yearly basis.³⁹ From that group, ICSID has the largest number of known arbitrations initiated, having registered 433 cases under the ICSID Convention and Additional Facility Rules by June 30, 2013.⁴⁰ However, it must be noted that ICSID cases are known because of its transparency rules and their policy to publish

under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Rosemary Rayfuse, ed.), p. 28 (1993).

³⁴ ICSID Convention, Art. 25.

³⁵ Dolzer and Schreuer, *op. cit.*, p. 238-244.

³⁶ Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties*, Kluwer Law International, p. 47 (2009).

³⁷ Dolzer and Schreuer, *op. cit.*, p. 242.

³⁸ *Id.*

³⁹ UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*, p. 110 (2013)

⁴⁰ See ICSID Caseload-Statistics (Issue 2013-2), p. 7, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics> (last visited Dec. 13, 2013).

on their website,⁴¹, whereas several other arbitration fora such as the Permanent Court of Arbitration (PCA), the International Chamber of Commerce (ICC) or the Stockholm Chamber of Commerce (SCC) or ICC these rules do not exist.

If we review the cases registered before ICSID, most disputes are related to regulated sectors, as extractive industries, like oil, gas and mining (25%), electric power and other energy (12%), transport (11%), financial services (7%), water sanitation and flood protection (6%), among others.⁴² This has opened the door for objections that international arbitrators decide these matters as if they were – basically – regulators, but without the mechanisms of check and balances provided in domestic law, evaluating the legality of governmental decisions about property rights, capital transfers, taxation, and use of technology, among other areas.⁴³

Today, as ICSID caseload statistics shows, Latin America is the region with the higher number of cases registered under the ICSID Convention and Additional Facility Rules by State Party involved.⁴⁴ Over the past years, several countries of the area have responded to one or more investment treaty arbitration, Argentina⁴⁵ being the most frequent respondent in the overall statistics, followed by Venezuela, Ecuador and Mexico.⁴⁶ Ecuador has also faced the highest award against a host State (US\$1.77 billion)⁴⁷ although an annulment proceeding is currently taking place since October 2012. While some investors from Latin American countries have initiated arbitration proceedings

⁴¹ Following Arbitration Rule 48(4) of ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), ICSID has published decisions and awards on its website or in the ICSID Review— Foreign Investment Law Journal, with consent of the parties involved. Under the same Rule 48 (4), the Centre also publishes excerpts of the legal reasoning in an award where a party does not wish to publish that award.

⁴² ICSID Caseload Statistics, op. cit.,p. 12.

⁴³ Gus van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, European Journal of International Law, European Journal of International Law 2006 17 (121).

⁴⁴ This percentage accounts 29% for South America and 6% for Central America and the Caribbean. See ICSID Caseload – Statistics, op. cit, p. 11.

⁴⁵ Most of Argentina's cases arose from the economic crisis and social collapse of 2011 and the measures taken by the Argentine State to offset it and its consequences. Ignacio Torterola and Diego Brian Gosis, "Argentina", in *Latin American Investment Protections: Comparative Perspectives on Laws, Treaties, and Disputes for Investors, State and Counsel*, (Jonathan C. Hamilton, Omar E. Garcia-Bolivar, Hernando Otero, eds). Martinus Nijhoff Publishers, 2012, p. 15.

⁴⁶ UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issue Note, N° 1, March 2013, p. 4.

⁴⁷ Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012.

under ICSID, notably from Mexico, Argentina and Chile,⁴⁸ foreign investors from countries of the region do not rank as the most frequent claimants.

Such scenario has understandably fostered concerns and criticisms about this regime of Investor-State dispute settlement in Latin America, and especially against ICSID which has become the most relevant forum of investment disputes for the region. While some countries have taken the more radical position of exiting the system, others have decided to exhaust all recourses within the system before complying with the award,⁴⁹ or even have pushed the limits of the regime “proactively non-paying”⁵⁰ before settling some claims – as it seems to be the case of Argentina,⁵¹ who has reportedly paid 5 outstanding awards⁵² and it seems to have reached a preliminary pact on compensation in the *Repsol*⁵³ case.⁵⁴

The denunciation of the ICSID Convention by the Plurinational State of Bolivia, the Republic of Ecuador and the Bolivarian Republic of Venezuela, and the termination of several IIAs by the same countries, poses new and difficult problems for the international investment regime. In the next section we will analyze the reasons behind this decision and the consequences for such States.

⁴⁸ Guido Santiago Tawil, *Arbitration in Latin America: Current Trends and Recent Developments*, *Europaisches wirtschafts und steuerrecht*, Vol. 15, N° Extra 2, 2004, p. 15-20.

⁴⁹ See the case *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, the longest arbitration in ICSID history, spanning more than 15 years from the filing of the request for arbitration with a resubmission proceeding still pending, even after the annulment decision.

⁵⁰ Luke E. Peterson, *Argentina By The Numbers: Where Things Stand With Investment Treaty Claims Arising Out Of The Argentine Financial Crisis*, *Investment Arbitration Reporter*, Feb 1, 2011, *available at* http://www.iareporter.com/articles/20110201_9 (last visited Dec. 13, 2013).

⁵¹ It is also interesting to note that even though most of Argentina’s BITs have already expired, and they could be terminated one year after notification since they do not include a renewal period, Argentina has not decided to terminate them yet. Federico M. Lavopa, Lucas E. Barreiros, and M. Victoria Bruno, *How to Kill A Bit and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties*, *Journal of International Economic Law*, first published online December 4, 2013, p. 12, *available at*: doi:10.1093/jiel/jgt025 (last visited Dec. 13, 2013).

⁵² It has been recently reported that Argentina has offered about US\$500 million to settle 5 ICSID cases with France’s Vivendi SA, British electric and gas utility National Grid PLC, Continental Casualty Company (a unit of Chicago-based CNA Financial Corp), U.S.- based water company Azurix and Blue Ridge Investments (a subsidiary of Bank of America Corp). Reuters, *Argentina to pay \$500 million to end disputes at World Bank*, Oct. 10, 2013, *available at* <http://www.reuters.com/article/2013/10/10/argentina-worldbank-settlement-idUSL1N0I01HK20131010> (last visited Dec. 13, 2013).

⁵³ *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38).

⁵⁴ Fox News Latino, “Argentina, Repsol reach preliminary pact on compensation for YPF”, Nov. 25, 2013, *available at*: <http://latino.foxnews.com/latino/news/2013/11/25/argentina-repsol-reach-preliminary-pact-on-compensation-for-ypf/> (last visited Dec. 13, 2013).

III. Why some Latin American States have denounced the ICSID Convention?

To understand why these denunciations have taken place, we have to look at the context of the Bolivarian Alternative for Latin America and the Caribbean (“Alianza Bolivariana para los Pueblos de Nuestra América” – ALBA), an organization created by Venezuela and Cuba in December 2004, as an alternative to the neoliberal model of integration, presenting a response to the FTAA (Free Trade Area of the Americas), sponsored by the United States.⁵⁵

In April 2006, after the incorporation of Bolivia as a member, ALBA included a Peoples' Trade Treaty (“Tratado de Comercio de los Pueblos” – TCP) an exchange instrument “intended to benefit the peoples as opposed to the Free Trade Agreements that are geared to increasing the power and the domination of the transnational enterprises”.⁵⁶ For that reason, and after the incorporation of Nicaragua (January 2007), Dominica (January 2008), Honduras (August 2008),⁵⁷ Ecuador (June 2009), Saint Vincent and the Grenadines (June 2009), and Antigua and Barbuda (June 2009), the organization changed its name in June 2009 to “Bolivarian Alliance for the Peoples of Our America - Peoples' Trade Treaty” (ALBA-TCP).⁵⁸ Recently, Saint Lucia joined ALBA as a full member (July 2013)⁵⁹

The “Bolivarian Alliance” promotes regional integration not only for trade liberalization, but also based on solidarity and complementarity between the countries, with promotion

⁵⁵ The idea of ALBA came out during the Third Summit of the Association of Caribbean States (ACS), held in Margarita Island, Venezuela, on December 11-12, 2001, with the name “Bolivarian Alternative for the Americas”. Carlos Moreno, *Integración Latinoamericana: ALCA vs. ALBA. Presente y Pasado*. Revista de Historia, Universidad de Los Andes. Mérida-Venezuela, Year 12. N° 23. Jan-Jun, 2007, pp. 155-178.

⁵⁶ ALBA-TCP, “History of ALBA-TCP”, available at <http://www.alba-tcp.org/en/contenido/history-alba-tcp> (last visited Dec. 13, 2013).

⁵⁷ Honduras withdrew from the ALBA on December 15th, 2009, after the *de facto* president Roberto Micheletti issued an executive decree later ratified by the Congress on January 13th, 2010, *El Tiempo*, El Parlamento de Honduras Ratifica Su Salida del ALBA, Jan. 13, 2010, available at: <http://www.eltiempo.com/archivo/documento/CMS-6939247> (last visited Dec. 13, 2013).

⁵⁸ ALBA-TCP, *op.cit.*, supra 57.

⁵⁹ Caribbean Journal, “St Lucia Officially Joins ALBA”, August 9, 2013, available at <http://www.caribjournal.com/2013/08/09/st-lucia-officially-joins-alba/> (last visited Dec. 13, 2013).

and protection of social rights, particularly.⁶⁰ This was clearly established by the late Venezuelan President Hugo Chavez, one of the founding fathers of ALBA.⁶¹

In April 2007, during the 5th Presidential Summit of ALBA, Bolivia, Venezuela and Nicaragua, proclaimed their intent to withdraw from the International Monetary Fund, the World Bank⁶² and especially from ICSID, in order to guarantee their sovereign right to regulate foreign investment on their national territories, and expressly rejecting “*the diplomatic and media pressure exercised by some multinational companies, which having made vulnerable constitutional rules, national laws, contractual obligations, regulatory environmental and labor resolutions, resist the application of sovereign rules by threatened countries by initiating international arbitration against national states*”.⁶³ As we can see, they reject the use of Investor-State arbitration as a system, and for that reason some of these countries not only have denounced the ICSID Convention but also some of their Bilateral Investment Treaties or Free Trade Agreements with investment chapters that provide investors with the recourse of international arbitration against the host State, even outside ICSID.

3.1. *Bolivia*

Bolivia was the first state to effectively implement ALBA-TCP resolution and filed a notice of denunciation of the Convention on the Settlement of Investment Disputes between States and Nationals of other States on May 2, 2007. According to Article 71 of

⁶⁰ Antonios Tzanakopoulos, *Denunciation of the ICSID Convention under the General International Law of Treaties*, International Investment Law And General International Law: From Clinical Isolation To Systemic Integration, Hofmann, Rainer and Tams, Christian, eds. Nomos, Baden Baden, 2011, available at: SSRN: <http://ssrn.com/abstract=1735495> (last visited Dec. 13, 2013).

⁶¹ Statement by Hugo Chavez, the President of Venezuela in “What is the ALBA—TCP?”, available at: <http://www.alternativabolivariana.org/modules.php?name=Content&pa=showpage&pid=2080> (last visited Dec. 13, 2013).

⁶² Emmanuel Gaillard, The Denunciation of the ICSID Convention, New York Law Journal, Vol. 237 N° 122, Tuesday June 26, 2007.

⁶³ Committee for the Abolition of the Third World Debt, “Bolivia, Venezuela and Nicaragua withdraw together from the ICSID”, May 2, 2007, available at <http://cadtm.org/Bolivia-Venezuela-and-Nicaragua> (last visited Dec. 13, 2013).

the ICSID Convention, the denunciation took effect six months after receipt of notification, in November 3, 2007.⁶⁴ Bolivia had signed the ICSID Convention on 1991.⁶⁵

As justification of its decision, the Government of Bolivia pointed out several problems that in their view affect the Investor-State arbitration system: a perceived bias on their decisions (“pro-business”), lack of transparency and appeal mechanisms, high transaction costs, and demands for “irrational” compensation.⁶⁶ The ICSID case *Aguas del Tunari v. Republic of Bolivia*,⁶⁷ has been specifically cited by the authorities of the Plurinational State of Bolivia as a prime example of these problems.⁶⁸ However, it is worth mentioning that no final arbitration award against the Bolivian State has been rendered yet.⁶⁹

Bolivia has made several statements about its intention of terminate or denunciate bilateral investment treaties,⁷⁰ and since 2009 a new Constitution is in force establishing as a duty of the Executive Branch the denunciation or renegotiation of international

⁶⁴ ICSID News Release, May 16, 2007, Bolivia Submits a Notice under Article 71 of the ICSID Convention, available at <http://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp> (last visited Dec. 13, 2013).

⁶⁵ Bolivia signed the ICSID Convention on May 3, 1991, and deposited its instrument of ratification on June 23, 1995. It entered into force for Bolivia on July 23, 1995.

⁶⁶ Elizabeth Arismendi, then Ministry of Legal Defense of Bolivia, “La Experiencia del Estado Plurinacional de Bolivia en el Centro de Arreglos de Diferencias Relativas a Inversiones” (CIADI), Oc. 19, 2010, Organization for the Harmonization of Business Law in the Caribbean (OHADAC), available at <http://www.ohadac.com/travaux/10/experiencia-boliviana-en-el-ciadi-en-el-centro-de-arreglos-de-diferencias-relativas-a-inversiones.html> (last visited Nov. 15, 2013).

⁶⁷ *Aguas del Tunari SA v. The Republic of Bolivia*, ICSID Case No. Arb/02/03.

⁶⁸ In 1999, few weeks after the Bolivian government granted a forty-year agreement for the exclusive provision of water services of the 3rd largest city in the country (Cochabamba) to a private company (“Aguas del Tunari”), a subsidiary of Bechtel Enterprises of California, the company raised water rates by an average of over 50% and the local community started massive public protests, claiming inability to pay the invoices. In April 2000, in the midst of violence and riots that led to the declaration of a “state of siege” in a so-called “Water War”, Aguas del Tunari executives left the country and abandoned the concession that was then rescinded by the Government. Bechtel and its co-investor, Abengoa of Spain, filed a claim under ICSID Arbitration Rules, on February 25, 2002, invoking Bolivia-Netherlands BIT, after “migrating” their matrix from Bahamas to Luxembourg, whose shares were in turn owned by a new company established in the Netherlands. Facing strong domestic and international pressure, Bechtel reached an agreement with Bolivia in January 19, 2006, accepting a compensation for damages in the amount of two Bolivians - 25 cents. See Alexandre de Gramont, “After the Water War: The Battle for Jurisdiction in Aguas Del Tunari, S.A. v. Republic of Bolivia”, *Transnational Dispute Management (TDM)* Vol. 3, Issue 5, December 2006, available at <http://www.transnational-dispute-management.com/article.asp?key=850> (last visited Dec. 13, 2013).

⁶⁹ Fernando Aguirre “Arbitration – Bolivia”, available at: <http://latinlawyer.com/reference/article/40147/arbitration/> (last visited Dec. 13, 2013).

