December 19, 2009

The Uncertain Future of ICSID in Latin America

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

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

The story of State-investor dispute resolution is one that relates to the process of decision-making that the transnational corporations undergo when analyzing whether to invest their capital in a particular country. In this sense, the International Community has created a variety of devices, such as the Washington Convention for Settlement of Investment Disputes (“Washington Convention or the ICSID Convention”), and the International Centre for the Settlement of Investment Disputes (“ICSID”), that enable the less developed countries (“LDCs”) to send a signal to the rest of the countries, showing if the have embraced a system of protection of foreign direct investment (“FDI”). Once sent, these signals transform into ‘credible commitments’ to treat foreign investors fairly.

The attitude of Latin American countries towards the Washington Convention and the ICSID has been convoluted throughout the time. During the first decades of its existence virtually all Latin American countries stayed away from the ICSID, preferring to adopt a system of “internationalization” of foreign investment contracts, to ensure foreign investors the respect for their investments. Then, in the 90’s these countries radically changed their mind: in just a few years the vast majority of the Latin American countries became signatories of the Washington Convention, and entered into several Bilateral Investment Treaties with other nations (“BITs”). This step was taken in order to attract foreign capitals by sending a signal to foreign investors. Apparently, Latin American authoritarianism against FDI was an issue of the past.

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2 Foreign direct investment refers to “direct control of either assets or an enterprise in a foreign country through ownership of a substantial portion of the assets or enterprise.” See, Thomas L. Brewer, International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment, 26 Law & Pol’Y Int’l Bus. 633, 634 (1995). Likewise, the Oorganization for Economic Co-Operation and Development (OECD) has compiled a definition of FDI to provide operational guidance on how FDI data should be compiled to meet internationally agreed standards. See, OECD Benchmark Definition of Foreign Direct Investment. Third Edition (1996) [the entire text of the document could be obtained at http://www.oecd.org/dataoecd/10/16/2090148.pdf ; last visited on November 12, 2008].


5 For a list of BITs by country, please See. (last visted on November 17, 2008) http://www.unctadxi.org/templates/DocSearch_779.aspx (last visted on November 17, 2008).

6 See, Zachary Elkins, Andrew T. Guzman, and Beth Simmons, Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000, 2008 U. Ill. L. Rev. 265, 266. (Once sent, these signals transform into ‘credible commitments’)

7 Prior to 1990 no case involving Latin America had been tried before the ICSID, and today the majority of the cases decided and pending decision on ICSID are related to this region. See, Jean E. Kalicki, ICSID Arbitration in the Americas, Arbitration Review of the Americas, 5 (2007). At: www.arnoldporter.com/resources/documents/ICSID%20arbitration%20in%20the%20Americas.pdf (last visted on November 12, 2008).
However, recent events indicate that the Latin American attitude towards ICSID could be changing again. The most critical examples of recent hostility against ICSID in Latin America are found in the cases of Bolivia, Ecuador, and Venezuela. In fact, in 2007 Bolivia became the first country ever to denounce the Washington Convention, thus formally withdrawing from ICSID.8 Ecuador excluded an entire set of claims from the Centre’s jurisdiction; and, the Venezuelan Supreme Court recently issued an opinion limiting the reach of the country’s consent to submit to the Centre’s jurisdiction.

The purpose of this article is to research the historical interaction of ICSID and Latin America, in an effort to suggest that these cases might not be an aberrational phenomenon. For this reason, the first section of this paper is devoted to explore the roots of the Latin American initial rejection and subsequent acceptance of the ICSID as an effective protection for foreign investors. The first part of this section provides a brief summary of the Centre’s jurisdictional requirements, with a special emphasis on the doctrinal issue of consent. This issue was initially misunderstood by the Latin American countries whose initial reluctance towards the Washington Convention seem to lay on the misconception that by signing the Convention they acquired the obligation to consent on the Centre’s jurisdiction in every subsequent case.

In this effort this paper analyzes a possible destiny for the system of protection of FDI in the Region. The analysis will be performed in light of the recent expropriations undertaken by the Governments of Bolivia, Ecuador, and Venezuela. The first part of this article summarizes the origins and history of the ICSID; there, questions of how Latin American countries initially approached the ICSID initiative are analyzed. In the last pages of the first part, this paper explores the rise of the ICSID in the region during the 90’s. In the second part of this article, an analysis of the implications and consequences of Bolivia’s withdrawal from ICSID is undertaken. Similarly, the next part discusses the repercussions of Ecuador’s exclusion, and Venezuela’s most recent Supreme Court decision. Finally, the conclusions suggest that the system of protection of FDI in Latin America may be on the eve of a drastic change.

II. ICSID and Latin America: From Sour to Sweet…

1. ICSID Claims & Arbitration Without Privity

The ICSID is an autonomous institution established by the Washington Convention in 1965, under the auspices of the World Bank.9 The purpose of this institution is “to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.”10 According to ICSID, the core of the Washington

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9 Notwithstanding its ‘autonomy’ and its own governing body, the ICSID is still considered an affiliate of the World Bank group. See http://www.worldbank.org. This close relationship may better appreciated by taking into account: (i) that all of ICSID’s members are also members of the World Bank [indeed, §67 of the Washington Convention establishes that it may only be adopted by countries members of the World Bank, or at least, party to the Statute of the International Court of Justice]; (ii) the World’s Bank Governor sits ex officio on ICSID’s Administrative Council; and (iii) the ICSID Secretariat’s expenses are financed out of the World Bank’s budget, although costs of individual proceedings are borne by the parties involved (as per Chapter VI of the Washington Convention).
10 See §1(2) of the Washington Convention. Furthermore, the Centre on its webpage states that: “ICSID was created by the Convention as an impartial international forum providing facilities for the resolution of legal
Convention was to ease the flows of capitals between nations\(^\text{11}\) by: (a) removing barriers to private investment posed by non-commercial [mainly political] risks, and (b) establishing a specialized international method to resolve investment disputes, which did not exist at the moment.\(^\text{12}\)

Once a country signs and ratifies the Washington Convention it becomes a member of the ICSID. But becoming a member is not enough to provide foreign investors with sufficient and efficient protection. The country must act further. It actually must consent to the Centre’s jurisdiction. This can be done in different ways, but the most important are part of what has been called “arbitration without privity.” This term was introduced in 1995 by Professor Jan Paulsson to explain a new ‘world’ in international arbitration, which relates to the investor-State system of protection that, in his own words: “is one where the claimant need not have a contractual relationship with the defendant and where tables could not be turned: the defendant could not have initiated arbitration, nor is it certain of being able even to bring a counterclaim.”\(^\text{13}\) In his work, Professor Paulsson describes different initiatives in the investor-State system of protection arena, which could resort to arbitration notwithstanding the absence of a prior arbitration agreement. Among these devices are: national investment protection laws, BITs, and the North American Free Trade Agreement (NAFTA).\(^\text{14}\)

2. Jurisdictional Requirements of an ICSID Claim

\(^\text{11}\) Actually, the main goal was, and still is, to facilitate investment flows with a view to economic development. See Ibironke T. Odumosu, The Antinomies of the (continued) Relevance of ICSID to the Third World, 8 San Diego Int’l L.J. 345, 359 (2007). This position was further expanded in the case Amco Asia Corp v. Indonesia, “where the [ICSID] Tribunal cited the ICSID’s Convention’s preamble with approval and went on to argue that protecting investments amounts to the protection of the general interest of development and developing countries.” Id citing Amco v. Indonesia, 23 I.L.M. 351, 369; 1 ICSID Rep. 413.

\(^\text{12}\) Under §1201, Chapter 11 of the North America Free Trade Agreement, which entered into effect in 1994 (by Canada, The United States, and Mexico) an investor from one of these countries may elect to sue a host country either under the UNCITRAL rules, or under the ICSID Additional Facility Rules. However, a condition precedent to select the latter path is that the investor, or the country where the investment has been made, must be a member of the Washington Convention; and, as of November 4, 2007 only The United States had ratified the Convention (Canada, for instance, signed the Convention in 2006, but has not ratified it, and consequently, it has not entered into force in that country).

Another interesting aspect about the procedural framework of NAFTA arbitration to comment is that the only parties entitled to bring a claim and assert jurisdiction under NAFTA, are investors from a State party. And, the term ‘investment’ has been broadly defined by §1139 of NAFTA, thereby widening the jurisdictional reach of a NAFTA claim. For further and more detailed analysis on the subject, please see, Lucy Reed, Jan Paulsson, and Nigel Blackaby, Guide to ICSID Arbitration, p.66. Published by Kluwer Law International (2004). Similarly, a panel of arbitrators, headed by Mr. Bernardo Cremades, established in Bayview Irrigation District v. Mexico (2007), that “In order to determine whether the claims fall within Articles 1115 and 1116 it is therefore necessary to determine whether the Claimants are ‘investors’, and whether their claims are within the scope and coverage of Chapter 11.” Available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC653_En&caseId=C246 (last visited on November 16, 2008).
Prior to bring a claim [on the merits] before the ICSID, certain jurisdictional criteria must be met: (i) the investor bringing the claim must be a national of a State member of the Washington Convention [jurisdiction *ratione personae*]; (ii) similarly, the investment must have been made in a Contracting State of the Washington Convention [also jurisdiction *ratione personae*]; (iii) the dispute must be a legal dispute arising directly out of an investment, in the terms established by caseload of the ICSID Tribunals readily available [jurisdiction *ratione materiae*]; and (iv) perhaps must importantly, express ‘consent’ to arbitrate must be given in writing by both parties.15

The first two criteria are self-explanatory;16 however, it is important to remark that the nationality – membership requirement have the exception of cases arising under the Additional Facility Rules. For instance, in disputes arising under the NAFTA, the only cases that can be decided by an ICSID Tribunal are those involving a party related to the United States. This would be the case of a claim filed by U.S. investors against Canada or Mexico; and the case of a claim filed by Canadian and/or Mexican investors against the U.S. as well. Another interesting discussion in this topic, which has been particularly relevant in Latin America, is the so-called practice of ‘treaty shopping,’ and corporate engineering.17

Likewise, the third criterion poses the difficulty of the definition of the term ‘investment.’18 However, there is sufficient precedent set by ICSID awards that set the grounds to define this term.19 For instance, in contractual claims ‘tribunals have found ‘disputes arising directly out of an investment’ to include disputes over capital contributions and other equity investments in companies and joint ventures, as well as non-equity direct investments via service contracts, transfer of technology, natural resource concession agreements, and projects for the

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16 However, it should be noted that for purposes of determining the nationality of a juridical person the Convention introduces the concept of ‘foreign control.’ §25(b)(2) of the Convention establishes that National of Another Contracting State means, “any juridical person which had the nationality of a Contracting State other than the State party […] and any juridical person which had the nationality of the Contracting State party to the dispute […]and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

17 These terms refer to a practice common in the field, where sophisticated attorneys seek to structure deals by using different corporate forms, with the intention to extend to investors the protection of a third country BIT, when their own home country does not have one protecting their investment. In Agus del Tunari v. Bolivia, ICSID Case N.ARB/02/3, Decision on Respondent’s Objections to Jurisdiction (2005), an ICSID Tribunal found that national routing was a valid and legitimate exercise of the Corporation that changed its ownership structure, in order to be able to claim jurisdiction under the Bolivia-Netherlands BIT. Id. However, Kalicki notes that such a practice is now being taken care of by recent developments in BIT drafting, in which “Contracting States include a provision allowing a party to deny the benefits of the agreement to investors that have no ‘substantial business activities’ in their putative home country. See See Jean Kalicki, and Suzana Medeiros, Id., at 82.

18 Regarding the meaning of the phrase “legal dispute” in contractual investment disputes Reed, Paulsson & Blackaby held that “ICSID Tribunals have generally used the phrase to refer either to disputes regarding the existence or scope of a legal right or obligation, or to disputes regarding the nature or extent of the reparation to be made for the breach of a legal obligation.” See, Lucy Reed, Jan Paulsson, and Nigel Blackaby, Guide to ICSID Arbitration, p.15. Published by Kluwer Law International (2004). A classical example of this would be an expropriation of FDI made without just compensation, or a denial to honor payments of promissory notes (bonds).

19 For instance, see Autopista Concesionaria de Venezuela v. Venezuela, ICSID Case No.ARB/00/5, Decision on Jurisdiction (2001). And, Mihaly International v. Sri Lanka, ICSID Case No.ARB/00/2, Award (2002).
construction and operation of production and service facilities in the host State;” 20 meanwhile in non-contractual claims the tribunals have traditionally applied an even broader definition of ‘investment,’ to cover “the laying out of money or property in business ventures, so that it may produce a revenue or income.” 21

Finally, the last criterion, the consent, as seen above, is deemed to be fundamental for the assertion of the Jurisdiction of ICSID. Consent is “the explicit expression of both parties; acceptance of ICSID arbitration.” 22 According to §25 of the Convention, the consent must be given in written format. The investor normally expresses his consent to arbitrate disputes under a particular investment by submitting it to the Centre along with his request for arbitration, in accordance with §36(2) of the Convention. On the other hand, even though States may also do this, expressing thereby their consent on a case-by-case basis, they normally give their anticipated consent through BITs and Investment Protection Laws.

Moreover, the importance of consent was underlined on the famous Report of the Executive Directors of the World Bank on the ICSID Convention, prepared in 1965 at the origins of the Centre. They referred to consent of the parties as being ‘the cornerstone of the Jurisdiction of the Centre.’ 23 Similarly, in relation to consent the Directors stated in this document that consent must exist prior to a request for arbitration or a request for conciliation; and (2) some of the forms of consent permitted to satisfy the requirements of §25(1) are: (i) a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement; (ii) a compromis regarding a dispute which has already arisen; (iii) a provision in the host State’s investment promotion legislation offering to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, which would still require the investor’s acceptance in writing. 24 The great academic discussion in this field arises out from the third form of consent; specifically from the BITs, which once in force could be considered part of the country’s internal legislation. 25

A parallel classification of the form of consent permitted is based on the source of the consent: whether contractual or not. Sometimes investors and States enter into ‘investment

20 See Lucy Reed, Jan Paulsson, and Nigel Blackaby, supra at 22.
21 Id. Lucy Reed, Jan Paulsson, and Nigel Blackaby citing Fedax v. Venezuela, ICSID Case No.ARB/96/3, Decision on Objections to Jurisdiction (1997). (In this case the ICSID Tribunal held that the issuance of bonds/promissory notes by Venezuela, and the subsequent acquisition of them in the secondary markets by a Netherlands investor, constituted an investment in the territory under the Netherlands-Venezuela BIT).
22 Id. at 22, 38. Moreover, in a recent article, an author has argued that investment contracts are more convenient than BITs for the International business Community, because with these contracts developing countries may provide investors with credible commitments, and at the same time they would be able to bargain for a suitable special treatment. See Jason Webb Yackee, Do we really need BITs? Toward a Return to Contract International Investment Law, 3 Asian J. WTO Int’l Health L.& Pol’y 121 (2008).
25 In fact, this would depend in whether the particular country adopts a Monistic or a Dualistic theory of International Law. The former refers to countries that assume International law and their municipal law as a unity equally applicable. While the latter refers to countries that highlights the differentiation between domestic and International law, and require the conversion of International law into domestic laws, through the enactment of internal laws. See generally Christopher C. Joyner, International Law in the 21st Century: Rules for Global Governance, Published by Rowman & Littlefield, (2005).
contracts,’ including there an arbitration clause, which grants jurisdiction to the Centre.\textsuperscript{26} Conversely, in the vast majority of the cases, the States, running the race for foreign capital, have consented in advance to the ICSID Jurisdiction, by including an arbitration clause in BITs or Multilateral Investment Treaties (“MITs”) entered with other nations,\textsuperscript{27} or even by including the sovereign’s consent to arbitration in foreign investment legislation. As explained in this section, the latter would constitute cases of arbitration without privity.