⁷⁰ Luke Eric Peterson, “As US-Bolivia relations deteriorate, trade preferences withdrawn; BIT remains”, available at www.iareporter.com/downloads/20100107_14/download, p. 12 (last visited Dec. 13, 2013).

treaties against the Constitutional Text within the period of four years after taking office.⁷¹ Up to now Bolivia has denounced its Free Trade Agreement with Mexico (that included an investment chapter),⁷² replacing it by an Economic Complementation Agreement (without an investment chapter),⁷³ and the BIT with the United States.⁷⁴ Although a denunciation process it has been reportedly initiated with respect to all BITs, there is no public information about its current status.⁷⁵ According to the information provided by UNCTAD,⁷⁶ the Office of the Bolivian Attorney General, and other private sources,⁷⁷ the Plurinational State of Bolivia⁷⁸ still has 20 BITs in force. After finishing with the denunciation process, Bolivia has announced its intention to renegotiate all BITs

⁷¹ The Constitution of the Plurinational State of Bolivia, in its Transitory Provision 9 stipulates that “Within four years following the election of the new executive organ, the latter shall denounce and, as appropriate, renegotiate those international treaties that run contrary to the Constitution.”

⁷² The denunciation Mexico Bolivia FTA was requested under Article 21-07, on December 7, 2009 and in force since June 2010. See Mexican Secretary of Foreign Affairs, Official Gazette June 4, 2010, *available at* http://www.economia.gob.mx/files/comunidad_negocios/comercio_exterior/decreto_bolivia.pdf (last visited Dec. 13, 2013).

⁷³ SICE, Foreign Trade Information System, “Bolivia-Mexico”, *available at* http://www.sice.oas.org/tpd/BOL_MEX/BOL_MEX_e.asp#EntryintoForce (last visited Dec. 13, 2013).

⁷⁴ Article 16 of US-Bolivia BIT that entered into force in June 6, 2001, provided that it will remain in force for a minimum of 10 years, after which period either party may terminate the treaty giving a year’s notice. Bolivia delivered notice on June 10, 2011, and pursuant to the terms of the treaty, termination took effect one year from the date of that notice, on June 10, 2012, but it will continue to apply for another 10 years to covered investments existing at the time of termination. Department Of State, Office of the United States Trade Representative, Public Notice 7893, *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/html/2012-12494.htm>. (last visited Dec. 13, 2013).

⁷⁵ Bolivia, Procuraduría General del Estado, “Procuraduría y Ministerios Proponen Mecanismos de Renegociación de los Tratados Bilaterales de Inversión”, 28 January 2013, <http://www.procuraduria.gob.bo/index.php/articulos/303-procuraduria-y-ministerios-proponen-mecanismos-de-renegociacion-de-los-tratados-bilaterales-de-inversion> (last visited Dec. 13, 2013).

⁷⁶ These BITs are with Germany, Switzerland, United Kingdom, France, Belgium-Luxemburg, Italy, Sweden, Netherlands, China, Peru, Argentina, Chile, Denmark, Cuba, Ecuador, Romania, Korea, Austria, Paraguay, and Spain. See UNCTAD, List of BITs concluded by a specific country, *available at* [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Country-specific-Lists-of-BITs.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Country-specific-Lists-of-BITs.aspx) (last visited Dec. 13, 2013). UNCTAD’s authority in this regard is merely referential, and the fact that BITs are still or are not on UNCTAD’s database is not a criterion for the treaty’s existence or ratification.

⁷⁷ Fernando Aguirre, “Bolivia” in “Latin American Investment Protections: Comparative Perspectives on Laws, Treaties, and Disputes for Investors, States and Counsel” (Jonathan C. Hamilton, Omar E. Garcia-bolivar and Hernando Otero, eds.) May 2012, p. 65.

⁷⁸ Bolivia, Procuraduría General del Estado, “Leyes y Tratados Bilaterales de Inversión”, 04 May 2011, *available at* <http://www.procuraduria.gob.bo/index.php/marco-legal/leyes-y-tratados-bilaterales-de-inversion> (last visited Dec. 13, 2013).

without including Investor State arbitration before ICSID – but to a UNASUR/ALBA Regional Centre, as it will be explained later.⁷⁹

The new Bolivian Constitution takes a strong stance against foreign investment. Article 320 states that “Bolivian investment will be **prioritized** over foreign investment”, raising the possibility of blocking private foreign investors.⁸⁰ The same provision asserts the independence of the Bolivian State in all internal policy decisions, without accepting impositions or conditions “by states, banks or financial institutions Bolivian or foreign, multilateral institutions and transnational corporations”.

From the information publically available, Bolivia is still facing two pending arbitrations under ICSID both from investors in the mining sector.⁸¹ The two earlier cases in that forum are both now settled.⁸²

Presently Bolivia also has at least three ad hoc arbitrations under UNCITRAL Arbitration Rules, two with administrative support of the Permanent Court of Arbitration (PCA). One brought by UK and US investors after the nationalization of an electricity generation company in May 2010⁸³ and another by the Spanish infrastructure company Albertis following the nationalization of its controlled company operating three airports in Bolivia

⁷⁹ The Attorney General of Bolivia, Hugo Montero, proposed that investment disputes between a public or private enterprise in the region and the Bolivian state is carried out through a system embedded in ALBA-UNASUR agreements. “Although they were originally designed as impartial arbitrators, institutions such as ICSID misrepresented their purpose and were directed more to the protection of multinational companies (...) the replacement of Bilateral Investment Treaties (BITs) for ALBA multilateral system for the treatment and UNASUR conflict resolution is a legal political struggle, part of a joint desire to renegotiate all BITs and simultaneously advance a new system that supports development, environmental protection and recognition of social participation”. *América Economía*, November 25, 2011, *available at* <http://www.americaeconomia.com/economia-mercados/comercio/bolivia-fija-5-ejes-para-renegociar-22-pactos-bilaterales-de-inversion> (last visited Dec. 13, 2013).

⁸⁰ James M. Roberts and Gonzalo Schwarz, “New Constitution Pushes Bolivian Economy into Socialism”, The Heritage Foundation, WebMemo #2355 on Latin America, March 23, 2009, *available at*: <http://www.heritage.org/research/reports/2009/03/new-constitution-pushes-bolivian-economy-into-socialism> (last visited Dec. 13, 2013).

⁸¹ *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), and *Pan American Energy LLC v. Plurinational State of Bolivia* (ICSID Case No. ARB/10/8).

⁸² *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3), and *E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia* (ICSID Case No. ARB/07/28).

⁸³ *Guaracachi America, Inc. (U.S.A.) and Rurelec plc (United Kingdom) v. Plurinational State of Bolivia* (PCA Case No. 2011-17).

(“Servicios de Aeropuertos Bolivianos S.A.” – SABSA).⁸⁴ The remaining case has been brought by South American Silver Limited under Bolivia-United Kingdom BIT, as a result of the revocation of mining concessions covering the Malku Khota Mining Project held by Compañía Minera Malku Khota S.A. (CMMK), a wholly-owned subsidiary of South American Silver Limited.⁸⁵ In the past, Bolivia faced at least one ad hoc arbitration case under UNCITRAL Rules,⁸⁶ one at the Arbitral Institute of the Stockholm Chamber of Commerce (SCC),⁸⁷ and one before the Permanent Court of Arbitration (PCA),⁸⁸ all of them related to hydrocarbons and now settled.

Therefore, we can conclude that Bolivia has today more investment cases pending outside ICSID and that the overall number of arbitrations, both ICSID and ad hoc under UNCITRAL Rules is similar. As mentioned, there is no public knowledge of a final arbitration award in any of those forums against Bolivia that could validate its decision of exiting the ICSID system and remaining bound to other forms of international arbitration by several BITs still in force.

3.2. *Ecuador*

On December 4, 2007, the Secretary General of ICSID received a notification under Article 25 (4) of the ICSID Convention, by the Republic of Ecuador. Under that provision the Contracting States may, when ratifying, accepting or approving such Convention **or at any time thereafter**, notify the Centre of the class or classes of

⁸⁴ *Albertis v. The Government of Bolivia*. See Investment Arbitration Reporter, “After arbitrator disqualification process, ad-hoc tribunal to hear Spanish company’s investment treaty claims against Bolivia”, March 20, 2013, available at: <http://www.iareporter.com/articles/20130320> (last visited Dec. 18, 2013).

⁸⁵ Investment Treaty Arbitration, “South American Silver Limited v. Bolivia”, available at: <http://italaw.com/cases/2121> (last visited Dec. 18, 2013).

⁸⁶ *Gas Trans Boliviano (GTB) v. Bolivia* – a tax related dispute brought by this company held by Petrobras (Brazilian State Owned Enterprise) and Shell (a British-Dutch company) settled on July 22, 2008 after agreeing the payment of US\$ 39.3 million in 8 instalments in a period of 3 and a half years.

⁸⁷ *Ashmore Energy International (AEI) v. Bolivia*, a US based company that was one of the shareholders of Transredes, Bolivia’s largest oil pipeline company, nationalized in June 2008. In October 2008 the claim was settled. See Aguirre, op. cit., supra 78, p. 73.

⁸⁸ *Oiltanking GmbH and The Graña y Montero Group v. Bolivia* – after May 2008 nationalization of the claimant shares (one German – one Peruvian) in Compañía Logística de Hidrocarburos (CLHB) a company engaged in the transportation and storage of hydrocarbons. The claim was settled in February 2011, after a reported payment of US\$ 16.4 million. See Aguirre, op. cit. supra 78, p. 73.

disputes which it would bring, or not consider submitting, to the jurisdiction of the Centre.⁸⁹ Through such communication, Ecuador excluded from ICSID jurisdiction future disputes relating to oil, gas and mining. However, a notification of this kind did not have legal consequences if the State had given its prior consent with respect to the said class of disputes.⁹⁰

Yet in most BITs, Ecuador had consented to a broad range of investment disputes across all economic sectors, a consent that remained in force despite the mentioned notification. In fact, in the case *Murphy Exploration and Production Company International v. Republic of Ecuador*, registered on April 15, 2008,⁹¹ the arbitral tribunal unanimously rejected the objection to ICSID jurisdiction raised by the Ecuador based on its unilateral declaration under Article 25(4) of the ICSID Convention, although by majority sustained the objection to ICSID jurisdiction based on the Claimant's non-compliance with the six-month consultation and negotiation period prescribed in Article VI of the Ecuador-US BIT. Another case that was registered against Ecuador after its declaration under Article 25(4) of the ICSID Convention⁹² was discontinued by request of both parties pursuant to ICSID Arbitration Rule 43(1), on February 9, 2011, after memorial and counter-memorial on jurisdiction were filed.

Subsequently, on July 6, 2009, the World Bank received a written notice of denunciation of the ICSID Convention by the Republic of Ecuador. Under Article 71 of that treaty, the

⁸⁹ ICSID News Release, December 5, 2007, Ecuador's Notification under Article 25(4) of the ICSID Convention, available at <http://icsid.worldbank.org/ICSID/Index.jsp#> (last visited Dec. 18, 2013).

⁹⁰ UNCTAD Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims, IIA Issues Note N° 2, December 2010, p. 4

⁹¹ *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, December 15, 2010, available at: <http://www.italaw.com/cases/723> (last visited Dec. 18, 2013).

⁹² *Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/10), registered on August 8, 2008. See Order of the Tribunal Taking Note of the Discontinuance of the Proceeding, February 9, 2011, available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1406.pdf> (last visited Dec. 18, 2013).

denunciation began to take effect from January 7, 2010.⁹³ Ecuador had signed the ICSID Convention in 1986⁹⁴ and had joined ALBA only on June 24, 2009.

While departing from the ICSID, Ecuador also initiated the termination of BITs. In 2008, Ecuador terminated nine bilateral investment treaties (with Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay). Starting in 2010, at the request of the President of Ecuador, Rafael Correa, the Ecuadorian Constitutional Tribunal issued several decisions between 2010 and 2013 declaring all BITs unconstitutional,⁹⁵ giving the denunciations a basis in national law.⁹⁶

2008 Ecuadorian Constitution is not against foreign investment. In fact, according to Article 339, “**the State shall encourage domestic and foreign investment**, and shall establish specific regulations according to investment types, giving priority to domestic investment”. The same article states a **subsidiarity principle for FDI** which shall “supplement domestic investment; it shall abide strictly by the country’s legal framework and regulations, and the application of rights, and shall be aimed at meeting the needs and priorities laid down in the National Development Plan, as well as in the various development plans of the decentralized autonomous governments”.

However, Article 422 of the same Constitution provides that “Treaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities in disputes involving contracts or trade between the State and natural persons or legal entities cannot be entered into”. This article is the central piece in the

⁹³ ICSID News Release, July 9, 2009, Ecuador Submits a Notice under Article 71 of the ICSID Convention, available at: <http://icsid.worldbank.org/ICSID/Index.jsp#> (last visited Dec. 18, 2013).

⁹⁴ Ecuador signed the ICSID Convention and deposited its instrument of ratification on January 15, 1986. It entered into force for Ecuador on February 14, 1986.

⁹⁵ The decisions of the Constitutional Court affecting the BITs with France (September 16, 2010), Canada (October 7, 2010), Finland (August 1, 2010), China (August 17, 2010), Chile (November 11, 2010), Sweden (September 16, 2010), Netherlands (August 16, 2010), Switzerland (November 11, 2010), Venezuela (November 25, 2010), United States (November 25, 2010), United Kingdom – Ireland (July 30, 2010), Germany (June 24, 2010), Argentina (January 17, 2013), Spain (April 25, 2013), Peru (July 24, 2013) Italy (May 14, 2013) and Bolivia (July 24, 2013), are available at the Court’s website in Spanish: <http://www.corteconstitucional.gob.ec/> (last visited Dec. 18, 2013).

⁹⁶ Hernán Pérez Loose, “Ecuador to investigate investment arbitration obligations”, International Law Office, July 4, 2013, available at: <http://www.internationallawoffice.com/newsletters/detail.aspx?g=2770987e-df7f-4354-aea0-dba622b5ab22> (last visited Dec. 18, 2013).

ratio decidendi of the Constitutional Court to declare BITs unconstitutional, although the retroactive application of a constitutional provision based on the principle of constitutional supremacy has been debated even inside Ecuador.⁹⁷

The same year 2010, the Ecuadorian government started the internal process to denunciate all remaining BITs and it has been reported that the National Assembly of Ecuador has approved the denunciation of all of them.⁹⁸ From this group only, the BIT with Finland has concluded the denunciation process.⁹⁹ By June 2013, UNCTAD reports that Ecuador still has 16 BITs in force.¹⁰⁰ On the other hand, the Ecuadorian Ministry of Foreign Affairs has also announced talks with the US Government for a renegotiation of the Ecuador-US BIT.¹⁰¹

Ecuador is one of the most frequent respondents in Investor-State arbitration cases, third after Argentina and Venezuela, as reported by UNCTAD at the end of 2012.¹⁰² Currently Ecuador has 3 pending cases before ICSID¹⁰³ and 11 have been concluded at the same

⁹⁷ See Christian Masapanta Gallegos, Análisis del dictamen No. 023-10-DTI-CC de la Corte Constitucional para el período de transición referente al “Tratado entre la República del Ecuador y la República Federal de Alemania sobre fomento y recíproca protección de inversiones de capital” (Caso No. 0006-10-TI), Foro: Revista de Derecho; 17 (I Semestre, 2012), Universidad Andina Simón Bolívar, p. 141-175.