3. Why Countries entered into BITs?

A BIT is an agreement entered into by two nations with the purpose of stimulating the investment and trade between both nations, by offering a framework of protections available to investors. Usually, the process of entering into a BIT makes sense when there is a prospect that the commercial relations among one State (a capital-importer State) and the nationals of the other State (capital-exporter) may improve.\textsuperscript{28}

In part, this assertion may explain why the vast majority of the BITs bear a similar structure. According to one author, most BITs “mimic” two unsuccessful attempts to uniform the International Community approach to FDI, \textit{i.e.}, the 1959 \textit{Abs-Shawcross Convention}, and the 1967 \textit{OECD Draft Convention on the Protection of Foreign Property}.\textsuperscript{29} The structure of a typical BIT is formed by a set of substantive protections that States offer to investors; also, by a clause granting jurisdiction to foreign tribunals to solve the claims that may arise under the treaty (whether considered to be consent, or a mere unilateral offer to consent).\textsuperscript{30} The substantive protections usually contained in BITs are: (i) fair and equitable treatment; (ii) nondiscriminatory treatment; (iii) non-arbitrary or unreasonable treatment; (iv) full protection and security treatment; (v) treatment as favorable as that provided to national investors; (vi) ability to repatriate proceeds of the investment to home country; (vii) no expropriation without compensation; and (viii) the host country will honour its contractual and other legal obligations owed to the foreign investor (\textit{a.k.a.}, the umbrella clause).\textsuperscript{31}

\textsuperscript{26} Moreover, the Centre provides a comprehensive list of model clauses on its webpage. See: http://icsid.worldbank.org/ICSID/StaticFiles/model-clauses-en/main-eng.htm (last visited on November 17, 2008).

\textsuperscript{27} For instance, §24 of the U.S. Model BIT clause grants jurisdiction (though not exclusive) to the ICSID. To see the entire text of the U.S. Model BIT please visit: http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited on November 17, 2008).

\textsuperscript{28} In fact, Professor Guzman explains the BIT explosion by inferring that the confidence that investors felt that their investments will not be opportunistically expropriated by the host State, was caused by the fact that BITs “allow potential investors to negotiate for whatever protections and safeguard they feel are needed. In other words, BITs provide the investors with protections that are superior, in all forms of investor-host conflicts, to those of customary international law.” See, Andrew T. Guzman, \textit{Id.} at 644.


\textsuperscript{30} Perhaps this fact explains why the drafters of ICSID Rules devised a scheme of proceedings that are often bifurcated into separate phases to address the merits and the jurisdiction.

What we witnessed during the 90’s was an explosion of LDCs, in particular Latin American countries, embracing the Washington Convention, entering into hundreds of BITs, and also modifying their foreign investment legislation; similarly, we also witnessed an explosion of claims against Latin American countries before this forum. When the spark started the BITs became “the preferred method of governing the relationship between foreign investors and host governments in developing countries.”

Professors Elkins, Guzman, and Simmons provide interesting and detailed data about the advent and spread of BITs. They hold that competition among similarly situated countries explain, both theoretically and empirically, the spread of the BITs. They also found empirical basis for the assertion that the most important drivers of the spread of BITs are also factors that heavily impacts investment decisions. For instance, they found that BITs are more valuable where political risk is endemic.

For these reasons, in order to attract capital, Latin American countries in the 90’s needed to entered into these treaties, or modified their internal legislation, waiving part of their immunity, by agreeing beforehand to the jurisdiction of a third party; in most cases, the ICSID. With this system of protection, investors sought to effectively de-politicize investments disputes. Indeed, they would be able to mitigate political risks, normally associated to the functioning of business in Latin America, by removing these disputes from the internal (and sometimes corrupted) judiciaries, and from customary diplomatic channels, submitting them to this new form of direct arbitration.

4. The No-de-Tokyo

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32 See Annex A.
33 Id.
36 Id. at 640
37 Id.
38 Id.
39 In his article Professor Guzman criticizes the way LDCs massively entered into BITs. In his conclusions he states that “Although BITs improve the efficiency of foreign investment, they may not increase the welfare of developing countries. BITs give an individual country the ability to make credible promises to potential foreign investors. As a result, the country is more attractive to foreign investors and will receive a larger volume of investment than it would without the ability to make such promises. The increase in investment, however, is likely to come in large part at the expense of other developing countries. Developing countries as a group, therefore, will enjoy gains from an increase in total investment that is relatively modest. It is probable that this gain will be outweighed by the loss those countries will suffer as they bid against one another to attract investment.” (bolds added) See, Andrew T. Guzman, Id. at 688.
41 See Jean Kalicki, and Suzana Medeiros, Investment arbitration in Brazil: revisiting Brazil’s traditional reluctance towards ICSID, BITs, and investor-state arbitration, p.58 et seq. Revista de Arbitragem e Mediacao. Ano 4-14. Published by Editora Revista Dos Tribunas (July-Spetember 2007).
The ICSID Convention was not initially adopted by Latin American Nations. In fact, when the Convention was first discussed in different regional meetings of the World Bank, the Latin American countries, in bloc, opposed to the idea of establishing a specialized forum for governments and foreign investors. Professor Lowenfeld (along with other scholars) called this posture of Latin American countries to the Convention as a “No-de-Tokyo.” Probably, this could have been caused by a misunderstanding of the Latin American Nations who never considered that the Convention, as explained above, contained no substantive obligations, but merely an opportunity to submit in advance (or after a dispute has arisen) to international dispute settlement between an investor and a host state. If no further consent (either contractually or not) was given, it is impossible that a State may be subjected to ICSID’s Jurisdiction.

Furthermore, back in 1971 Professor Paul Szasz, a former Secretary General of the ICSID, identified the main reasons why Latin American countries had not adhered to the Convention by then. First, Professor Szasz recognized that not all governments were uniformly eager to attract FDI. Second, Latin American countries feared that by adopting the Convention they would be undermining the well-established principle of international law of non-intervention. Third, by allowing only ‘foreign’ investors (as opposed to nationals) to arbitrate their disputes against host States, they were breaching the also well-established principle of international law about equal treatment of foreigners and nationals. Fourth, the Latin American

42 These regional meetings took place in Ethiopia, Chile, Switzerland, and Thailand.
44 In fact, according to Professor Lowenfeld, “when the report of the regional meetings on the proposed [ICSID] convention came before the Board of Governors of the World Bank (i.e., the full membership), at the Annual Meeting of the Bank in Tokyo in 1964, all Latin American States voted ‘no’ – the first time in the Bank’s history that a final resolution had met with substantial opposition on a final vote.” See Andreas F. Lowenfeld, International Economic Law, p. 541. Published by Oxford University Press, 2d edition (2008).
46 See Paul C. Szasz supra at 260.
47 Id. at 260. Professor Szaz remarked that “Whether such reluctance is based on a general anti-capitalist, or on a suspicion or fear of any foreign penetration, or merely on unfortunate experiences with particular foreign investors, it is enough to say that such a reaction by its nature cannot be refuted in relation to the Convention. That instrument assumes that private international investment plays a significant role in international cooperation for economic development [as stated in the first paragraph of the Preamble of the Convention].” (bolds added)
48 Id. at 261. The second and the third reasons identified by Szaz are extremely related with the Calvo Doctrine. This doctrine establishes that jurisdiction in cases arising out from foreign investment in a country falls in the country, providing that foreigners may not be given a different treatment than the one given to nationals. See Carlos Calvo, Derecho internacional teórico y práctico de Europa y América, 191 (Durand & Pedone-Lauriel eds., 1st ed. 1868). Initially this doctrine was created as a legal answer of the Latin American Nations to insulate themselves from pressure and attacks of foreign countries on behalf of foreign investors.

However, several decades later this doctrine was revitalized in the context of an international effort to protect foreign investment. According to a recent paper in the subject: “for investors in Latin America, the possibility of direct arbitration against a government represented a significant change from the Calvo Doctrine, according to which a government’s liability toward foreigners can be no greater than that owed to nationals. As a result, disputes between foreigners and a host country could only be decided by the country’s own legal system.” See William Burke-White & Andreas Von Staden, Investment Protection in Extraordinary Times, 48 Va. J. Int’l L. 307, 310 (2008).
49 Id. at 261. The same comments made on footnote 15 apply here.
countries rejected the argument that their domestic courts were not ideal (in terms of efficiency and fairness) fora to try these claims.\textsuperscript{50} Last, Latin American countries were suspicious of arbitral proceedings, as opposed to judicial proceedings, primarily because of the “past association with foreign intervention, of arbitration and a private person.”\textsuperscript{51}

Meanwhile, FDI was not left unprotected in Latin America. Investors and Nations bargained for tailored solutions in order to limit the exposure of the former to political risks. The result of these contractual solutions was the ‘internationalization’ of investment contracts\textsuperscript{52} by systematically including in these contracts sophisticated arbitration, choice-of-law, and stabilization clauses.\textsuperscript{53}

5. \textit{Gradual Acceptance}\textsuperscript{54}

A few decades after the birth of the Convention the Latin American countries modified their approach to it and, gradually, decided to embrace it. In the 1980’s the first Latin American countries to join the Convention were Ecuador, Honduras, and El Salvador. In the 1990’s the rest of the Latin American countries, with the exceptions of Mexico and Brazil, joined the Convention.\textsuperscript{55}