⁹⁸ Ecuador Inmediato, “Concluye Ecuador denuncia de tratados bilaterales de inversión”, July 1, 2013, being at that time pending of votation only the BITs with Spain and Bolivia, *available at*: http://ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=200073&umt=concluye_ecuador_denuncias_tratados_bilaterales_inversion (last visited Dec. 18, 2013). However, at the web page of the Ecuadorian National Assembly (<http://www.asambleanacional.gob.ec/>) there is only available a resolution approving the denunciation of the BIT with Germany.

⁹⁹ Presidency of Ecuador, Executive Decree, December 9, 2010, *available at* http://www.lacamaradequito.com/uploads/tx_documents/denunciafinlandia.pdf (last visited Dec. 18, 2013).

¹⁰⁰ These BITs are with France, Canada, China, Chile, Sweden, Netherlands, Switzerland, Venezuela United States, United Kingdom – Ireland, Germany, Argentina, Spain, Peru, Bolivia and Italy. See UNCTAD, List of BITs concluded by a specific country, *available at*: [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Country-specific-Lists-of-BITs.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Country-specific-Lists-of-BITs.aspx) (last visited Dec. 18, 2013).

¹⁰¹ El Comercio, “El Gobierno analiza alternativas a la denuncia del Tratado Bilateral con EE.UU”, October 17, 2013, *available at*: http://www.elcomercio.com/negocios/Gobierno-alternativas-Tratado-Bilateral-EEUU_0_1012698923.html (last visited Dec. 18, 2013).

¹⁰² UNCTAD Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note N° 1, March 2013, p. 4, *available at*: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf (last visited Dec. 18, 2013).

¹⁰³ Perenco Ecuador Limited v. Republic of Ecuador (ICSID Case No. ARB/08/6); Burlington Resources, Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5) and Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11).

forum. From this group, 5 have been settled,¹⁰⁴ in 3 Ecuador prevailed – either because jurisdiction was declined¹⁰⁵ or claim were rejected;¹⁰⁶ in 2 monetary compensation was granted as a relief for the claimants;¹⁰⁷ and 1 was discontinued after request of the claimant.¹⁰⁸

Ecuador presently faces no less than 7 pending ad hoc arbitrations under UNCITRAL Arbitration Rules, 4 with administrative support of the Permanent Court of Arbitration (PCA)¹⁰⁹ and 3 others where few information is available.¹¹⁰ There are also at least five concluded cases outside ICSID – in 2 of them claims were accepted¹¹¹ and in 2 were rejected.¹¹²

¹⁰⁴ Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador) supra 93; City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador) (ICSID Case No. ARB/06/21); Corporación Quiport S.A. and others v. Republic of Ecuador (ICSID Case No. ARB/09/23); IBM World Trade Corp. v. Republic of Ecuador (ICSID Case No. ARB/02/10); and Noble Energy Inc. and MachalaPower Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad (ICSID Case No. ARB/05/12).

¹⁰⁵ Empresa Eléctrica del Ecuador, Inc. (EMELEC) v. Republic of Ecuador (ICSID Case No. ARB/05/9); and Murphy Exploration and Production Company International v. Republic of Ecuador supra 92.

¹⁰⁶ M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador (ICSID Case No. ARB/03/6).

¹⁰⁷ Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador (ICSID Case No. ARB/04/19) where an award of August 18, 2008 granted compensation of USD 5,578,566, plus interest; and Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (PetroEcuador) (ICSID Case No. ARB/01/10), where an award of February 20, 2004, ordered PetroEcuador to pay the sum of US\$13,684,279.23.

¹⁰⁸ Técnicas Reunidas, S.A. and Eurocontrol, S.A. v. Republic of Ecuador (ICSID Case No. ARB/06/17);

¹⁰⁹ Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador (UNCITRAL, PCA Case No. 2009-23); Merck Sharpe & Dohme (I.A.) Corporation v. The Republic of Ecuador (UNCITRAL, PCA); Murphy Exploration & Production Company – International v. Republic of Ecuador, (UNCITRAL, PCA Case No. AA434); and Copper Mesa v. Ecuador (PCA No. 2012-2) brought under the Canada-Ecuador BIT arising from the termination of mining concessions. All are reported at the Permanent Court of Arbitration webpage (http://www.pca-cpa.org/showpage.asp?pag_id=1029), with the exception of the Copper Mesa case, that has been reported by Ecuador's Office of the General Procurator, infra 111.

¹¹⁰ According to a recent report published by Ecuador's Office of the General Procurator, these cases are: Zamora Gold Corporation v. Ecuador, an UNCITRAL Rules arbitration brought under the Canada-Ecuador BIT arising from an alleged expropriation of seven mining sites; RSM v. Ecuador, an arbitration regarding claims for alleged expropriation of investment and wrongful termination of mining licenses in violation of the Ecuador-US BIT; and Global Net - Únete Telecomunicaciones and Clay Pacific S.R.L. v. Ecuador, ad hoc arbitration proceeding brought after termination of telecommunications concession and currently suspended by agreement of the parties.

¹¹¹ Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (PCA Case No. 2007-2); where an award on damages of USD\$96,355,369.17 was rendered on August 31, 2011; and Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, where compensation in the amount of USD\$71,533,649 plus interest was granted by award of July 1, 2004.

¹¹² EnCana Corporation v. Republic of Ecuador (LCIA Case No. UN3481, UNCITRAL) and Ulysseas, Inc. v. The Republic of Ecuador (UNCITRAL).

As we can see, the overall performance of Ecuador in ICSID cases has been better than outside ICSID, and seemingly Ecuador had more incentives to terminate BITs than the ICSID convention. However, in the Occidental Petroleum Corp (“Oxy”) case, a split ICSID tribunal determined on October 5th, 2012, that Ecuador had breached the US-Ecuador BIT, and in a split decision with a strong minority dissent by Prof. Brigitte Stern, awarded damages of US\$1.77 billion with interest, reportedly the largest award ever to have been issued by an ICSID tribunal.¹¹³ However the annulment proceeding on that case is still pending.

3.3. *Venezuela*

On January 24, 2012, the World Bank received a written notice of the Bolivarian Republic of Venezuela withdrawing from the ICSID Convention. In accordance with the provisions of Article 71 of such treaty, the denunciation took effect six months after receipt of notification of Venezuela, on July 25, 2012.¹¹⁴

In the communication explaining this decision, Venezuela stated that had acceded to the Convention in 1993¹¹⁵ “by order of a provisional government weak and lacking popular legitimacy, pressured by transnational economic sectors involved in the dismantling of Venezuela's national sovereignty”.¹¹⁶ It also affirmed that the ICSID Convention contravenes the Constitution of the Bolivarian Republic of Venezuela of 1999 that expressly excludes foreign claims in public interest contracts.¹¹⁷ This is in line with

¹¹³ Tai-Heng Cheng, “ICSID’s Largest Award in History: An Overview of Occidental Petroleum Corporation v the Republic of Ecuador”, Kluwer Arbitration Blog, December 19, 2012, *available at*: <http://kluwerarbitrationblog.com/blog/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/> (last visited Dec. 18, 2013).

¹¹⁴ ICSID News Release, 26 January 2012, *available at*: <http://icsid.worldbank.org/ICSID/Index.jsp#> (last visited Dec. 18, 2013).

¹¹⁵ Venezuela signed the ICSID Convention on August 18, 1993 and deposited its instrument of ratification on May 2, 1995. It entered into force for the Venezuela on June 1, 1995.

¹¹⁶ Notas ALBA-TCP, “Gobierno Bolivariano denuncia convenio con Ciadi”, January 25, 2012, *available at*: <http://www.alba-tcp.org/contenido/gobierno-bolivariano-denuncia-convenio-con-ciadi-25-de-enero-de-2012> (last visited Dec. 18, 2013).

¹¹⁷ Article 151 of the Constitution of the Bolivarian Republic of Venezuela, provides: “In the public interest contracts, unless inapplicable by reason of the nature of such contracts, a clause shall be deemed included even if not expressed, whereby any doubts and controversies which may raise concerning such contracts and which cannot be resolved amicably by the contracting parties, shall be decided by the competent courts

Article 301 of the Venezuelan Constitution, which provides that “Business enterprises, organs or persons of foreign nationality shall not be granted with regimes more advantageous than those established for Venezuelan nationals. Foreign investment is subject to the same conditions as domestic investment”. There is no provision in the Venezuelan Constitution explicitly prioritizing domestic against foreign investment – like in Article 320 of Bolivia’s Constitution, or as a supplement of domestic investment – like in Article 339 of Ecuador’s Constitution.

Before denouncing the ICSID Convention, Venezuela sent a formal communication to the Netherlands on April 30, 2008, with the intention of terminating the BIT, which entered into force in 1993 for an initial period of 15 years.¹¹⁸ However, Venezuela has not formally pursued the termination of the remaining bilateral investment treaties and by June 2013, UNCTAD still reports 26 BITs in force.¹¹⁹ In fact, the same year Venezuela denounced the BIT with Netherlands started negotiating and later ratified three new bilateral investment treaties, with Belarus (2008), Russia (2009) and Vietnam (2009).¹²⁰ All these BITs include Investor-State arbitration only under ad hoc rules – ICSID jurisdiction is not considered.

As reported by UNCTAD at the end of 2012, Venezuela is one of the most frequent respondents in Investor-State arbitration cases, only second to Argentina.¹²¹ Currently Venezuela has 11 cases concluded before ICSID, 4 claims have been dismissed 2 on

of the Republic, in accordance with its laws and shall not on any grounds or for any reason give rise to foreign claims”.

¹¹⁸ Luke Eric Peterson, “Venezuela gave notice of its intention to withdraw from the BIT in order to avoid the treaty’s automatic renewal for an extension period of 10 years”, *International Arbitration Reporter*, May 16, 2008, available at: <http://www.iareporter.com/Archive/IAR-05-16-08.pdf> (last visited Dec. 18, 2013).

¹¹⁹ These are the BITs with Argentina, Barbados, Belarus, Belgium and Luxembourg, Canada, Chile, Costa Rica, Cuba, Czech Republic, Denmark, Ecuador, France, Germany, Indonesia, Iran, Lithuania, Paraguay, Peru, Portugal, Russian, Spain, Sweden, Switzerland, United Kingdom, Uruguay and Vietnam. See UNCTAD, List of BITs concluded by a specific country, available at: [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Country-specific-Lists-of-BITs.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Country-specific-Lists-of-BITs.aspx) (last visited Dec. 18, 2013).

¹²⁰ Sebastian Perry, “Ecuador champing at the BITs”, *Global Arbitration Review*, August 11, 2010, available at <http://globalarbitrationreview.com/news/article/28642/ecuador-champing-bits/> (last visited Dec. 18, 2013).

¹²¹ UNCTAD Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note N° 1, March 2013, p. 4, available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf (last visited Dec. 18, 2013).

merits¹²² and 2 for lack of jurisdiction,¹²³ 4 claims have been discontinued,¹²⁴ in 2 cases claims were accepted¹²⁵ and 1 case was settled.¹²⁶ However, 26 cases are still pending before ICSID. Of these pending proceedings 3 have been suspended,¹²⁷ 9 were initiated after Venezuela's notice of denunciation of the ICSID Convention¹²⁸ and the remaining 14 are in different procedural stages.¹²⁹

¹²² *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6) – where all the claims were unanimously dismissed by award of January 16, 2013; and *Opic Karimun Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/14) – claim dismissed by award rendered on May 28, 2013 (see Investment Arbitration Report, “Venezuela says oil arbitration lodged via 1999 investment statute has been dismissed on jurisdictional grounds; dissenting opinion also rendered”, May 30, 2013, available at: http://www.iareporter.com/articles/20130530_4) (last visited Dec. 18, 2013).

¹²³ *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3) – dismissed by lack of jurisdiction by award of May 14, 2012; and *Highbury International AVV and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/1) - Award rendered on September 26, 2013 declining jurisdiction over claims. See: Investment Arbitration Report, “Arbitrators decline jurisdiction over claims by Highbury and Ramstein under Dutch treaty and Venezuelan statute for expropriation of mining assets” September 30, 2013, at: http://www.iareporter.com/articles/20130930_3 (last visited Dec. 18, 2013).

¹²⁴ *GRAD Associates, P.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/3) – discontinued on February 5, 2002, for lack of payment of advances pursuant to Regulation 14(3)(d) of ICSID Administrative and Financial Regulations; *I&I Beheer B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/05/4) discontinued on December 28, 2007 in accordance with Article 44 of ICSID Arbitration Rule; *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15) - discontinued pursuant to ICSID Arbitration Rule 43(1) on February 15, 2012; and *Ternium S.A. and Consorcio Siderurgia Amazonia S.L. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/19) - discontinued pursuant to ICSID Arbitration Rule 44 on November 29, 2012.

¹²⁵ *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3) – where on March 9, 1998, USD \$598,950 were awarded as principal of promissory notes due, plus regular and penal interest; and *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5) – where pecuniary damage was awarded on September 23, 2003, for around USD\$ 12,089,929 plus interest.

¹²⁶ *Eni Dación B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/4) - Settled by the parties and discontinued at the request of the Claimant on April 18, 2008.

¹²⁷ *Holcim Limited, Holderfin B.V. and Caricement B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/09/3) – where the parties filed a request for the suspension of the proceeding on September 10, 2010; *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/9) – where following the agreement by the parties, the Tribunal suspended the proceeding on September 16, 2013 until August 10, 2016; and *The Williams Companies, International Holdings B.V., WilPro Energy Services (El Furrial) Limited and WilPro Energy Services (Pigap II) Limited v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/10) – where the proceeding was suspended pursuant to the parties' agreement on March 22, 2012.

¹²⁸ These cases are: *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13); *Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/18); *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20); *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/23); and *Transban Investments Corp. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/24); *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/22); *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5); *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/21); and

In the past, Venezuela had faced at least one ad hoc arbitration case under UNCITRAL Rules.¹³⁰ Although there may have been other cases whose existence is not identified due to the confidentiality of the dispute concerned, the overwhelming majority of known Investor-State arbitration cases have been under ICSID Rules, which could explain the reaction against that forum, although it is worth mentioning that only 2 final arbitration awards against the Bolivarian Republic of Venezuela have been passed.

IV. Effects of the Denunciation of the ICSID Convention

Denunciation of treaties is subject to existing international law in this area. According to the Vienna Convention on the Law of Treaties (VCLT), the denunciation of a treaty, may take place only as a result of the application of the provisions of the treaty or of the VCLT, and may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties agree differently.¹³¹

The possibility of denunciation of the ICSID Convention and its impact on given prior consent to the jurisdiction of the Centre is regulated in Articles 71 and 72 of the Washington Convention. Denunciation of the ICSID Convention by Bolivia, Ecuador and Venezuela has provoked a lively debate about the correct interpretation of this article, as is briefly discussed below.

Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/13/11).

¹²⁹ Vestey Group Ltd v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/06/4); Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27); ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/30); Gold Reserve Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/09/1); Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5); Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/19); Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/1); Longreef Investments A.V.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/5); Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2); Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/19); OI European Group B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/25); Hortensia Margarita Shortt v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/30); and Gambrinus, Corp. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/31).

¹³⁰ Nova Scotia Power Incorporated (Canada) v. República Bolivariana de Venezuela, UNCITRAL – where the claim was dismissed due to lack of jurisdiction on April 22, 2010.

¹³¹ Vienna Convention on the Law of Treaties, Arts. 42 (2) and 44 (1).

Article 71 of the ICSID Convention provides that a Contracting State may denounce this Convention by written notice thereof to the depositary, and “shall take effect *six months after receipt of such notice*”.¹³² Thus, for the period of six months from the notification, the rights and obligations under the Washington Convention, continue being applicable to the denouncing State.

For its part, Article 72 of the same treaty provides that a notice by a Contracting State made under Article 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*”.¹³³

The ambiguity of this article is derived from the expression “given by one of them” which can be interpreted as referring to “State or of any of its constituent subdivisions or agencies or of any national of that State” or alternatively, considering Article 72 as applicable to unilateral consent of the State, so that could be perfected even after the denunciation.¹³⁴

Some authors interpret this provision noting that only in cases where both the host State and the investor have given their mutual consent to submit the dispute to ICSID, prior to the notice of the denunciation, would fall within the scope of ICSID jurisdiction. A unilateral expression of will by the host State contained in an IIA would not be sufficient because – under this interpretation – this is not “consent”, but rather an “offer to consent to arbitration” since consent is reciprocal by nature. Therefore consent must be perfected through an acceptance to arbitration by the investor **before** the date of the denunciation in order to create ICSID jurisdiction.¹³⁵ Under another possible reading of Article 72,

¹³² ICSID Convention Article 71.

¹³³ ICSID Convention Article 72.

¹³⁴ UNCTAD, Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims, IIA Issues Note N° 2, December 2010, p. 5.

¹³⁵ Christoph Schreuer, Denunciation of the ICSID Convention and Consent to Arbitration, en: The Backlash against Investment Arbitration: Perceptions and Reality (M. Waibel, A. Kaushal, Kyo-Hwa Liz Chung, C. Balchin eds.) Chapter 15, p. 353-368 (2010).

investors may still accept the consent given in a BIT until the denunciation becomes effective in accordance with Article 71 six months after receipt of the notice of denunciation by the depositary.¹³⁶

This seems to be the interpretation accepted by the denouncing States. In such period of 6 months, there was one case filed against Bolivia— later settled —¹³⁷ and one case against Ecuador¹³⁸ – discontinued pursuant to Arbitration Rule 43(1) on November 11, 2011 – and a string of at least 9 cases against Venezuela in the months preceding that date. In 6 of them ICSID jurisdiction has not been challenged by Venezuela¹³⁹ and in 3 cases¹⁴⁰ there has been a jurisdictional challenge, but there is no public information available on which grounds.

Other authors consider the possibility of accepting a State’s consent to ICSID arbitration established on IIAs, as long as such agreement stays in force.¹⁴¹ Under this interpretation,

¹³⁶ See Christian Tietje, Karsten Nowrot and Clemens Wackernagel, *Once and Forever? The Legal Effects of a Denunciation of ICSID*, *Transnational Dispute Management*, Vol .6, Issue 1, March 2009, p. 8, and Sébastien Manciaux, *Bolivia's withdrawal from ICSID*, *Transnational Dispute Management* (Issue 5, 2007), p. 4, *available at*: <http://www.transnational-dispute-management.com/article.asp?key=1076> (last visited Dec. 18, 2013).

¹³⁷ *E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia*, supra 83, infra 162.

¹³⁸ *Corporación Quiport S.A. and others v. Republic of Ecuador* (ICSID Case No. ARB/09/23), registered on December 30, 2009.

¹³⁹ These cases are: *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, supra 129, registered on June 15, 2012; *Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela*, supra 129, registered on July 25, 2012; *Ternium S.A. and Consorcio Siderurgia Amazonia S.L. v. Bolivarian Republic of Venezuela*, supra 125, registered on August 01, 2012, but discontinued a request of the claimant pursuant to ICSID Arbitration Rule 44 on November 29, 2012; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, supra 129, registered August 07, 2012; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, supra 129, registered August 21, 2012; and *Transban Investments Corp. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/24), supra 129, registered August 27, 2012.

¹⁴⁰ These cases are: *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, supra 129, registered August 15, 2012; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, supra 129, registered on August 01, 2012 – where on July 16, 2013 the Tribunal issued a decision on the Respondent’s objections to jurisdiction as a preliminary question, that is not publicly available; and *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, supra 129, registered on August 10, 2012, by a Dutch affiliate of the US-based Owens-Illinois conglomerate, under the Netherlands-Venezuela BIT terminated in 2008, although its protections for existing investments in Venezuela will remain in place until 2023 due to a “sunset clause”. See Jarrod Hepburn and Luke Eric Peterson *Venezuela Claims Round-up: Nine new investor-state arbitrations registered in the months preceding ICSID withdrawal*, *Investment Arbitration Reporter*, September 2, 2012, *available at*: <http://www.iareporter.com/articles/20120903> (last visited Dec. 18, 2013).

¹⁴¹ Tietje et al, *op. cit.*, p. 9.

Article 72 of the ICSID Convention would include all unilateral “offers to consent to arbitration” that remains effective in IIAs signed by the host State after the denunciation of the ICSID Convention.¹⁴² In support of this view, it has been argued that “the legislative history of the ICSID Convention indicates that the word “consent” in Article 72 must be read as “unilateral consent” and not as “arbitration agreement” and that the consent given by the host state under a BIT has to be regarded as an “independent legal obligation”.¹⁴³

For purposes of determining whether the clause in BITs is “unilateral consent” or an “offer to consent to” to ICSID arbitration by the host State, it should be noted that the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) of ICSID,¹⁴⁴ establishes in Rule N° 2(3) that “date of consent” means “*the date on which the parties to the dispute consented in writing to submit it to the Centre; **if both parties did not act on the same day**, it means the date on which the second party **acted**”*. As noted, it would be possible to interpret the rule transcribed as the parties may agree in writing separately, because such rule considers separate “actions” in order to determine the date of consent. However, the Spanish¹⁴⁵ and French¹⁴⁶ texts of the same rule put the emphasis in the existence of “consent” and not of a mere “act”. To consent is not the same as to act. It could be interpreted that to be able to consent on a different date, the offer to arbitrate before ICSID should be a standing one, and therefore consent could not be perfected after the denunciation of the ICSID convention is in force.

¹⁴² UNCTAD, op. cit, (December 2010), p. 5.

¹⁴³ Ramon Ramirez Quijada, The “Survival Clause” In The Netherlands-Venezuelan BIT: A Salvation Gateway For Foreign Investment In The Oil Sector Or A Curse For The Venezuelan Government? Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee, available at: <http://www.dundee.ac.uk/cepmlp/gateway/?news=29871> (last visited Dec. 18, 2013).

¹⁴⁴ The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules) of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(b) of the ICSID Convention.

¹⁴⁵ “Fecha del otorgamiento del consentimiento” significa la fecha en que las partes en la diferencia hayan consentido por escrito en someterla al Centro; y si ambas partes no lo hubieran hecho el mismo día, contará la fecha en que la última lo haya hecho.

¹⁴⁶ La “date du consentement” est la date à laquelle les parties au différend ont consenti par écrit à soumettre leur différend au Centre ; si les deux parties ont donné leur consentement à des dates différentes, c’est la dernière des deux dates qui est retenue.

In addition, IIAs usually specify that they shall remain effective for a minimum fixed period (often 10 to 15 years), or have an indefinite duration but always subject to the right of either party to terminate the agreement by written notice.¹⁴⁷ Thus, following the above mentioned second interpretation, a denunciation of the ICSID Convention would not directly affect the dispute settlement provisions of the IIA, unless such agreement is also terminated. Then, to minimize this possibility, it might be appealing for the host State to denounce not only the ICSID Convention but also terminate the IIAs containing such provisions. But, these treaties also typically include a “sunset provision” or “survival clause” which ensures that the provisions of the agreement will remain in force for 5, 10, 15 or even 20 years after the termination of the treaty. These clauses guarantee that the international protection of investments does not cease to exist abruptly in the case of the termination of the treaty. Therefore, even though a State may terminate investment agreements, it will remain bound by its provisions in respect of investments made prior to the termination of such IIA.¹⁴⁸

Consequently, following the most far reaching interpretation of Article 72 of the ICSID Convention, an investor would be able to give consent and initiate an ICSID arbitration against a host State, after the denunciation of the ICSID Convention is effective and even after the termination of the IIA invoked as basis of consent, provided that its dispute settlement provisions are still in force due to a “survival clause”.¹⁴⁹

An additional problem comes from the wording on some treaties that do not provide alternatives in the investor’s discretion, but instead, only one arbitration forum or only one arbitration forum as the sole alternative the domestic courts. What if that arbitration forum is ICSID?¹⁵⁰ For example, the BITs entered into by Chile with Bolivia, Ecuador and Venezuela and the Venezuela–France and Ecuador–Peru BITs; provide as dispute

¹⁴⁷ Tietje, et. al, op. cit., p. 9.

¹⁴⁸ UNCTAD, op. cit, (December 2010), p. 3.

¹⁴⁹ UNCTAD, Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims, IIA Issues Note N° 2, December 2010, p. 5.

¹⁵⁰ See: A. A Mezgravis and C. González, “Denunciation of the ICSID Convention: Two Problems, One Seen and One Overlooked”, TDM Vol. 9, issue 7, December 2012, p. 17-18, *available* at: <http://www.transnational-dispute-management.com/article.asp?key=1914> (last visited Dec. 18, 2013).

resolution forums either domestic courts of the host State or ICSID arbitration at the investor's discretion. If the restrictive interpretation prevails, then Chilean investors would be prevented from bringing their claims under arbitration and forced to submit their claims to Bolivian, Ecuadorian or Venezuelan courts, respectively. And what would happen with those BITs providing for ICSID arbitration as the only forum for deciding investment disputes? This appears to be the case with the Venezuela–Germany BIT.¹⁵¹ Some authors have pointed out that such a result would be absurd and violate the legitimate expectations of investors who invested “with the firm belief that future disputes would be submitted to a neutral forum such as international arbitration”.¹⁵²

To complicate things further, the majority of IIAs include Most-Favored Nation (MFN) clauses, and although the issue of whether such provisions could be applicable in respect of dispute resolution is highly controversial,¹⁵³ it could be sustained that the dispute resolution provision could survive the termination of the IIA if is incorporated in other treaties from which the host State has not chosen to withdraw and in turn, might have long survival periods.¹⁵⁴

Moreover, the mere analysis from the perspective of the revocation of the right of the investors to use Investor-State arbitration overlooks the other side of the coin: the obligation arising out of the consent to ICSID jurisdiction with respect to other Contracting States of a BIT or an FTA.¹⁵⁵ In the case of ICSID, once denunciation becomes effective, the denouncing State ceases to be a Contracting State and loses the rights and obligations derived from membership status such as: (i) not being bound to recognize or enforce ICSID arbitration awards rendered against other Contracting States;

¹⁵¹ Andrés Mezgravis, Denunciation of the ICSID Convention and the Easy Path, *The Arbitration Review of the Americas 2014*, Section 3: Country Chapters “Venezuela”, available at: <http://globalarbitrationreview.com/reviews/57/sections/197/chapters/2268/> (last visited Dec. 18, 2013).

¹⁵² Id.

¹⁵³ See: Wolfgang Alschner, Ana Berdajs and Vladyslav Lanovoy, “Legal basis and effect of denunciation under international investment agreements”, Graduate Institute of International and Development Studies, Geneva, Trade Law Clinic Memorandum, 9 May 2010, p. 38-39, available at: [http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/UNCTAD%20-%20International%20Investment%20Treaties%20Denunciations%20\(final%20-%20June\).pdf](http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/UNCTAD%20-%20International%20Investment%20Treaties%20Denunciations%20(final%20-%20June).pdf) (last visited Dec. 18, 2013).

¹⁵⁴ Ramírez, op. cit., p. 20-21.

¹⁵⁵ Mezgravis and González, op. cit., p. 13.

and (ii) no right to make appointments to ICSID panels or hold representation in the ICSID Administrative Council.¹⁵⁶

So far, discussions on the correct meaning of Article 72 have been largely academic, but a couple of recent cases could show us a concrete interpretation. On 31 October 31, 2007, after the receipt of the denunciation notice by Bolivia, but within the 6 months period before the withdrawal took effect, a Dutch subsidiary of Telecom Italia claimed compensation form some US\$250 Million following the 2007 nationalization of its investments in the Bolivian telecoms firm Entel.¹⁵⁷ Bolivia objected to the Centre’s jurisdiction but the ICSID Secretariat registered the case anyway, as it did not consider that manifestly fell outside ICSID jurisdiction.¹⁵⁸ However, after a memorial and counter-memorial on jurisdiction and a procedural hearing, proceedings were discontinued at the claimant’s request in October 2009, to be pursued under UNCITRAL ad hoc rules before the same panel.¹⁵⁹ After this agreement was challenged even before US Courts, claiming that the Minister of Legal Defense of the Bolivian State had exceeded her authority,¹⁶⁰ the dispute was settled with US\$100 Million in compensation.¹⁶¹

The first case dealing with this issue could be *Pan American Energy LLC v. Bolivia*. On April 12, 2010, the oil company Pan American Energy requested the institution of arbitration proceedings against the Plurinational State of Bolivia for the nationalization of its subsidiary Chaco Petroleum Company, in January 2009.¹⁶² Surprisingly, after the case was registered in ICSID (but before the tribunal was constituted) the official website of the World Bank informed that it was “unlikely” that this claim would be addressed by ICSID “considering it was filed after the six -month period in which the treaty has ceased

¹⁵⁶ Id., p. 16-17

¹⁵⁷ E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia, supra 83.

¹⁵⁸ Aguirre, op. cit. supra 78, p. 71

¹⁵⁹ UNCTAD, op. cit. (December 2010), p. 5

¹⁶⁰ Plurinational State of Bolivia v. E.T.I. Euro Telecom International N.V., District Of Columbia District Court, Docket Number: 1:10-cv-01704, available at <http://archive.recapthelaw.org/dcd/144414/> (last visited Dec. 18, 2013).

¹⁶¹ Luke Eric Peterson, “Telecom Italia subsidiary agrees to withdraw ICSID claim against Bolivia, but case to proceed under other auspices”, November 25, 2010, Investment Arbitration Reporter, available at http://www.iareporter.com/articles/20101126_8 (last visited Dec. 18, 2013).