Along with this significant adoption of the Convention, in the 90’s several Latin American States modified their internal legislation, and/or entered into numerous Bilateral Investment Treaties.\textsuperscript{56} This completed the required consent (as explained above) in several cases, bringing to the ICSID an unprecedented number of claims. For instance, as of 2007, 15 percent of the concluded matters concerned claims against Latin American States.\textsuperscript{57} As of the present, 52 percent\textsuperscript{58} of the pending matters at the ICSID involve Latin American States.\textsuperscript{59} For this reasons, one could argue that the booming of ICSID in Latin America in the 90’s, preceded by the so-

\begin{itemize}
\item[\textsuperscript{50}] Id. at 262.
\item[\textsuperscript{51}] Id. at 263.
\item[\textsuperscript{53}] It shall be noted that the theory of internationalization of investment contracts also presented some difficulty at its early stages, especially given the fact there was no body of laws governing a relationship in which one of the parties was not subject to International law. However, the adoption of the Restrictive Theory of Sovereign Immunity by the American legal system, favored the trend of Internationalizing Investment Contracts. See M. Sornarajah, Id. at 80. This legal phenomenon began with the famous Tate letter, See 26 Dep’t of State Bull., 984 (1952), which was later codified in 1976 in the Foreign Sovereign Immunities Act, 28 U.S.C. §1602-1611, 28 U.S.C. §330. For a marvelous explanation about the absolute and restrictive theories of sovereign immunity see Pedro Martinez-Fraga, \textit{The New Role of Comity in Private Procedural International Law}, p.164 et seq. Published by Thomson (2007).
\item[\textsuperscript{54}] Title taken from Andreas F. Lowenfeld, \textit{Investment Agreements and International Law}, at 121.
\item[\textsuperscript{55}] See Appendix #1.
\item[\textsuperscript{56}] Currently there are 327 BITs in force in the region, excluding Mexico. See Appendix #1.
\item[\textsuperscript{57}] See, Jean Kalicki, \textit{ICSID Arbitration in the Americas}, Arbitration Rev. of the Am., 5 (2007).
\item[\textsuperscript{58}] This number excludes the four claims pending against Mexico, under the Additional Facility Rules. Otherwise, the percentage would rise up to 55 percent.
\item[\textsuperscript{59}] Computation made with numbers provide by ICSID on: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (last visited on November 17, 2008).
\end{itemize}
called “No-de-Tokyo,” could have made the ICSID, and the investor-State system of protection in general, earn the cognomen of “sleeping beauty.”

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

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

The problem with this statement is found in its ideological component. In other words, if it can be shown that the investment flows had grown; there must also be the conviction that the investment agreements caused such inflows. This would be the only way that a country may be willing to offset the costs of large ICSID awards. Otherwise, if the credible commitments toward foreign investment (BITs, MITs and Investment Protection Laws granting Jurisdiction to ICSID) have not attracted significant investment to the host country, why would such country continue to assume those costs?

III. ICSID and Latin America: From Sweet to Sour...

1. General overview of the growing resistance

Along with the strong supporters of ICSID and the investor-State system of protection, there is also a growing number of detractors and criticism. While some of the critiques seem to have more scientific grounds, others seem to carry an ideological component with it.

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60 According to Professor Norbert Horn, “the ICSID regime has been referred as the ‘sleeping beauty’ of investment arbitration, as in its early years only one or two cases were filed annually” [in fact, during the first six years of ICSID no case was filed], while now two or three cases are filed monthly. See Norbert Horn and Stefan Kröll, Arbitrating Foreign Investment Disputes, p. 269. Published by Kluwer Law International, 2004.


62 For instance, the United Nations Conference on Trade and Development (UNCTAD) conducted a study about BITs entered by LDCs with developed nations in the 90’s to conclude that BITs played a secondary an minor role in attracting foreign investment. See UNCTAD, Bilateral Investment Treaties in the Mid-1990s, at 8, 177, U.N. Sales No. E.98.II.D.8 (1998). In another study, a World Bank economist found that BITs ‘act more complements than as substitutes for good institutional quality and local property rights. See Mary Hallward-Driemeier, Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a BIT… and They Could Bite, World Bank Policy Research Working Paper No. 3121 (2003). Available at SSRN: http://ssrn.com/abstract=636541. However, in a more recent study, Salacuse and Sullivan conducted their own study, and reviewed both of these research studies, to conclude in the opposite direction, by stating that “BITs have a particularly strong effect on encouraging FDI in developing countries. In short, the grand bargain between developing and developed countries that underlies BITs, the bargain of investment promotion in return for investment protection, seems to have been achieved, although the effect of the bargain is only realized slowly after the BIT is signed.” See Jeswald W. Salacuse and Nicholas P. Sullivan, Do BITs really work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain, 46 Harv. Int'l L.J. 67, 111 (2005).
BITs and the investor-State system of protection pertains to a flow of capital from capital-exporters countries to capital-importers-countries, it is possible to measure whether these efforts have succeeded in bringing wealth into a particular country in a specific period of time.

Although in this article I do not pretend to draw my own conclusions on whether BITs and the investor-State system of protection have succeeded in each particular country of the Region, I do analyze in this section how different Latin American countries have recently reacted to the system. With no doubts the sweet approach to the system has disappeared in the Region. The relationship between ICSID and Latin America went back from sweet to sour.

On April 29, 2007, the Presidents of Bolivia, Venezuela, Cuba, and Nicaragua held in Caracas the V Summit of the Bolivarian Alternative for the People of Our America (a.k.a., ALBA), which is an alternative agreement from these countries in bloc, to the investor-State system of protection encompassing the different BITs and MITs. At this meeting Presidents Morales and Chavez announced that the four countries in conjunction will withdraw from the ICSID and denounce all the BITs in force. Consequently, on May 11, 2008, Ecuador’s President Rafael Correa publicly stated that he “had no confidence in the World Bank arbitration branch [i.e., ICSID] that is hearing U.S. oil company Occidental’s lawsuit against Ecuador.” He also explained that “Ecuador handed over its sovereignty when it signed international accords binding it to the bank’s ICSID.”

These announcements have echoed some of the strongest criticism to the investor-State system of protection. Nonetheless, they can also be explained by the recent wave of nationalizations and expropriations of FDC undertaken in the region, which, in most cases, bears an ideological explanation. Most of the arguments brought by the Latin American governments against the ICSID and the investor-state system of protection are focused in the following

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63 See Ibironke T. Odumosu, The Antinomies of the (Continued) Relevante of ICSID to the Third World, 8 San Diego Int’l J. 345 (2007) (arguing that ICSID is a Neo-liberal investment protection mechanism, and that its origins are routed to the interests of TNCs in Third World countries).
64 See Venezuelan Presidential Press Release, Paises del Alba y TCP denuncian Convención del CIADI April 27, 2007. Available at: http://www.mci.gob.ve/noticias_-_prensa/28/13558/paises_del_alba.html (last visited on November 18, 2008). However, please note that even when the announcement did not make any distinctions about a potential withdrawal of Cuba from the ICSID Convention, this is an absurd, since Cuba has never been a Contracting State of the Convention.
66 Id.
67 Id. For instance, on May Day, 2007, when President Chavez announced the expropriation of the private participation in the four major heavy crude oil upgraders, located in the Orinoco Oil Belt, he justified his decision by saying that “We can’t have socialism if the state doesn’t have control over its resources!” See Tim Padgett, Chavez’s Not-So-Radical Oil Move, Time Magazine, May 1, 2007, online version. Available at: http://www.time.com/time/world/article/0,8599,1616644,00.html (last visited on November 19, 2008). However, in many other occasions President Chavez, and his closest advisors have indicated that expropriations and de-privatizations are an essential part of his plan of taking Venezuela towards the Socialism. In his view FDI represents the interest of the Imperialism, and strengthens the Capitalism. See Bolivarian News Agency, Expropiación de empresas está sujeta al compromiso social, March 22, 2007. Available at: http://www.aporrea.org/ideologia/n92267.html (last visited on November 19, 2008) (Former member of Chavez Cabinet explaining that companies reluctant to embrace the Socialism of the XXI Century would be expropriated).
reasons: 

(i) ICSID awards are not subject to appeal; 
(ii) the fact that a vast majority of ICSID awards have been decided in favor of the private investors shows that the system lacks neutrality and impartiality; 
(iii) only private companies may sue at this forum; 
(iv) the cost to litigate these claims is very high.