¹⁶² Pan American Energy LLC v. Plurinational State of Bolivia, ICSID Case No. ARB/10/8, registrado el 12 de abril de 2010.

to have effect for Bolivia”.¹⁶³ Today, after the arbitral tribunal issued a decision on the Respondent's Preliminary Objections (April 26, 2013), the claimant has filed a memorial on the merits (September 24, 2013). None of these documents are publicly available, neither is the cited communication of the World Bank, although it has been reported that the arbitrators rejected Bolivian objection that Pan American's claims were “manifestly without legal merit”.¹⁶⁴

Recently another case that could involve an interpretation of Article 72 of ICSID Convention has been registered against Venezuela by two Spanish companies, subsidiaries of the Mexican food conglomerate GRUMA,¹⁶⁵ for the expropriation of their operations in Venezuela under a governmental decree of May 2010.¹⁶⁶ The case was registered on June 06, 2013 and Venezuela’s denunciation of the ICSID Convention took effect on 25 July 2012.¹⁶⁷

The question of the effects of denunciation of the ICSID Convention is moving from theory to practice. In the absence of a multilateral agreement on interpretation, arbitral tribunals will be the ones to decide the matter. Regardless of the interpretation we think is a correct one, it is clear that denunciation of the ICSID Convention and investment treaties is not an “easy” solution to exit the system, because the effects of this decision could be questioned for a very long period of time. It could even be considered as

¹⁶³ World Bank (Spanish website), “Bolivia se va del CIADI”, en “Bolivia solo tiene un caso pendiente en el CIADI”: “es improbable que sea abordado en el CIADI dado que la demanda fue presentada después de los seis meses de plazo en los que el tratado ha dejado de tener vigencia para Bolivia”. It was available at: <http://web.worldbank.org/WBSITE/EXTERNAL/BANCOMUNDIAL/EXTSPPAISES/LACINSPANISHEXT/BOLIVIAINSPANISHEXT/0,,contentMDK:21567378~pagePK:141137~piPK:141127~print:Y~theSitePK:500410,00.html> (last visited: Feb. 28, 2012).

¹⁶⁴ Luke Eric Peterson, “Arbitrators reject Bolivian objection that Pan American's claims are manifestly without legal merit; effects of ICSID denunciation at issue in case”, Investment Arbitration Reporter, April 30, 2013, available at: http://www.iareporter.com/articles/20130430_1 (last visited Dec. 18, 2013).

¹⁶⁵ El Universal, “Afirman que el país debe presentarse ante el Ciadi”, 12 June 2013, available at: <http://www.eluniversal.com/economia/130612/afirman-que-el-pais-debe-presentarse-ante-el-ciadi>

¹⁶⁶ Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela, supra 129. The tribunal has not been constituted but on August 13, 2013, Horacio Grigera Naón accepted his appointment as arbitrator by the claimants. On November 26, 2013, Yves Derains has accepted his appointment as arbitrator by the ICSID’s Chairman of the Administrative Council.

¹⁶⁷ Jarrod Hepburn, ICSID round-up: profiling new claims against Slovenia, Costa Rica, Venezuela and Egypt, June 18, 2013, available at: <http://www.iareporter.com/articles/20130617> (last visited Dec. 18, 2013).

“counter-productive”.¹⁶⁸ As UNCTAD has reported the “survival clause” of the IIAs subscribed by Ecuador and Bolivia range from 5 to 20 years in the case of Bolivia and from 5 to 15 years in the case of Ecuador.¹⁶⁹ All of Venezuelan BITs have a survival clause,¹⁷⁰ and in the majority of them the survival period is of 10 years for investments made before the termination.¹⁷¹

V. What are the choices after exiting the system?

Following a series of formal and informal conversations with various Investor-State Dispute Settlement (ISDS) stakeholders, UNCTAD identified five broad paths toward reform of the system: (i) Promoting alternative dispute resolution; (ii) Tailoring the existing system through individual IIAs; (iii) Limiting investor access to ISDS; (iv) Introducing an appeals facility; and (v) creating a standing international investment court.¹⁷²

As we will see some of these paths have actually been taken by Bolivia, Ecuador and Venezuela, especially with respects to limiting the access to Investor-State arbitration based on treaties, and in the creation of a regional investment court with an appeal facility and promotion of mediation – a classic mechanism of Alternative Dispute Resolution (ADR). Other choices taken by these countries are new – as the monitoring of investment disputes – and others imply some return to contract-based arbitration that might be or not similar to those invoked as basis of arbitration in well-known awards handed down in the 1950s.¹⁷³

¹⁶⁸ See: Diana Marie Wick, “The Counter-Productivity of ICSID Denunciation and Proposals for Change”, *The Journal of International Business & Law*, Vol. XII (2), August 2012, p. 239-291.

¹⁶⁹ UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, p. 20-21.

¹⁷⁰ Ripinsky, *op. cit.*, supra 4.

¹⁷¹ Mezgravis, *op. cit.*, supra 152, endnote 24. Even the BIT between Bolivia and Venezuela BIT contains a survival clause. The last paragraph of Article 11 provides that in case of termination of the agreement, its provisions will continue to protect the investments made before the date of termination, for a further period of ten years. See: *Acuerdo sobre Promoción y Protección recíproca de Inversiones entre La República de Bolivia y la República Bolivariana de Venezuela*, available at: http://www.unctad.org/sections/dite/ia/docs/bits/bolivia_venezuela_sp.pdf (last visited Dec. 18, 2013).

¹⁷² UNCTAD, *op. cit.*, supra 3, p. 4.

¹⁷³ See Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2004, p. 225.

5.1. *Domestic Courts and Contract Arbitration*

The natural alternative after exiting the ICSID system seems to be for investors to go to the domestic courts. But as we will see, the denunciation of the Washington Convention does not mean the end of international arbitration.

a. *Bolivia*

Article 320 of 2009 Bolivian Constitution provides that “all foreign investments shall be subject to the jurisdiction, the laws and the Bolivian authorities, and no person may claim exemption status **or recourse to diplomatic claims** for more favorable treatment”. Moreover, the same article states that is not possible to grant to foreign companies more favorable terms than those provided for Bolivians. As we can see, even if there is an explicit exclusion of the use of diplomatic protection, Article 320 does not expressly exclude international arbitration.

The same Constitution in Article 366 specifies that “all foreign enterprises that conduct activities in the hydrocarbons production chain in name and representation of the State will submit to the sovereignty of the State, and to the laws and authority of the State. In no case a foreign court or foreign jurisdiction will be recognized, and foreign investors may not invoke any exceptional situation for international arbitration, nor appeal to diplomatic claims”.

The precise meaning of these new constitutional provisions, as well as its scope and effects are open to discussion, but as we can clearly appreciate, the exclusive jurisdiction of the Bolivian domestic courts in foreign investment disputes is reserved **only** for those related to those companies conducting activities in the hydrocarbons production chain. Therefore, foreign investors in other areas could perfectly use international investment arbitration, if it is still provided in international investment agreements or in a contract with the Bolivian State.

In fact, even the situation of hydrocarbons companies is not absolutely clear. By Supreme Decree No. 0224 of 24 July 2009 and already under the new 2009 Constitution, the

Bolivian Executive Branch has authorized the estate oil company YPFB (Yacimientos Petroliferos Fiscales Bolivianos) to accept foreign law and international arbitration when YPFB needs to purchase goods, works or services abroad from companies not established in Bolivia, when these are not available at the domestic market, or if is of greater economic benefit to YPFB.¹⁷⁴

This indicates that for such cases related to YPFB the Constitutional restriction does not apply, and such State entity in a commercial transaction could freely agree to local or international arbitration under domestic or foreign law,¹⁷⁵ and some of these goods, works or services contracts could qualify as foreign investment. It must be noted that under Article 361 of the Bolivian Constitution YPFB is the only company authorized to carry out the activities of the hydrocarbons production chain and its marketing, in the territory of Bolivia.¹⁷⁶

The focus seems to be against Investor-State arbitration and not against international arbitration as such. Under State procurement regulations, most of the Bolivian State-Owned companies are authorized to accept foreign governing law and international arbitration or foreign jurisdiction, in a contract for the purchase of goods and services abroad with suppliers or service providers domiciled outside Bolivia.¹⁷⁷ Some of these contracts could also qualify as foreign investment, depending on the definition of investment of the applicable IIA.¹⁷⁸ On the other hand, Bolivian Arbitration Law expressly provides that the State and public State entities may submit to international arbitration to solve commercial disputes.¹⁷⁹

¹⁷⁴ Bolivia, Decreto Supremo N° 224, 24 de julio de 2009, <http://www.lexivox.org/norms/BO-DS-N224.xhtml> (last visited Dec. 18, 2013).

¹⁷⁵ Aguirre, op. cit., supra 70.

¹⁷⁶ According to Art. 361 of the Bolivian Constitution: "I. Yacimientos Petroliferos Fiscales Bolivianos (YPFB) is an autarchic, non-seizable public company, with autonomous administrative, technical and economic management, under the state policy of hydrocarbons. YPFB, under the tuition of the relevant ministry and as the operational arm of the state has sole authority to conduct the activities of the supply chain and marketing of hydrocarbons. II. YPFB may not transfer its rights or obligations in any shape or form, implied or expressed, directly or indirectly".

¹⁷⁷ Aguirre, op. cit. supra 78, p. 59.

¹⁷⁸ All Bolivian BITs still in force define investment broadly as "any type of asset, including personal or real property, equity shares, credits in cash, contractual rights and concessions", Id., p. 76.

¹⁷⁹ Ley N° 1770, Ley de Arbitraje y Conciliación, March 10, 1997, Article 4.

b. Ecuador

In the case of Ecuador, there is an interesting duality that derives from the very 2008 Constitution. As we have seen, according to Article 339, the State shall encourage domestic and foreign investment, giving priority to domestic investment, envisioning foreign investment as supplement to domestic investment. In addition, Article 422 of the same Constitution provides that “**Treaties or international instruments** where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities in disputes involving contracts or trade between the State and natural persons or legal entities cannot be entered into”. Therefore, in principle, domestic courts are the natural forum of foreign investment disputes.

However, the second paragraph of the same Article 422 establishes that “The treaties and international instruments that provide for the **settlement of disputes between States and citizens in Latin America by regional arbitration entities** or by jurisdictional organizations designated by the signatory countries are exempt from this prohibition. Judges of the States that, as such or their nationals, are part of the dispute cannot intervene in the above”. This opens a possibility for a Latin American arbitration entity available for Latin American citizens – a notion that could have a very broad extension if we take the definitions of investor of some BITs signed by Ecuador that are still in force.¹⁸⁰

If we look carefully, Article 422 rejects those “Treaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities”, and there is no prohibition of agreeing to arbitration in **contracts** with foreign investors.

¹⁸⁰ For example, the Netherlands-Ecuador BIT defines investor as comprising with regard to either Contracting Party: “(i) natural persons having the nationality of that Contracting Party; (ii) legal persons constituted under the law of that Contracting Party; (iii) legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii)” (Article 1, b). It must be noted that the BITs of Ecuador with U.S., U.K. Switzerland, France and Germany, do not define “investor” as such, and they take the more approach of referring to “nationals” and “companies”.

As a matter of fact, Article 27 of the “Organic Code for Production, Trade, and Investment” of Ecuador, in force since December 22, 2010 – after Ecuador’s denunciation of the ICSID Convention – expressly provides for the possibility of international arbitration clauses, only excluding tax issues, previous approval of the General Procurator of the Nation:

*“In the investment contract with foreign investors, **arbitration clauses may be agreed upon to solve controversies that might happen between the State and the investors.***

The controversies between a foreign investor and the Ecuadorean State, which had been pursued and exhausted through administrative routes, shall try to be resolved in an amicable manner, with direct dialogue within a period of sixty (60) days. If a direct solution between the parties is not arrived at, there shall be a compulsory mediation instance within the three (3) following months from the inception of the formal beginning of direct negotiations.

*If after this mediation instance the controversy still exists, the conflict may be subjected to national or **international arbitration**, in accordance to the valid treaties, of which Ecuador is a party. The decisions of this Arbitration Tribunal shall be of law, the applicable legislature shall be the Ecuadorean one, and the binding judgment in arbitration, shall be definitive and binding to all parties.*

*If after six (6) months the administrative route has been exhausted, the parties have not arrived to an amicable agreement, neither have subjected to arbitral jurisdiction for the solution of their conflicts, the controversy shall be brought to the attention of the Ordinary National Justice. **Tax issues shall not be subject of arbitration**”.*¹⁸¹

This procedure was recently used on a large-scale mining contract with the Chinese-owned company Ecuacorriente, to invest \$1.4 billion in a copper project (“El Mirador”).¹⁸² That contract, signed on March 5, 2012 provides in Clause XVII that in case of disputes between the parties, they should seek an amicable settlement. But on the case of failure to reach an agreement, they must go to mediation or to a consultant in cases where there disputes are purely technical. Disagreements not resolved by direct

¹⁸¹ Ecuador, Organic Code for Production, Trade, and Investment, Art. 27, available at http://www.wipo.int/wipolex/es/text.jsp?file_id=252399 (last visited Dec. 18, 2013).

¹⁸² Reuters, Ecuador signs first large-scale mining contract, March 5, 2012, available at: <http://www.reuters.com/article/2012/03/06/ecuador-mining-idAFL2E8E5D4M20120306> (last visited Dec. 18, 2013).

negotiation or that have not been submitted for the opinion of a consultant, will be finally resolved by arbitration under UNCITRAL Rules, administered by the Permanent Court of Arbitration in The Hague, but will be held in Santiago de Chile.¹⁸³

It has been reported that the Ministry for Production, Competitiveness and Employment of Ecuador has signed at least eight investment protection contracts with Chinese and European investors that would consider these arbitral clauses, with a total investment amounting to US\$2.5 billion.¹⁸⁴

c. Venezuela

Article 151 of the Constitution of the Bolivarian Republic of Venezuela, provides that: “In the public interest contracts, *unless inapplicable by reason of the nature of such contracts*, a clause shall be deemed included even if not expressed, whereby any doubts and controversies which may raise concerning such contracts and which cannot be resolved amicably by the contracting parties, shall be decided by the competent courts of the Republic, in accordance with its laws and shall not on any grounds or for any reason give rise to foreign claims”. Therefore, the exclusive jurisdiction of domestic courts in foreign investment disputes is limited to “public interest contracts” and not as matter of general policy.

The Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice, has ruled that within the category of public interest contracts are “*all contracts entered into by the Republic, through the competent organs of the National Executive which object is crucial or essential for the attainment of the objectives and tasks Venezuelan State in pursuit of satisfying individual and coincident interests of the national community and not just a particular interest of a sector, as in the case of contracts of state or municipal public*

¹⁸³ Juan José Herrera, Karla Arias and Julio López, “Análisis económico y socio-ambiental del primer contrato de minería a gran escala: Una mirada desde la sociedad civil”, *Esfera Pública* N° 5, Octubre 2012, Grupo Faro, p. 33, available at: <http://www.grupofaro.org/sites/default/files/archivos/publicaciones/2012/2012-10-23/ep-contratominero-5.pdf> (last visited Dec. 18, 2013).

¹⁸⁴ Rodrigo Jijón-Letort, Juan Manuel Marchán, “National and International Arbitration in Ecuador”, *The Arbitration Review of the Americas* 2014, Section 3: Country Chapters: Ecuador, available at: <http://globalarbitrationreview.com/reviews/57/sections/197/chapters/2264/ecuador/> (last visited Dec. 18, 2013).

interest, where the object of such legal acts would be critical or essential to the inhabitants of that contracting state or municipal entity, involving the assumption of obligations whose total or partial payment stipulated is to be done in the course of several fiscal years after that in which caused the object of the contract was caused, in view of the implications of the adoption of such commitments may imply for the economic and social life of the Nation".¹⁸⁵ This is a restrictive interpretation that leaves room for investor-State arbitration in portfolio investments or in contracts with no "public interest" for the Venezuelan State considered as a whole. In addition, as emphasized in Article 151, the exclusion of foreign claims in public interest contracts is not absolute, and could be not applicable "by reason of the nature of such contracts", which could be interpreted broadly.

Subsequent judgments for the Supreme Tribunal of Justice of Venezuela have declared that a concession contract for the exploitation of a motorway connecting Caracas with the main airport of the Republic,¹⁸⁶ a contract for mining exploitation,¹⁸⁷ and a contract with the State-owned broadcasting station "Venezolana de Televisión",¹⁸⁸ fell under the category of contracts of national interest and therefore not be subject to international arbitration.¹⁸⁹

On October 18, 2008, in a judgment interpreting Article 258 of the Venezuelan Constitution,¹⁹⁰ the Constitutional Chamber of the Supreme Tribunal of Justice, after

¹⁸⁵ Tribunal Supremo de Justicia de Venezuela, Judgment of 24 September 2002, in the case of Andrés Velásquez, Elías Mata and Enrique Márquez, *available at*: <http://www.tsj.gov.ve/decisiones/scon/Septiembre/2241-240902-00-2874%20.htm> (last visited Dec. 18, 2013).

¹⁸⁶ The Republic v Aucoven, Political Administrative Chamber of the Venezuelan Supreme Tribunal of Justice, 18 November 2003.

¹⁸⁷ MINCA v Corporación Venezolana de Guayana, Political Administrative Chamber of the Venezuelan Supreme Tribunal of Justice, 15 July 2004.

¹⁸⁸ Eletttronica Industriale SPA v Venezolana de Televisión, Political Administrative Chamber of the Venezuelan Supreme Tribunal of Justice, 5 April 2006.

¹⁸⁹ Fernando Peláez-Pier, José Gregorio Torrealba R., "Arbitration Agreements in Contracts with the Venezuelan State and its Instrumentalities", *The Arbitration Review of the Americas 2013*, Section 3: Country Chapters: Venezuela, *available at*: <http://globalarbitrationreview.com/reviews/48/sections/167/chapters/1870/> (last visited Dec. 18, 2013).

¹⁹⁰ Article 258 of the Venezuelan Constitution provides that "Justice of peace in communities shall be organized by law. Justices of peace shall be elected by universal suffrage, directly and by secret ballot, in accordance with law. **The law shall encourage arbitration, conciliation, mediation and any other alternative means for resolving conflicts**".

making a general review of several arbitration laws and treaties (including all BITs signed by Venezuela), declared that arbitration – national or international – was part of the judicial system of Venezuela:

“In the opinion of this Court, when the Constitution extended the judicial system with the inclusion of alternative modes of dispute resolution, including arbitration, to the ordinary judicial function exercised by the judiciary, the archetype of the justice system was reconsidered, which although implies a relief of the ordinary courts, denotes that the arbitration cannot be considered as an institution outside the achievement of a truly effective judicial protection and, therefore, exclude the possibility of qualifying arbitration and other alternative means of dispute resolution institutions as exceptional within the jurisdiction exercised by the judiciary.

*(...) the Chamber notes that the possibility of submitting to arbitration or other alternative means of resolving conflicts of interest contracts , among other circumstances arises the indisputable need for the State to enter into business relationships directly or indirectly with foreign factors for the development of activities of common interest, which in many cases cannot be done by the public or the private sector of the State, so that not only celebrates contracts with foreign companies but also promotes and regulates conditions to facilitate foreign investment along with other nation states. So, within those general conditions that encourage and permit foreign investment is a common practice and desired by most investors, the need to submit the differences resulting from the development of related economic activities in a jurisdiction which in the opinion of stakeholders not tend to favor domestic interests of each individual State or involved in the dispute”.*¹⁹¹

Although in the same judgment the Supreme Tribunal states that investment arbitral tribunals are usually not impartial, because they *“tend to favor the interests of transnational corporations, becoming an additional instrument of domination and control of national economies”*, it clearly affirms that *“it is impossible to sustain a theory of absolute immunity or broadly assert the unconstitutionality of arbitration clauses in contracts of general interest”*, and that *“to determine the validity and extent of the respective arbitration clauses the specific applicable legal regime should be considered”*. Finally, the same Court hints a preference for contract-based arbitration after declaring that arbitration does not collide with the Constitution *“to the extent that the Republic in*

¹⁹¹ Tribunal Supremo de Justicia de Venezuela, Judgment of 8 October 2008, Interpretation of Article 258 available at: <http://www.tsj.gov.ve/decisiones/scon/octubre/1541-171008-08-0763.htm> (last visited Dec. 18, 2013).

the exercise of its sovereignty can specifically determine the terms and conditions based on which will be submitted to international arbitration, since under the principles of good faith and pacta sunt servanda a State must be sovereign enough to honor his promise to submit to international arbitration”.

In accordance with article 335 of the Venezuelan Constitution, this judgment is binding to every judge in Venezuela. In practice, the current status of Venezuelan case law “allows for the use of arbitration in public interest contracts only when the contract is of a commercial nature, regardless of if the public interest is involved or not”.¹⁹²

5.2. *Creation of a Regional Arbitration Mechanism*

The Heads of State and Government of the member countries of ALBA, in the Joint Declaration of the Sixth Extraordinary Summit held in the city of Maracay, Venezuela, on June 24, 2009, “greeted the decision of Bolivia and Ecuador to denounce the International Centre for Settlement of Investment Disputes (ICSID)”, and instructed the Council of Ministers of ALBA to set up a working group in order to develop a proposal for a regional dispute settlement, to be presented at the next Summit ALBA - TCP.¹⁹³ Among ALBA’s member States only Bolivia, Ecuador and Venezuela have denounced the ICSID Convention, and until now Nicaragua, St. Lucia and St. Vincent and the Grenadines, remain signatories of the ICSID Convention.

Principle 16 of ALBA’s Peoples’ Trade Treaty (TCP), entitled “Partners and no bosses”, establishes the requirement that foreign investment respects national laws, looks for reinvest the utilities and “*solves any controversy with the State like any national investor (...) The foreign investors will not be able to demand to the National States nor the Governments for develop policies of public interest*”.¹⁹⁴ This principle was later embedded in Article 2 N° 16 of the Agreement for the Creation of the Economic Space of

¹⁹² Peláez-Pier and Torrealba, op. cit.

¹⁹³ Declaración de Maracay, 24 de junio de 2009, en: ALBA-TCP, Construyendo un Mundo Pluripolar, Cumbres 2004-2010, Octubre 2010, p. 100.

¹⁹⁴ ALBA, Fundamental Principles of the Peoples’ Trade Treaty – TCP, Principle 16, VII Summit - Cochabamba, Bolivia - October 17, 2009.

ALBA-TCP (ECOALBA-TCP),¹⁹⁵ with basically the same wording, highlighting the difference with Free Trade Agreements “*that impose a series of advantages and securities in favor of multinational companies*”.¹⁹⁶

The latest update within ALBA is a Special Resolution on Arbitration and Transnational Companies, approved during their XII Summit in Guayaquil, Ecuador, on July 30, 2013. In this document, heavily driven by the outcome of two cases against Ecuador (Occidental and Chevron, previously referred), ALBA member States denounced biases in favor of foreign investors (“*the vast majority of opinions issued by arbitral bodies have systematically favored transnational interests against the states to the point of ignoring their national law and, therefore, undermining its sovereignty*”) and the high value of damages awarded, compromising the development of the host State (“*the payments required by these arbitration bodies to the States entail amounts of money, due to the high value, compromise the development and welfare programs for the population*”). Although is clear that these two cases are not representative of the majority of the awards in the Investor-State Dispute Settlement system, they definitely provide enough base for criticism due to the high amount of the awards involved.

In this Special Resolution ALBA member States have decided to implement four measures:¹⁹⁷

- a) Coordinate effective actions to consolidate new arbitration bodies that contribute to the strengthening of an appropriate legal framework to ensure fair and balanced process for investors and States;
- b) Reaffirm and continue with the implementation of the agreements generated in the framework of the First Ministerial Conference of Latin American and Caribbean Affected by Transnational Interests, held in the city of Guayaquil on April, 22nd, 2013, such as: i) creating an International Observatory funded by contributions

¹⁹⁵ Agreed at the Economic Complementation Council of ALBA, XI Summit - Caracas, Venezuela - February 04 and 05, 2012.

¹⁹⁶ Agreement for the Creation of the Economic Space of ALBA-TCP (ECOALBA-TCP), Art. 2 N° 16.

¹⁹⁷ ALBA, Special Resolution on Arbitration and Transnational Companies, XII Summit, Guayaquil, Ecuador, 30 July 2013.

- from the States, and ii) establishing the Executive Committee of the Conference, among others;
- c) Support countries affected by transnational interests in terms of self-defense against the sentences issued by arbitral bodies; and
 - d) Urge that the judgments and rulings of the national justice systems prevail over rulings of the arbitral bodies.

However, the said proposal of a regional mechanism for the settlement of disputes in foreign investment has not yet been finalized.

While not directly related to ALBA within another regional organization in Latin America – UNASUR (Union of South American Nations)¹⁹⁸ – a draft has been proposed to create a regional arbitration center as an alternative to ICSID. In this regard, it is important to have in mind that 9 of the 12 countries of UNASUR have faced claims in the ICSID system, which represents 29% of all cases of this Centre.¹⁹⁹

The idea of an UNASUR arbitration center was first proposed by Ecuador in 2009 and then further explored during the V Summit of Judicial Powers of UNASUR, from 23 to 25 June 2010, where the Presidents and Representatives of the Judiciary Branch of Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Uruguay and Venezuela – with Cuba as guest country – recommended the inclusion of the proposal to study the creation of the Consultative Council of Justice of UNASUR and the International Centre for Conciliation, Mediation and Arbitration for the region, in the Agenda of the VI Summit of Judicial Powers of UNASUR.²⁰⁰ In December 2010 in

¹⁹⁸ UNASUR members are: Argentina, Brazil, Bolivia, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela. The Constitutive Treaty of the Union of South American Nations (UNASUR), was signed on May 23, 2008 and is in force since 11 March 2011, *available at*: http://www.unasur.org/index.php?option=com_content&view=article&id=290&Itemid=339 (last visited Dec. 18, 2013).

¹⁹⁹ Only Brazil, Colombia and Suriname have not acted as respondents. See ICSID Caseload – Statistics (Issue 2013-2), *op. cit.*, p. 11.

²⁰⁰ At the 39th Session of the General Assembly of the Organization of American States, Ecuador's Foreign Minister, Fander Falconí, proposed that UNASUR create an Arbitration Centre. See Silvia Karina Fiezzoni: The Challenge of UNASUR Member Countries to Replace ICSID Arbitration Beijing Law Review, 2011, 2, p. 140.

Guyana, the Foreign Ministers of the UNASUR member countries unanimously decided that Ecuador will chair the Working Group on Investment Dispute Settlement System (“Grupo de Trabajo de Solución de Controversias en Materia de Inversiones”), and it has been recently confirmed as Chair of that Working Group.²⁰¹

It has been reported that in May 2011, Ecuador had already submitted a proposal for the creation of this regional mechanism, allowing for Investor-State and State to State arbitration when provided for in contractual provisions or an international instrument.²⁰² Hereunder we will explain the main characteristics of this proposal, followed by commentaries about its feasibility or chances of improvement:

- a) **Limited jurisdiction:** According to the proposal, the jurisdiction of the Centre precludes disputes concerning health, taxation, and energy, among others, unless expressly stated in the treaty or contract. In addition, disputes about the legitimacy of the internal laws of the member countries are absolutely excluded. A comment about this is that obviously limits the jurisdiction of a significant number of investment disputes and if there are not relaxed, may restrict this Centre chances of success, which are fairly bounded, considering that it omits several areas where foreign investment is highly relevant.²⁰³ Plus, the question on legitimacy of internal laws could be interpreted broadly.

- b) **Exhaustion of local remedies:** UNASUR countries could demand the exhaustion of domestic judicial and administrative remedies, as a precondition to arbitration. This feature has been criticized because it might force the claimant to wait years to access UNASUR arbitration, and therefore if UNASUR Member States wants to insist on this feature, it would be recommendable to at least establish a

²⁰¹ UNASUR Noticias, “Distribución de Consejos Sectoriales de UNASUR”, 10 Oct. 2013, available at: <http://www.unasur.org/inicio/centro-de-noticias/archivo-de-noticias/distribuci%C3%B3n-de-consejos-sectoriales-de-unasur> (last visited Dec. 18, 2013).

²⁰² Fiezzoni, op. cit., p. 140-142. According to this author, this documentation was been obtained in May 2011 from a UNASUR’s member of the Working Group on Investment Dispute Settlement. However, it must be pointed out that there is still no public “official” proposal about this Centre.

²⁰³ According to 2013-2 ICSID Caseload, cases related to Electric Power & Other Energy represent 12% of all the cases registered under ICSID Convention and Additional Facility.

reasonable limit of time for the conclusion of the domestic proceedings, in order to give more certainty and security.²⁰⁴

- c) **Prior Consultation / Mediation:** Before entering into arbitration, parties must attempt to resolve any dispute by consultations – at least during 6 months from the date of filing the request, unless they agree to continue further with this mechanism or they replace it with mediation – without specific limit of duration. This is very much in line with UNCTAD proposal of exploring alternative dispute resolution in investment disputes,²⁰⁵ but also with the fact that almost 90% of the treaties with Investor-State arbitration provisions require such cooling-off period, before that the investor brings a claim.²⁰⁶
- d) **Arbitrators:** Where a party does not select its own, or the parties do not agree on a presiding arbitrator, the UNASUR Directorate General shall designate the arbitrators by a draw system. This feature intends to address the criticisms against ICSID where the President of the World Bank is in charge of appointing an arbitrator should a party fail to elect its own, and to designate the presiding arbitrator if there is no agreement by the parties. However, the same claim of impartiality could be made also to UNASUR as proceedings could generate conflicts of interests. A better solution would be to consider the appointment in these situations by an external institution like the the International Court of Justice. More worrisome is that the proposed UNASUR Code of Conduct for Arbitrators and Mediators include the examination of the likelihood of an arbitrator having a state of mind or prejudgment that favors one side in the

²⁰⁴ Silvia Karina Fiezzoni, UNASUR Arbitration Centre: The Present Situation and the Principal Characteristics of Ecuador's Proposal, *Investment Treaty News*, N° 2, Vol 2. December 2011/January 2012, p. 6, available at: http://www.iisd.org/pdf/2012/iisd_itn_january_2012_es.pdf (last visited Dec. 18, 2013).