The fact that these arguments may have a counterargument and a clear-cut explanation supports the presumption that these announcements are not driven by scientific or statistical data, but by ideology. In other words, by a personal conviction that FDI, even if fosters development and prosperity, is wrong, and promote Imperialism. If this presumption proves to be true, it would be very hard, if not impossible, to predict what would be the future of ICSID in the Region.

IV. Case Study: Bolivia, Ecuador & Venezuela

1. Bolivia’s formal withdrawal from ICSID: the end of a relationship

On May 2, 2007 Bolivia formally notified the ICSID Secretariat of its formal from the Centre and the Washington Convention. This raised a series of legal issues. At the core of the legal discussion of Bolivia’s withdrawal and its consequences, there is an underlying discussion about the reach of consent on ICSID claims. Even when the arguments may turn out to be highly scholastic, the potential implications of adopting one posture over the others may be translated in entirely procedural results in the future.

- Background

68 These reasons are enumerated in the World Bank press release (in Spanish) announcing Bolivia’s exit to ICSID. See The World Bank, Bolivia se va del CIADI, November 3, 2007. Available at: http://go.worldbank.org/2L60II0X80 (last visited on November 19, 2008).

69 Even though it is technically true that ICSID awards are not subject to appeal , the Washington Conventions provide grounds for the interpretation (§50), revision (§51), and annulment of the award (§52). An award may not be amended through annulment. Annulment would erase the award entirely, thereby providing the parties with a chance to re-instat the claim. However, the annulment system is designed to safeguard the integrity and not the outcome of the award. See Lucy Reed, Jan Paulsson, and Nigel Blackaby, Guide to ICSID Arbitration, p.99. Published by Kluwer Law International (2004)

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

71 The rationale of this argument is that given that prior consent is critical, and that in many cases, once a dispute has arisen, an investor is entitle to sue in ICSID due to the existence of a previous unilateral offer to consent to arbitration by the State (e.g., a BIT); but the converse would not be true, because once a dispute arises, if the State is seeking to sue the investor, it would be impossible to obtain its consent to arbitrate. However, this argument may be underestimating the bargaining power of the country, even when the dispute has arisen.

Although §36 technically entitles a country to initiate an arbitration against a foreign investor, The only case in which a government might sue an investor under the Washington Convention, would be a case in which it contracted directly with the investor. This is what happened in Tanzania Electric Supply v. Independent Power Tanzania, Ltd, ICSID Case No. ARB/98/8, Award, July 12, 2001 (the award was published on ICSID’s website). Presumably this was also the case in Government of the Province of East Kalimantan v. PT Kaltim Prima Coal, ICSID Case No. ARB/07/3, because notwithstanding there is little information publicly available about this case, one may infer from the fact that both parties are related to Indonesia (in fact, East Kalimantan is an Indonesian Province), that the basis of ICSID jurisdiction was also an investment agreement with an explicit arbitration clause granting jurisdiction to the Centre. No other case has ever been started by a country.

72 Title taken from a World Bank press release. See supra footnote 73.
Bolivia’s decision to withdraw from ICSID came at the midst of a drastic change in the hydrocarbons sector undertaken by the Bolivian government. Joining the trend of other Latin American Nations, President Jaime Paz Zamora (who served from 1989 to 1993), implemented in Bolivia a major legal reform in order to attract FDI. During Paz Zamora’s presidency the Legislature enacted the first Investment and Privatization Acts, and the country became a member of the Multilateral Investment Agency (MIGA), the overseas Private Investment Corporation (OPIC), and ICSID. Also, about thirty percent of the country’s BITs were signed during Paz Zamora’s presidency.

In 1994 President Sánchez de Lozada (Paz Zamora’s successor), who remembered well the hyper-inflation experienced in the country in the 80’s, privatized several state-owned companies, including five of the largest companies in the country (through the Capitalization Act of 1994). Due to Bolivia’s vast reserves of non-associated natural gas, the most important of these privatizations related to the natural gas industry. The 1996 modification of the Hydrocarbons Law was essential to the privatization of the hydrocarbons industry. Among other controversial provisions, the new law established royalties for up to 18 percent of the gas production. On the other hand, new contracts for the exploration and exploitation of non-associated gas were negotiated and entered into by the Bolivian government and private foreign investors, by-passing the Constitutional mandate of legislative approval. For the same reason these contracts would be invalidated some years later. However, it is important to highlight that during the 90’s, in overall, FDI boomed in Bolivia.

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73 In a speech given by Jorge Quiroga, Minister of Finance of Paz Zamora’s government (and later President of Bolivia), given at the Woodrow Wilson Center for Scholars in Washington D.C. on July 15, 1992 (a copy of the speech may be found on the archives of Richter Library at the University of Miami), said: “the Bolivian government wants the private sector to be perfectly aligned with the productive sector –hydrocarbons, mining, and services. That is a three-stage process. The government is selling all the productive enterprises, although there are more than sixty, such as ceramic, textiles, and small airlines. Joint ventures in hydrocarbons and mining are also being undertaken because, due to constitutional restrictions, the government cannot sell them. We are also moving into services, but regulatory framework must first be developed. Federal regulatory agencies, which we do not have, are good in certain instances. The government does not want to transform public monopolies into private monopolies overnight, as has happened in other countries in Latin America. Subsidized credit has been eliminated in Bolivia. This will allow for an increase flow of resources from the private sector. If the government sends a signal to the private investors – ‘This is your area, it is open to you, we will provide an Investment Law and the necessary regulatory framework, so come [to] invest’—then I think the private sector will react.” Id. (bolds added)


75 For a complete chronological list of BITs ratified by Bolivia, see Appendix #3.


77 See Julius Spatz, Poverty and Inequality in the Era of Structural Reforms, p.11.

78 See Appendix #2.
In his first term, Sánchez de Lozada was followed by a former dictator and retired General, Hugo Banzer. President Banzer continued the trend of privatization and ‘modernization,’ and put a special emphasis on the eradication of coca plantations, until he had to resign due to a serious medical condition. His Vice-President, Jorge Quiroga, took office and concluded the term a year later. Then, Sánchez de Lozada served a second term, in which he heavily raised taxes, after the adoption of an IMF program, and faced the turmoil of the so-called ‘gas war.’ The riots of the gas-war were a consequence of a plan to build a pipeline to pump gas to the Chilean coasts to be exported to Mexico and the United States. This turned out to be a terrible idea due to a historical rivalry with Chile. After fifteen days of riots President Sánchez de Lozada resigned, and his Vice-President Carlos Mesa assumed office. In 2004 President Mesa called for a National Referendum on a new Hydrocarbons Law, which was voted in his favor. The new law proposed a raise in the taxes associated to production, and increased the percentage of State participation in the hydrocarbons activities, including the production of gas and oil. Nonetheless, it did not receive the general approval of both the population and the investors. Few days later, President Mesa resigned, and the Bolivia’s Chief Justice, Mr. Eduardo Rodriguez, assumed office for a six month period, until the leftist leader Evo Morales was elected on a general election.

In his inaugural speech Morales explicitly stated “it is true that Bolivia needs partners, not owners of our natural resources [...] We’ll guarantee the foreign companies the right to recover what they invested, and also the right to have some profit; but, we just want that the people get to benefit from these resources.” In this sense, one of the first measures taken by President Morales’ government was to issue decree 28701 which nationalized the entire hydrocarbon industry. The following day, May 2, 2006, President Morales militarized the oil & gas field to ensure the enforcement of the decree. Exactly a year later, Bolivia formally notified the ICSID Secretariat the denunciation of the Washington Convention.

**Bolivia Membership Status**

Given that Bolivia’s withdrawal was formally communicated to the ICSID’s Secretariat on May 2, 2007, in accordance to §72 6-month rule, the last day in which Bolivia was effectively considered a Contracting State of the Washington Convention was November 2, 2007. Therefore, it was perfectly understandable why the ICSID Secretariat registered the case E.T.I.