²⁰⁵ See UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (2010), available at: http://unctad.org/en/Docs/diaeia200911_en.pdf, and UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (2011) available at: http://unctad.org/en/Docs/webdiaeia20108_en.pdf (last visited Dec. 18, 2013).

²⁰⁶ OECD, "Dispute settlement provisions in international investment agreements: A large sample survey", Investment Division, Directorate for Financial and Enterprise Affairs, 2012, p. 14, available at: <http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf> (last visited Dec. 18, 2013).

dispute. This goes beyond the current “disclosure of interest” and disqualification/challenge in the ICSID system and UNCITRAL Rules, and could dampen the nomination process, that should be based “in the independence and impartiality of the arbitrators as well as their high academic and professional qualifications”.²⁰⁷

- e) **Consolidation of proceedings:** Following the same path established in NAFTA under Article 1126,²⁰⁸ and continued in other FTAs signed by the United States²⁰⁹ (and also in the 2012 US Model BIT), a specific procedure for the consolidation of two or more arbitration proceedings is considered to avoid inconsistent decisions and awards, if a common question of fact or law on the same measure or decision is discussed. Neither UNCITRAL Rules, nor the ICSID Convention, or the Additional Facility Rules, have any provision allowing for consolidation of claims, but they have been abundantly discussed and even suggested by the OECD, although considering that “the consent of the parties as a prerequisite for a request for consolidation and concerns about confidentiality still weigh strongly against the advantages of this measure”.²¹⁰
- f) **Appeal mechanism:** The Ecuadorian proposal establishes a standing body to hear appeals allowing the revision of questions of law with a system of precedent. Eight arbitrators would integrate the appeal tribunal (one more than in WTO’s Appellate Body), with three of them acting for any given case. This is intended to provide consistent and coherent jurisprudence, something that has been criticized about ICSID proceedings and ISDS arbitration in general. This is also one of the paths identified by UNCTAD toward reform of the system.²¹¹ However, there is no clarity about the appointment mechanism of the members of such appeal

²⁰⁷ Fiezzoni, op. cit., supra 210. p. 6.

²⁰⁸ See *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/1); and *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5)

²⁰⁹ See US-Singapur FTA, Article 15.24; Chile-U.S. FTA, Art. 10.24, and US DR-CAFTA, Art. 10.25.

²¹⁰ Catherine Yannaca-Small, *Consolidation of Claims: A Promising Avenue for Investment Arbitration?*, OECD International Investment Perspectives, 2006, p. 238.

²¹¹ UNCTAD, op. cit., supra 3, p. 4

tribunal and a lack of legitimacy or technical capacity of its members could undermine the very goal of having an appellate review. Plus, the intended effect of coherence would be naturally limited by its regional character. For some of these reasons, it has been advanced that in investment arbitration, “an examination of how an appeals facility would function suggests that it may well undermine the very goal its proponents seek to achieve”.²¹²

- g) **Transparency:** According to the proposal, all arbitration proceedings should be made public, including documents, records, evidence, hearings and awards, except for those relating to defense and security of States and in special cases which the parties may determine by mutual agreement. This proposed regulation goes beyond the 2006 ICSID amendments of its Arbitration Rules²¹³ and it seems to be closely in line with the recently adopted UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.²¹⁴ It is a feature that we also find in the 2012 US Model BIT.²¹⁵
- h) **Enforcement of the award:** The awards rendered under this proposed UNASUR Arbitration Tribunal could be challenged by rectification, revision, annulment and appeal. Once the award is final, the only basis for denying recognition and enforcement would be if in accordance with the host State’s Constitution or its laws, the subject of the dispute is not subject to arbitration or it is against public policy. This is similar to the 1958 New York Convention but differs from the ICSID Convention,²¹⁶ where States are prevented from invoking public policy against the enforcement of an ICSID award.²¹⁷

²¹² For a detailed review of the complications of a structural design of an appeals facility, see: Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. Int’l L. & Pol. 1109 (2012), p. 1204.

²¹³ See especially Rule 32 (Open hearings) Rule 37 (Amicus briefs), and Rule 48 (Publication of the awards).

²¹⁴ UNCITRAL Arbitration Rules (with new article 1, paragraph 4 as adopted in 2013), including the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, *available at*: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/pre-release-UNCITRAL-Arbitration-Rules-2013-e.pdf> (last visited Dec. 18, 2013).

²¹⁵ US Model BIT, Art. 29.

²¹⁶ Fiezzoni, *op. cit.*, supra 210, p. 7.

²¹⁷ ICSID Convention, Article 53.

From an administrative point of view, it has been reported that the Centre will have a Board of Directors, integrated by a representative of each Member State, with the Presidency of the Board being yearly alternated between all members, in alphabetical order. The Secretary General of UNASUR would assume the functions of the Centre's Secretariat, and its budget will be provided by Member States and also through the fees charged for services provided.²¹⁸

Ecuador's proposal in UNASUR has been expressly endorsed by ALBA members, in the Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests (April 22, 2013).²¹⁹ However, there has been no public information of a concrete advance in such proposal, although recently it was reported that the works for the creation of the Center "are by 80%" there and as "countries like Brazil and Bolivia do not accept arbitration to settle disputes", a provision on mediation and facilitation has been included.²²⁰ It has also been informed that while Bolivia and Venezuela had expressed to be in favor of the proposal, "Colombia, Peru, Chile and Brazil were against the plan. Uruguay expressed its concerns to scare off foreign investors".²²¹ The Ecuadorian Ministry of Foreign Affairs reports "advancement" in the process of constitution of the center,²²² and at the recent 7th Summit of UNASUR Foreign Ministers, held in Paramaribo, Suriname, on August 30, 2013, there was an instruction to

²¹⁸ NOTIMEX, "Unasur analiza creación del Centro de Solución de Controversias", Aug. 14. 2013, available at: <http://noticias.starmedia.com/politica/unasur-analiza-creacion-centro-solucion-controversias.html> (last visited Dec. 18, 2013).

²¹⁹ In that declaration, ALBA members support "the constitution and implementation of regional organisms for settling investment disputes, to ensure fair and balanced rules when settling disputes between corporations and States. Encourage UNASUR in the approval of a regional mechanism currently under negotiation and promote the inclusion of other Latin American States in this mechanism". Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests (April 22, 2013), available at: http://cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_eng.pdf (last visited Dec. 18, 2013).

²²⁰ Ecuadorian Deputy Foreign Minister, Marco Albuja, "Unasur promotes mediation with arbitration center", Ecuador Times, 13 September 2013, available at: <http://www.ecuadortimes.net/2013/09/13/unasur-promotes-mediation-with-arbitration-center/> (last visited Dec. 18, 2013).

²²¹ PAGBAM Abogados, "Projects To Leave ICSID Not Advancing In Argentina", Arbitration Newsletter N° 20, March 2013, p. 2.

²²² Ecuador, Ministerio de Relaciones Exteriores y Movilidad Humana, "Avanza proceso de constitución para Centro de Arbitraje de UNASUR", 07 October 2013, available at: <http://cancilleria.gob.ec/es/avanza-proceso-de-constitucion-para-centro-de-arbitraje-de-unasur/>

the Working Group on the Investment Dispute Settlement System to finish this work as soon as possible, preferably before the end of 2013.²²³

The idea of a regional mechanism for investment disputes has already been raised years before Bolivia, Ecuador and Venezuela exited the ICSID Convention, in order to propose the establishment of an institutional system similar to ICSID in Latin America, but according to its own character and legal systems.²²⁴ According to its proponents, this would lower translation costs, expertise and transfers, since Latin American countries are close and share similar legal frameworks.²²⁵ In 2009, UNCTAD was invited to pursue the possibility of establishing an “Advisory Facility on International Investment Law and ISDS” together with the Centro America Academy, the Organization of American States and the Inter-American Development Bank. The outcome was a treaty ready for signature but that was not signed by anyone.²²⁶

One might try to assess the experience of other regional Courts in the region before creating a new one. Remarkably, the first successful case of a treaty allowing individuals to bring claims against States before an international tribunal, took place in Latin America, at the Central American Court of Justice (“Court of Cartago”) that worked from 1907 to 1918, although it did not try any foreign investment case, even if its jurisdiction would allow the Court to do so.²²⁷ The Inter-American Court of Human Rights (IACHR)

²²³ UNASUR, Declaration of Paramaribo, supra 229, Section 43.

²²⁴ Juan Banderas, “La significación de nuevos temas en esquemas de integración a nivel de zonas de libre comercio”, en V Seminario Internacional: Dimensión Jurídica de la Integración, ALADI, 1998, p. 140-144.

²²⁵ Jorge Witker, “Aspectos regulatorio-institucionales de la Inversión Extranjera Directa (IED)”, en: Marcos Kaplan e Irma Manrique (coordinadores) “Regulación de Flujos Financieros Internacionales”, Instituto de Investigaciones Jurídicas, Serie Doctrina Jurídica N° 34, Universidad Autónoma de México (UNAM), 2001, p. 40-47.

²²⁶ UNCTAD, op. cit., supra 40, p. 114.

²²⁷ Orrego Vicuña, op. cit., p. 49 (2004).

has also dealt with investment issues related to the right to property.²²⁸ However, Venezuela made effective its withdrawal from the IACHR on September 10, 2013.²²⁹

It should also be noted that the Court of Justice of the Andean Community of Nations (CAN),²³⁰ might actually become a forum for the settlement of disputes between the State receiving the investment and foreign investors,²³¹ when communitarian rules and are applicable for investments in the sub region.²³² There is also a problem of restricted standing for investors, because such rules require that the claim has not been presented before by the Secretary General of the CAN,²³³ although they could act as third parties.²³⁴ Another limitation is that damages cannot be claimed in this Court, only specific

²²⁸ See Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador (Preliminary Objections, Merits, Reparations, and Costs, Judgment of 21 Nov. 2007, Series C No. 170, at paras 173–218), where the right to property of investors and company owners was found to be violated by the Ecuador after a seizure of property in the context of a criminal investigation of drug trafficking. See Lucas Lixinski, “Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law”, *Eur J Int Law* (2010) 21 (3), p. 585-604, note 72.

²²⁹ Gobierno Bolivariano de Venezuela, “Venezuela withdraws today from the Inter-American Human Rights Court”, *English Bulletin*, September 10, 2013, available at: <http://www.rmv.gob.ve/index.php/venezuela-withdraws-today-from-the-inter-american-human-rights-court> (last visited Dec. 18, 2013).

²³⁰ Comunidad Andina de Naciones (CAN), Treaty of 26 May 1969 available at: <http://www.comunidadandina.org/normativa/tratprot/acuerdo.htm> (last visited Dec. 18, 2013).

²³¹ Diana Richardson, *Solución de Conflictos en Materia de Inversión Extranjera*, available at <http://www.portafolio.co/opinion/blogs/juridica/solucion-de-conflictos-en-materia-de-inversion-extranjera> (last visited Dec. 18, 2013).

²³² This framework has several rules which may be applicable to investment, such as Decision 291 which includes the Common Regime of Treatment of Foreign Capital and Trademarks, Patents, Licenses and Royalties, or Decision 292 Cartagena Agreement, Uniform Rules for Andean Multinational Enterprises.

²³³ This is expressly recognized in the case 03-AI-2006 of the Court of Justice of the Andean Community (TJCAN), where standing was recognized to the company Interamericana Game Technology Ltda. against Ecuador. The Court stated that Article 25 of the Treaty Establishing the Andean Court of Justice opens the possibility for individuals to exercise a non-compliance action if the following eligibility requirements are fulfilled: a) That their rights have been affected by the failure of a Member Country; b) That it has come to the means provided for in Article 31 of the Treaty Creating the Court , ie , that has not been exercised before the national court, in accordance with the requirements of domestic, action law to defend the rights affected by the failure of a Member Country; and c) That has complained to the General Secretariat of the Andean Community to start this respective pre-litigation procedure , in accordance with Article 25. Upon expiration of sixty (60) days referred to in Article 24 of the Treaty Creating the Court without the General Secretariat submitted the relevant action before the Court, the plaintiff was entitled to go directly to the Court, taking into account that this was also the complainant in the forward pre-litigation or trial phase with the General Secretariat of the Andean Community.

²³⁴ For example, in the case 89-AI-2000 of the TJCAN, Pfizer was recognized status as third party intervener after the Secretary General of CAN (SGCAN) filed an enforcement action against Peru for granting patent second use of the product “Pirazolopirimidinonas for the treatment of impotence” where Community legislation expressly prohibiting the patenting of second uses or other different uses (Judgment 28 September 2001).

performance by one of the Member States. Bolivia and Ecuador are members of the CAN, but Venezuela, although it was a member since 1976, made effective its withdrawal from the Community in 2006 to join MERCOSUR (and achieving full membership in 2012).²³⁵

However, while this system could work quite well at Latin American level, given the unity of language and similarity of legal systems, these same factors could play against their use by investors from outside the region, which still are the main foreign investors in Latin America.²³⁶

5.3. *International Observatory of Transnational Companies*

As it has been mentioned before, ALBA member States have decided to create an International Observatory funded by contributions from the States.²³⁷ As stated in the 2013 Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests, this observatory would have as objectives:²³⁸

- a) To give a periodical account for the state of international litigation on investments in both regional and global instances,
- b) To identify procedures to monitor the performance of international courts of arbitration,
- c) To investigate, analyze and propose mechanisms to reform of such instances arbitration
- d) To study, analyze and support the creation of alternative mechanisms of intermediation for the fair, reasonable and definitive resolution of differences between the States and transnational companies,
- e) To constitute an encounter forum for experts in international litigation on investments that work together with the countries of the South,

²³⁵ Andean Community, "Who we are", available at: <http://www.comunidadandina.org/en/index2.aspx> (last visited Dec. 18, 2013).

²³⁶ See UNCTAD, op. cit., supra 40, p. 57.

²³⁷ ALBA, Special Resolution on Arbitration and Transnational Companies, XII Summit, Guayaquil, Ecuador, 30 July 2013.

²³⁸ Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests, supra 225, Section 3.

- f) To promote the creation of mechanisms for coordination and mutual consultation between the judicial systems of Latin American States, to ensure the enforcement of domestic judicial decisions on disputes between States and transnational corporations;
- g) To create a compendium of legislation, policies, and trade and investment agreements, regarding negotiation processes between States and corporations, to facilitate the adoption of jointly strategies by the States;
- h) To study, analyze and provide the States with technical, legal and political advice to ensure the effective translation of their interests into trade and investment contracts with transnational corporations; and
- i) To establish dialogue mechanisms with social movements.