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80 Id.
81 In 1883 Bolivia lost its coastline to Chile in the War of the Pacific.
82 Id. at 32, 36.
85 An author has noted that “Morales deployed soldiers to Bolivia’s petroleum fields on the same day the Decree was issued, drawing international attention and prompting statements of concern from Bolivia’s largest investors, Brazil and Spain. Although these investors renewed and strengthened their threats to take Bolivia to international arbitration, none followed through: all ultimately signed new contracts within the timeframe specified by Decree 28701 and remain operating in Bolivia today” See Lindsay Sykes Pinto, Resolving the Bolivian Gas Crisis: Lessons from Bolivia’s Brush with International Arbitration, at 955.
Euro Telecom International N.V. v. Republic of Bolivia, 86 on Wednesday October 31, 2007. I am of the opinion that by registering this case the ICSID did not take any posture on the following discussion about consent, since at that date, Bolivia was still technically a member State of the Washington Convention.

There are grounds to believe that by registering this case the ICSID did not take any posture on the following discussion about consent, since at that date, Bolivia was still technically a member State of the Washington Convention. However, the authors Tietje, Nowrot, and Wackernagel, believe otherwise. The ICSID Secretariat, by registering the case, found that the case was not ‘manifestly outside the jurisdiction of the Centre,’ in the sense established by §36(3) of the Convention. 87 According to these authors, by doing this the ICSID Secretariat adopted a position contrary to the potential argument that Bolivia was not subject to the Centre’s jurisdiction since the date of the notification of denunciation (May 2, 2007), and not six months later, as established in §72. 88

- From ‘Offer to Consent’ to [just] ‘Consent’

The effects of a Bolivia’s denunciation of the Washington Convention raise the topic of the interplay between §25(1), §72 and, §71 of the Convention. The first two articles contain references to the consent of the parties, while the third section relates to right to denunciation. However, none of them explicitly defines what constitutes such consent. As part of the Chapter II of the Convention, regarding the jurisdiction of the Centre, §25(1) establishes that:

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

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

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

And, §72 of the same section establish that:

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87 §36(3) of the Washington Convention establishes that “The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.”
88 See Christian Tietje, Karsten Nowrot, and Clemens Wackernagel, Once and Forever? The Legal Effects of a Denunciation of ICSID, p. 12. ISSN1612-1368. Published by the Institute of Economic Law of the Martin Luther University Halle-Wittenberg School of Law. Available at: www.wirtschaftsrecht.uni-halle.de/Heft74.pdf (last visited on November 23, 2008)
Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

Then, the critical question is whether the effects of the protection contained in §71 may be extended due to the mandate of §25(1), even after the denunciation of the Washington Convention under §72. Any analysis in this area must pay special attention to the different sources of consent, whether contractually (through an investment agreement), or non-contractually (through Investment Protection Laws, BITs, or MITs). For instance, if a BIT is found to constitute consent, in the meaning of §25(1), the denunciation of the Convention as per §72, may not affect the ability of investors national of the other contracting country of the BIT, to hail the host country before the ICSID, during the existence of such consent, which is equivalent to say, ‘during the validity of the BIT.’

The most controversial issue here is the legal nature of the arbitration clause contained in most BITs. In this particular issue there are some encountered points of view. While some scholars believe that at most, a BIT contains a unilateral offer to consent to the jurisdiction of the Centre, which must be ‘perfected’ by a further acceptance by the investor; others believe that a BIT pledges the consent of the country to submit to the jurisdiction of the Centre during the validity of such instrument. The potential applicability of any of these views in Bolivia is clear: the supporters of the offer to consent theory believe that no other case could be filed by or against Bolivia before the ICSID, after November 2, 2007; while the detractors believe otherwise.89

- Offer to consent

Professor Christoph Schreuer is of the opinion that “a provision on consent in a BIT is merely an offer by the respective States that requires acceptance by the other party […] [which], may be accepted by a national of the other State party to the BIT.”90 In this sense, “consent is only perfected after it has been accepted by both parties. Therefore, a unilateral offer of consent by the host State through legislation or a treaty before a notice under Arts. 70 or 71 would not suffice.”91

This line of reasoning implies that the only way an investor may sue the host State before ICSID after denunciation, is by having given notice in writing of his consent, as required by §25(1), and thus perfecting the consent. Under this theory, the investor must always “perform

89 Given that Bolivia’s withdrawal was formally communicated to the ICSID’s Secretariat on May 2, 2007, in accordance to §72 6-month rule, the last day in which Bolivia was effectively considered a Contracting State of the Washington Convention was this date, November 2, 2007. Therefore, it was perfectly understandable why the ICSID Secretariat registered the case E.T.I. Euro Telecom International N.V. v. Republic of Bolivia, ICSID Case No. ARB/07/28, on Wednesday October 31, 2007. I am of the opinion that by registering this case the ICSID did not take any posture on the following discussion about consent, since Bolivia was still technically a member State of the Washington Convention, at that date. [However, the authors of a magnificent study on the subject, which is discussed below, believe otherwise. See Christian Tietje, Karsten Nowrot, and Clemens Wackernagel, Once and Forever? The Legal Effects of a Denunciation of ICSID, p. 12. ISSN1612-1368. Published by the Institute of Economic Law of the Martin Luther University Halle-Wittenberg School of Law. Available at: www.wirtschaftsrecht.uni-halle.de/Heft74.pdf (last visited on November 23, 2008)].
91 Id. at 1286.
Consequently, if the country has withdrawn its unilateral offer to consent prior to the perfection of such consent, the investor will no longer be able to sue before ICSID. The consequences of his position were recently reiterated by Professor Schreuer in relation to Bolivia’s case. By the same token, perhaps the most cited text in this subject is a discussion between Aron Broches and various country representatives at the origins of the Washington Convention. This conversation certainly reflects the position of the founding fathers of the Convention. At some point, Broches explained that the effects of the Convention would be extended after denunciation, in contractual cases:

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

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

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

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

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92 Id. at 206.
93 See, Investment Treaty News, Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions, May 9, 2007. Available at: http://www.iisd.org/pdf/2007/itn_may9_2007.pdf (last visited on November 23, 2008). Here, Professor Schreuer goes even further by stating that “If you look closer ... the six month notice period offers very little comfort to investors and potential litigants.” Id. It is also important to add Professor Sebastian Manciaux of the University of Bourgogne to the list of proponents of the offer to consent theory. See Sebastian Manciaux, La Bolivie se retire du Cirdi, TDM Vol. 4, issue #5 (September 2007). Available by subscription at: www.transnational-dispute-management.com (last visited on November 23, 2008).
96 Id.
By answering Mr. Gutierrez-Cano’s question Broches, considered the father of the Convention, sets his position on the offer to consent and consent discussion. It is important to remark that his answer was given in the context of explaining the scope and reach of §72, which is the source of this entire discussion. He said that:

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

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

“the consent of the investor may be evidenced by an express statement to that effect made to the host State, or it may be given at the time when the investor institutes proceedings against the host State. It must, however, be remembered that each party’s consent becomes irrevocable only after both parties have given it. Therefore, in the examples last mentioned [one of them refers to a BIT case], the host State could withdraw its consent as long as the investor had not equally consented.”

It is also important to remark that most of these discussions have been widely interpreted by the detractors of this theory in their writings. So, even when the words of Mr. Broches seem to be self-explanatory, some authors (as seen below) try to find an explanation that would not invalidate the opposing theory. The strength of this offer-to-consent theory resides precisely in its historical roots, which links it to the very foundation of the Centre. Recently, a French author stated that “this viewpoint appears less than convincing as all the history of the Convention, combined with the writings of the most qualified authors, and customary international law point in the same direction: an offer to arbitrate is a proposal to do a thing…usually accompanied by an expected acceptance, counter-offer, return promise or act.”

In sum, if Bolivia’s only source of non-contractual consent to ICSID jurisdiction were contained in its Investment Protections Law, the proponents of the offer-to-consent theory would not have much problem. Once the law has been abrogated the consent would have disappeared.

97 See Andreas F. Lowenfeld, Investment Agreements and International Law, at. 123
100 See Julian Fouret, Denunciation of the Washington Convention and Non-Contractual Investment Arbitration: “Manufacturing Consent” to ICSID Arbitration?, p.80, Journal of International Arbitration, 25 (2008). In fact, Fouret adopts a drastic position by considering that this discussion of consent is a fake one, invented by the creativity of practitioners in the field. Id at 81. To him “[…] it seems easy to determine the correct interpretation: consent is an exchange and not a unilateral act;” to support his findings he quotes the findings of an ICSID tribunal in the case Salini v. Kingdom of Morocco, ICSID Case ARB/00/4, Decision on Jurisdiction (2001). Id. at 87.
for of everybody. The problem arises when the parties of the dispute in question try to assert jurisdiction on a BIT. Here, the proponents of this view hold that even when the BIT in question is still in effect (because it has not been denounced or it is still in effect under the term established by the survival clause) after the expiration of the six months established in §72 the country, in this case Bolivia, may no longer be hailed into ICSID.

- [just] Consent…

This theory comprises different reads to the aforementioned interplay between §25(1), §71, and §72 of the Washington Convention. (1) Professor Gaillard argues that great weigh should be given to the actual language of the BITs; according to this author, wherever there is consent and not an offer to consent in the BIT, ICSID would still have jurisdiction even after denunciation.101 (2) Another study proposes the use of dynamic interpretation; the authors of this study state that “it seems to be more than appropriate to apply the principle of dynamic treaty interpretation also to the ICSID Convention and thereby provide an understanding of the regulatory interplay of its articles 25 and 72 in conformity with present-day conditions of consenting to ICSID arbitration that does not run contrary to the original and current object and purpose of the Convention.”102 (3) Finally, two practitioners from a prestigious law firm have published an article supporting this theory,103 through an approach linked to the international obligation to State consent; this approach is based primarily in the dissenting vote of Arbitrator Francisco Orrego Vicuña in the case Waguih Elie Heorg Siag & Clorinda Vecchi v. Egypt,104 and general principles of International law, specifically those related to good faith, and unilateral declarations.

- **Professor Gaillard’s point of view:**

E. Gaillard explains that ‘consent to ICSID jurisdiction’ does not result from a State’s status as Contracting Party to the Convention but, in accordance to §25(1), requires both parties’ written consent to the Centre’s jurisdiction.105 Then, the explanation on consent begins by commenting the discussion transcribed above between Aron Broches and other country representatives.106 His posture in this particular is simple, but very interesting: “had the drafters of the ICSID Convention intended to refer to a State’s ‘agreement to consent’ rather than to its ‘consent,’ they would have so provided. As a result, a denouncing State’s consent to the jurisdiction of the Centre based on an investment protection treaty dependson the terminology used in the arbitration clause contained in that treaty.”107 To clarify his position Professor

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102 See Christian Tietje, Karsten Nowrot, and Clemens Wackernagel, Once and Forever? The Legal Effects of a Denunciation of ICSID, p. 23.
106 See generally, Emmanuel Gaillard, The Denunciation of the ICSID Convention.
Gaillard divides the types of consent contained in the different BITs as ‘unqualified consent,’ and ‘agreements to consent.’ An example of the former is found in the language of §11 of the Bolivia-Germany BIT (use of the word ‘shall’), and an example of the latter may be found in §8 of the Bolivia – United Kingdom BIT (use of the word ‘may’). In his opinion “where an unqualified consent exists, as opposed to an agreement to consent, the rights and obligations attached to this consent should not be affected by the denunciation of the ICSID Convention.”

○ *Tietje, Nowrot & Wackernagel study:*

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

The application of the dynamic treaty interpretation methodology to ICSID cases would drive these Professors to look at the “extraordinary number of international investment agreements that have entered into force since the adoption of the ICSID Convention, in particular more than 2,500 BITs, but also the more than 240 other international agreements that deal with economic activities and also contain investment provisions.” Aside from the socio-economical and legal developments, another element to consider in this innovative methodology is the cause of such developments; accordingly, these authors found that “all of these agreements are at least primarily also aimed at the promotion of foreign investment and, in order to reach that goal, at

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108 Id.
109 §11(3) of the Bolivia-Germany BIT establishes that: “If both Contracting Parties are parties to the Convention of 18 March 1965 on the settlement of investment disputes between States and nationals of other States, any disputes between either Contracting Party and an investor, as referred to in this article, shall be submitted, in accordance with the rules of the laid Convention, to mediation and arbitration by the International Centre for Settlement of Investment Disputes.” (bolds and underline added)
108 §8(2) of the Bolivia-United Kingdom establishes that: “Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to: (a) the International Center for the Settlement of Investment Disputes[…].” (bolds added)
110 See generally, Emmanuel Gaillard, *The Denunciation of the ICSID Convention*.
112 Even though when The Vienna Convention on the Law of Treaties would be applicable as a primary source of law only to Contracting States, its content is nowadays widely considered part of the customary provisions of International law, and applicable as established in §38(b) of the Statute of the International Court of Justice.
providing private investors with additional legal safeguards." Thus, the principle of dynamic treaty interpretation would provide a “balanced interpretative approach of upholding the original and still current objects and purposes of the ICSID Convention by taking into account subsequent developments in the realm of international law.” Finally, by applying this principle to the issue of consent, these authors find that “if the respective BIT provides for consent this may only be revoked by bringing to a final end the legal effects of the BIT.” In other words, Professors Tietje, Nowrot, and Wackernagel believe that Bolivia might be taken before ICSID after November 2, 2007, as long as its BITs referring to the jurisdiction of the Centre are still in effect, which includes the duration of the survival clauses.

O Nolan & Sourgens approach:

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

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

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

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

According to these authors the core of Professor Orrego’s remarks is found on a dichotomy: even though the Washington Convention was drafted following a contractual type of consent in mind, “this would not affect the nature of international obligations incurred by the States in their ICSID consent.” Hence, in their view, the consent given by a State in their BITs would amount to International obligations of such Nation. The nature of these unilateral

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115 Id.
116 Id. at 28.
117 Id. at 27.
118 See Waguih Elie Heorg Siag & Clorinda Vecchi v. Egypt, p.64, ICSID Case No. ARB/05/15, Decision on Jurisdiction, (April 15, 2007).
declarations was established in the case New Zealand v. France (a.k.a., the Nuclear Test Case),\(^{120}\) in which the International Court of Justice highlighted the differences between a private unilateral promise, and a public unilateral promise, holding that the latter constitutes an International obligation binding upon such country. In words of Nolan and Sourgens: “promises made by sovereigns are qualitatively different from those made by private individuals, as axiomatically all promises of the sovereign on the international stage are binding as a matter of international law.”\(^{121}\)

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

“if undertakings to arbitrate investment disputes with private investors in bilateral investment treaties and national investment laws are understood as independent international obligations, that a state’s consent to ICSID arbitration operates as more than an offer to arbitrate. An implication is that denunciation by a state should not necessarily be viewed as immediately putting an end to the investor’s ability to invoke ICSID jurisdiction for an arbitration against that state.”\(^{122}\)

Accordingly, under this theory, Bolivia could still be sue in ICSID by investors nationals of countries with which Bolivia maintains BITs with ICSID arbitration clauses in force.\(^{123}\)

- **A look into the future, and the availability of potential avenues for investors harmed by Bolivia**

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

For this reason, probably the safest grounds would be to expect that the theory of offer-to-consent is going to be applied, and hence, Bolivia may no longer be hailed into ICSID.

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\(^{121}\) See, Michael Nolan and F.G. Sourgens, The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (possible) Venezuela Case Study, at 28.

\(^{122}\) Id. at 31.

\(^{123}\) Other notable practitioners from all over the world have advocated for a similar result. For instance, Timothy G Nelson, from Skadden, Arps, Slate, Meagher & Flom in New York, says that: "any implication that withdrawing from ICSID closes the door on expropriation cases is simply incorrect." See Latin Lawyer, Bolivia Withdraws from ICSID, May 22, 2007. Available at: http://www.americasnet.net/news/Bolivia_ICSID.pdf (last visited on November 30, 2008). Similarly, Jose Rafael Bermudez, from Bermudez, Nevett, Mezquita & Lopez in Caracas, holds that “any BITs containing consent to ICSID would stand, and that the Venezuelan government would have to also denounce those treaties to fully withdraw.” Id. Of course, after denouncing the BITs, the survival period would have to lapsed, in order to fulfill a complete exit from ICSID.
Despite the fact that Bolivia’s move to withdraw from ICSID may potentially bring disastrous consequences to future inflows of FDI. Our attention now must focus on the already existing FDI in Bolivia. Here, the logical issue that arises is whether existing foreign investors in Bolivia had been left totally unprotected, in the eventual case that the government, for instance, decides to expropriate them without paying just compensation.