The Republics of Ecuador, Dominican Republic and Venezuela, agreed to produce a proposal to create such organism within a period not exceeding three months. However, there has been no public information of a concrete advance of such proposal, although in the abovementioned Declaration of Paramaribo there is also a statement of UNASUR Members welcoming the creation of an International Observatory of Transnational Companies,²³⁹ and Bolivia and Ecuador have recently hinted a focus of that observatory on oil companies.²⁴⁰

Going beyond the idea of the International Observatory but also as a result of the abovementioned Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests, a coalition was created “to coordinate actions to face the growing number of international legal suits being taken against governments by transnational companies”, including all ALBA members plus Dominican Republic. It must be highlighted that this document is a product of a ministerial meeting of 12 Latin American countries held in Guayaquil, Ecuador. The representatives of Argentina,

²³⁹ UNASUR, Declaration of Paramaribo, supra 229 Section 30.

²⁴⁰ El País, “Bolivia y Ecuador impulsan el 'observatorio latinoamericano' sobre petroleras”, 04 October 2013, available at: http://economia.elpais.com/economia/2013/10/04/agencias/1380899204_209071.html (last visited Dec. 18, 2013).

Guatemala, El Salvador, Honduras and Mexico, participated in such Conference as guests and declared that will merely “convey the results to their governments”.²⁴¹

Ecuador has taken a step further on the idea of an observatory, but only domestically. Based on Article 416²⁴² of Ecuadorian Constitution, on May 6, 2013, the Presidency of Ecuador has created an international commission to audit the 26 BITs subscribed by Ecuador²⁴³ – CAITISA (Comisión para la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje Internacional en materia de Inversiones). On the course of 8 months, this commission should review and assess: “i) the process of signing and negotiation of bilateral reciprocal protection of investments (BITs) and other investment agreements signed by Ecuador and the consequences of its application, ii) the content and compatibility of these agreements with Ecuadorian law; iii) the validity and relevance of the actions and procedures adopted and decisions and awards issued by the bodies and jurisdictions that are part of the international arbitration system on investment that have known arbitrations against Ecuador, in order to determine the legality, legitimacy and fairness of their decisions and identify inconsistencies and irregularities which have caused or threaten to cause impacts

²⁴¹ The declaration further states that the “Executive Committee of the Ministerial Conference of Latin American States Affected by Transnational Interests”, will design and implement mutually supportive actions in the political and legal areas, including among others: “1) conveying urgent and timely information on legal disputes involving any of the signatory States, in the form of early alerts; 2) coordinating joint legal actions with international legal teams of experts and professional lawyers; 3) establishing permanent channels of communication with social movements; 4) designing communication strategies, as a counterbalance to global campaigns undertaken by transnational companies, for the dissemination of legal, technical and political aspects of the cases exposed, as well as the motivations of States”. Initially, Ecuador should be responsible for the coordination of this Committee.

²⁴² Article 416 N° 12, of Ecuadorian Constitution establishes that the relations of that country with the international community shall respond to the interests of the Ecuadorian people, fostering a new trade and investment system among States, based on justice, solidarity, complementariness, the creation of international mechanisms to monitor multinational corporations and the establishment of an international financial system that is fair, transparent and equitable. It expressly rejects converting disputes with foreign private companies into conflicts between States.

²⁴³ America Economía, “Ecuador prepara auditoría para 26 Tratados de Protección Recíproca y arbitraje internacional”, October 6, 2013, *available at*: <http://www.americaeconomia.com/node/102387> (last visited Dec. 18, 2013). Among the commissioners are Carlos Gaviria, former president of the Colombian Constitutional Court, Hildegard Rondón de Sansó, former member of the Venezuelan Supreme Court; Osvaldo Guglielmino, Argentina’s former Attorney General; Cecilia Olivet, from the Transnational Institute of Uruguay; Alejandro Olmos, former member of a commission to audit Argentina’s Public Debt; Javier Echaide, Argentinean expert on BITs; and Alberto Arroyo, Mexican scholar.

to the Ecuadorian State in economic, social and environmental, and the peoples and nationalities”.²⁴⁴

It is not clear if this audit is intended as a merely an assessment of the effects of IIAs and the ISDS regime in Ecuador, or if upcoming conclusions of CAITISA would be used as a defense in possible enforcement of future awards against Ecuador. It has been suggested that it could also make findings or recommendations about responsibility of Ecuadorian public servants on the negotiation and signature of those treaties – with any final decision in the hands of the Ecuadorian judiciary.²⁴⁵

VI. Conclusion

As we have seen, there is no easy answer to the questions posed by the denunciation of the ICSID Convention. We can disagree about the reasons for denouncing or terminating investment treaties, if the States were justified or not in taking this decision, or what are the legal effects of this denunciation following a limited or overreaching interpretation of the relevant provisions of the ICSID Convention and the BITs. But we could probably all agree that the denunciation of the ICSID Convention does not produce immediate consequences and that is highly debatable when the purported effect of the denunciation – excluding the host State of this ISDS forum – will be effective.

On the other hand, BITs providing with the foreign investor with the ability to submit claims to international arbitration with other choices beyond ICSID remain largely unaffected by the denunciation of the ICSID convention, and unless such treaties are effectively terminated, other arbitral forums are available, like ad hoc arbitration under UNCITRAL Rules, and of course, including ICSID Additional Facility.²⁴⁶

²⁴⁴ Decree N° 1506, Presidency of Ecuador, May 6, 2013, Article 2, *available at*: http://www.elciudadano.gob.ec/index.php?option=com_content&view=article&id=41842:gobierno-nacional-decreta-la-creacion-de-caitisa&catid=40:actualidad&Itemid=63 (last visited Dec. 18, 2013).

²⁴⁵ Interview to Cecilia Olivet, member of CAITISA, Publicogt.com, July 16, 2013, *available at*: <http://publicogt.com/2013/07/16/cecilia-olivet-habra-que-determinar-si-los-tbi-firmados-son-ilegales-e-ilegitimos/> (last visited Dec. 18, 2013).

²⁴⁶ Aguirre, *op. cit. supra* 78, p. 64

Nevertheless it is interesting to analyze what these States are proposing as alternative dispute resolution mechanisms. The more obvious one is domestic courts. This has been expressly stated by Bolivia, Ecuador and Venezuela, but interestingly these countries are not automatically proposing to go back to a sole domestic jurisdiction for foreign investment disputes, as in times when the “Calvo Doctrine” prevailed in Latin America.

As we have seen some of the paths followed by these countries deal especially with limiting the access to a specific forum of Investor-State arbitration – ICSID – and when available, they tend to privilege arbitration based on contracts than on treaties, and in the creation of a regional investment court with an appeal facility and the promotion of ADR mechanisms such mediation. Contract based arbitration could have the benefit of allowing States to tailor a dispute settlement mechanism – or to include ADR or Dispute Resolution Boards – based on concrete commitments of the foreign investor, that are more politically easy to sell.

Some scholars have already pointed out the possible benefits of contract-based arbitration vis-à-vis treaty-based arbitration on investment disputes. Poulsen has stated that “(...) from the perspective of many investors, contracts should be superior legal instruments to protect their assets compared to BITs. Apart from allowing the parties to use much more precise terms than the often vague provisions found in BITs, they also go further in specifying additional rights and obligations. With respect to substantial provisions, they thus typically deal with royalty and tax rates, customs regulations, stabilization of law, and other key issues not dealt with in BITs, and with respect to procedural rights, international law precludes host countries from revoking their consent to arbitrate contractual disputes if the investor does not agree.”²⁴⁷ Yackee concurs adding that “[H]ost states have long had the capacity to credibly bind themselves through contract, a capacity that the BIT phenomenon has done little directly to enhance or promote”.²⁴⁸

²⁴⁷ Lauge Skovgaard Poulsen, “The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence” (2010), online: <http://works.bepress.com/lauge_poulsen/4 > at 25, (last visited Dec. 18, 2013).

²⁴⁸ Jason Webb Yackee, *Do We Really Need Bits? Toward a Return to Contract in International Investment Law* (Rochester, NY: Social Science Research Network, 2008) at 130.

However, contractual arbitration for foreign investment dispute resolution could also face significant problems. As expressed by Schill, these solutions “(...) are only available to investors with sufficient negotiating power. While large-scale investment contracts have always contained arbitration, choice of law, stabilization, or internationalization clauses, small- or medium-sized investors, who play a considerable role in foreign investment relations, often lack the necessary bargaining power to negotiate for such protections. Moreover, contractual solutions are unavailable to investors that make their investments based on a country’s general investment legislation. For them, reaching agreement with the host State on non-domestic dispute settlement will be difficult once a dispute has arisen”.²⁴⁹

In addition, this kind of contracts would be mostly signed if investors have no other choice but to invest on a specific country – usually long term or natural resource seeking investment – and thus it would not be a solution for portfolio or other types of short term investment. Finally, if contract based arbitration is poorly drafted, the countries involved in these proceedings could face the same (or even worse) problems that have now fiercely criticized.

What is clear is that neither Bolivia, nor Ecuador or Venezuela exited the ICSID system pretending exclusive domestic jurisdiction in foreign investment disputes. This is a stark contrast with the attitude of Australia and more recently measures taken by South Africa.

The Australian Government announced in April 2011 that will no longer include investor-State dispute resolution procedures in trade agreements with developing countries, declaring that “If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries”.²⁵⁰ This statement reflects

²⁴⁹ Stephan Schill, “EJIL: Talk! – The Virtues of Investor-State Arbitration”, (19 November 2013), online: <<http://www.ejiltalk.org/the-virtues-of-investor-state-arbitration/#more-9873>> (last visited Dec. 18, 2013). According to Schill treaty-based arbitration might be the only alternative to administer justice fairly and independently in these cases.

²⁵⁰ Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity, p. 14, available at: http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf (last visited Dec. 18, 2013).

that there are also doubts among developed countries in general about the efficiency of IIAs and their particular arbitration system.²⁵¹

Conversely, and completely embracing the “Calvo Doctrine”, the Gillard Government declared its support to the principle of national treatment “that foreign and domestic businesses are treated equally under the law”, denying support to provisions “that would confer greater legal rights on foreign businesses than those available to domestic businesses”, or “that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses”.²⁵²

If this policy is implemented, domestic courts would be in theory the sole jurisdiction available for investment disputes, to investors from countries with no current IIA with Australia providing Investor-State arbitration. But this policy fails to see the system as a whole. As an example, although Australia already notably declined to be bound by an investor-State arbitration in the US-Australia FTA pointing out the reliability of its own legal system for resolving disputes involving U.S. investors,²⁵³ that did not prevent US-based Philip Morris to start a well-known arbitration against Australia on November 21, 2011²⁵⁴ claiming that governmental regulations on plain-packaging of cigarettes violated the Hong Kong-Australia BIT.²⁵⁵

²⁵¹ Leon Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?* (January 26, 2012). *Journal of World Trade*, Vol. 46, No. 1, pp. 83-120, 2012; UNSW Law Research Paper No. 2012-1.

²⁵² Gillard Government Trade Policy Statement, *op. cit.*, p. 14

²⁵³ Luke Eric Peterson, “In Policy Switch, Australia Disavows Need For Investor-State Arbitration Provisions In Trade And Investment Agreements”, April 14, 2011, *available at*: <http://www.iareporter.com/articles/20110414> (last visited Dec. 18, 2013).

²⁵⁴ Philip Morris Asia Limited v. Australia, UNCITRAL (Hong Kong/Australia BIT).

²⁵⁵ International Institute for Sustainable Development (IISD), “Philip Morris files for arbitration over intellectual property dispute with Australia”, *Investment Treaty News*, N° 2, Vol 2. December 2011/January 2012, p. 13, *available at*: http://www.iisd.org/pdf/2012/iisd_itn_january_2012_en.pdf

A recent change of government in Australia could signal a change in this policy, as is suggested by the recent FTA agreed between Australia and Korea in early December 2013, which again contemplates, Investor-State arbitration.²⁵⁶

South Africa has embarked in a more systemic approach against the ISDS system and in 2013 notified the termination of 4 of its BITs, with Spain (23 June), Netherlands (2 October), Germany (23 October), and Switzerland (30 October).²⁵⁷ This follows South Africa's previous termination of the BIT with the Belgium- Luxembourg in 2012, based on an earlier policy decision to phase out and review its BITs.²⁵⁸

Termination of the agreements will become effective within six or twelve months since the notice was issued. By virtue of the "survival clause" however, investments made by investors before the end of the BITs will remain protected for another ten years in case of Spanish investments, 15 years in case of Dutch investments and 20 years in case of German and Swiss investments.²⁵⁹

Following the same trend, on November 1, 2013, South Africa have published a draft Investment Promotion and Protection Bill²⁶⁰ eliminating the option of international Investor-State arbitration, and providing only domestic legal recourse for foreign investors, on the grounds that protection of property rights is enshrined in the country's Constitution. South Africa claims to have built credibility, of democratic constitutional government under the rule of law, independent judiciary, adequate domestic property

²⁵⁶ Australian Government, "Korea-Australia Free Trade Agreement (KAFTA) - Key outcomes", *available at*: <http://www.dfat.gov.au/fta/akfta/fact-sheet-key-outcomes.html> (last visited Dec. 18, 2013).

²⁵⁷ UNCTAD, Investment Policy Monitor N° 11, November 2013, p. 8.

²⁵⁸ Investment Treaty News, "South Africa begins withdrawing from EU-member BITs", News in Brief, October 30, 2012, *available at*: <http://www.iisd.org/itn/2012/10/30/news-in-brief-9/> (last visited Dec. 18, 2013).

²⁵⁹ UNCTAD, Investment Policy Monitor N° 11, November 2013, p. 8.

²⁶⁰ This draft bill is open for public comment during the next three months. South Africa, Department of Trade and Industry, "Promotion and Protection of Investment Bill, 2013", *available at*: <http://led.co.za/sites/led.co.za/files/promotion-and-protection-of-investment-bill-2013-invitation-for-public-comment.pdf> (last visited Dec. 18, 2013).

rights protection, so that there is no further need to rely on ISDS in the context of international investment agreements.²⁶¹

There is life after denouncing the ICSID Convention and bilateral investment treaties for Latin American countries. If this new life comes with improvements in their relationship with foreign investors that would largely depend on how they manage the choices they have available after exiting such system. However, if you want to find in Latin America a full nostalgic return to the Calvo Doctrine, you might need to look somewhere else.

²⁶¹ Statement by the Department of Trade and Industry, on the Promotion and Protection of Investment Bill 2013, 04/11/2013, available at: <http://www.polity.org.za/article/sa-statement-by-the-department-of-trade-nad-industry-on-the-promotion-of-protection-and-investment-bill-2013-04112013-2013-11-04> (last visited Dec. 18, 2013).