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

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

The case-law of the different arbitral tribunals in this particular issue seems to be inconsistent. In the cases Mafezzini, Siemens, Gas Natural and Suez, different

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124 §11(3) of Bolivia-Belgium BIT establishes that:

3. En cas de recours à l'arbitrage international, le différend est soumis à l'un des organismes d'arbitrage désignés ci-après, au choix de l'investisseur :

- le Centre international pour le Règlement des Différends relatifs aux investissements (CIRDI), créé par "la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats", ouverte à la signature à Washington, le 18 mars 1965, lorsque chaque Etat partie au présent Accord sera membre de celle-ci. Aussi longtemps que cette condition n'est pas remplie, chacune des Parties contractantes consent à ce que le différend soit soumis à l'arbitrage conformément au règlement du Mécanisme supplémentaire du CIRDI;
- le Tribunal d'Arbitrage de la Chambre de Commerce Internationale, à Paris;
- l’Institut d’Arbitrage de la Chambre de Commerce de Stockholm. Si la procédure d’arbitrage est introduite à l'initiative d'une Partie contractante, celle-ci invitera par écrit l'investisseur concerné à exprimer son choix quant à l'organisme d'arbitrage qui devra être saisi du différend.

125 For a detailed list of Bolivia’s BITs in force see Appendix # 3.

126 (Free translation from the original text in French, copied below).

§12. Pour toutes les questions relatives au traitement des investissements, les investisseurs de chacune des Parties contractantes bénéficient, sur le territoire de l'autre Partie, du traitement de la nation la plus favorisée.

127 See Emilio Agustin Mafezzini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, January 25, 2000. (the tribunal held that “if a third-party treaty contained provisions f dor the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most-favored-nation clause as they are fully compatible with the ejusdem generis principle.” Id at parag. 56)

tribunals interpreted “silence or ambiguity as indicative that the MFNC included, with certain limits, procedural provisions.” While in the cases Plama, Salini, and Telenor different tribunals found impossible to use the MFNC to “by-pass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.” Therefore, it remains unclear whether the MFNC could be used for extending jurisdiction to an ad hoc arbitral tribunal, governed by the UNCITRAL rules. However, in the rare cases where UNCITRAL arbitration is not an option, an ICC arbitration could then be an ideal venue for the investors.

2. Ecuador’s Oil and Gas Exclusion

i. Background

The adoption of free-market policies began in Ecuador in the presidency of Sixto Durán Ballén in the early 90’s. President Durán implemented a series in order to open the country to foreign capital. For these means, Ecuador became part of the World Trade Organization (“WTO”) in 1996, and signed approximately twenty five percent of its BITs during the last year of Durán’s presidency. Notwithstanding the efforts done to liberalize FDI, the political instability of Ecuador grew after Durán; in fact, from 1996 to 2000 Ecuador had four presidents. However, it must be noted that from 1992 to 1994 the levels of FDI tripled, and subsequently doubled from 1996 to 1998. Even though, the crisis sparked in 1998 was accelerated by unprecedented levels of inflations (more than 100 percent), the inflows of FDI remained stable. In part, this happened because the “lion’s share” of the FDI in the 90’s went to the oil & gas sector (more than 80 percent), and that type of investments, once done, are less volatile and tend to last for longer periods of time.

The social and political turmoil in Ecuador aggravated in 1998 when President Mahuad announced the decision to dollarize the economy by making their currency, the Sucre, obsolete. Two years later Mahuad was ousted and his Vice-President Gustavo Noboa assumed office.

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129 See Gas Natural SDG, S.A v. Argentine Republic, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005. (the tribunal held that “unless it appears clearly that the State parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.” Id., parag. 49)
132 See Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case No. ARB/03/04, Decision on Jurisdiction, February 8, 2005. (the tribunal held that “an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”Id., at parag.223).
135 Id. at parag. 92.
137 Id., at 10.
Noboa restored some of the stability lost. During Noboa’s presidency the dollarization announced by Mahuad was implemented, and important infrastructure projects, such as the construction of a major pipeline, were undertaken. Noboa turned over the government on January 15, 2003, to his successor, Colonel Lucio Gutierrez, who was later impeached for charges of corruption, and ousted from power. Alfredo Palacio, Gutierrez’ Vice- President, took power in office, for the remaining twenty months. In the following elections (2006), Noboa won the first round, but in the second round, Rafael Correa, running on an anti-establishment platform, won the presidency.

Correa’s victory came on a particularly stressful year for Ecuador’s FDI. In fact, by 2006 “Ecuador was in the final stages of negotiating a free trade agreement (FTA) with the United States, but that progress stalled with an April 2006 hydrocarbons law mandating revisions in contract terms.”¹³⁸ In May 2006, the Palacio Administration ordered the seizure of the assets of Occidental Petroleum, who was at the time, Ecuador’s largest investor.¹³⁹ This late measure of President Palacio resulted in one of the largest claims ever filed before ICSID.¹⁴⁰

After assuming office, Correa announced his decision to halt the FTAs talks; and, in October 1997 the Correa administration imposed a new tax on many foreign oil companies operating in Ecuador ordering to pay 99 percent of their extraordinary income to the government. Probably, to avoid a wave of new claims related to oil & gas, the Ecuadorian government decided to exclude its consent to arbitrate this class of claims. Notwithstanding this, in the last six months four major oil companies have sued Ecuador in before ICSID. At this point, where none of the tribunals have rendered a decision on jurisdiction, the analysis of consent in light of Ecuador’s exclusion becomes a relevant and important issue.¹⁴¹

**ii. Legal analysis of Ecuador’s exclusion**

¹³⁸ See U.S. Department of State. Background Note: Ecuador. Available at: [http://www.state.gov/r/pa/ei/bgn/35761.htm](http://www.state.gov/r/pa/ei/bgn/35761.htm)


¹⁴⁰ According to an Associated Press release, Occidental Petroleum is seeking more than $1 billion in relief. See, The Herald Tribune, Ecuador president has 'no confidence' in World Bank arbitration arm hearing Occidental case, May 11, 2008. Regarding the legal nature of the claim, according to the decision on jurisdiction by the arbitral tribunal in the case Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, rendered on September 2008: “On 15 May 2006, the Minister of Energy and Mines notified OPEC of his decision to terminate the Participation Contract by declaring its caducidad. The Claimants filed their Request for Arbitration two days later on 17 May 2006.”Id at parag. 20.

¹⁴¹ In the last six months, four claims has been registered in ICSID against Ecuador:

- Burlington Resources, Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/5, registered on June 2, 2008 (regarding hydrocarbon concession).
On December 4, 2007 the Republic of Ecuador formally notified to the ICSID Secretariat that it will not consent to Centre’s jurisdiction in “disputes that arise in matters concerning the treatment of investment in economic activities related to the exploitation of natural resources, such as oil, gas, minerals, or others.” The basis of such notification is found on §25(4) of the Washington Convention:

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

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

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

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

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142 The second paragraph of communication No. 56354/GM from the Minister of Foreign Relations of Ecuador to ICSID’s Secretary General, dated November 23, 2007 (but sent on December 4, 2007) states that: “La República de Ecuador no consentirá en someter a la jurisdicción del CIADI, las diferencias que surjan en materias relativas al tratamiento de una inversión, que se deriven de actividades económicas relativas al aprovechamiento de recursos naturales como petróleo, gas, minerales u otros. Todo instrumento contentivo de la voluntad previamente expresada por la República del Ecuador en someter esta clase de diferencias a la jurisdicción del Centro, que no se haya perfeccionado mediante el expreso y explícito consentimiento de la otra parte previa la fecha de presentación de esta notificación, es retirado por la República del Ecuador, con eficacia inmediata a partir de esta fecha.”


144 See Ceskoslovenska obchodni banka, a.s. v. Slovak Republic, parag.66.

145 Id, parag.65.
"While §72 of the Convention sets forth the effect of a state’s denunciation in relation to its rights and obligations under the Convention, there is no comparable provision addressing the effect of a notification pursuant to §25(4). An investor's position is therefore more uncertain, even where the investment was made prior to the state’s notification under §25(4)." 

Professor Gaillard’s explanation is based on the nature of the notification, and not in the consent of the parties, which in turn is required by §25(1) to assert the jurisdiction of the Centre in a particular case; such consent, once given may not be withdrawn. According to Gaillard an §25(4) notification is not an expression of consent – or lack thereof. However, the issue that has been omitted from this reasoning is what would happen when the consent for a particular dispute arises from a BIT that is still in force, and the host country has excluded, after the entrance into force of such BIT, that particular class of claims. If under Professor Gaillard’s approach, the country may successfully exclude a particular type of claims from the Centre’s jurisdiction, but may not do it through the denunciation of the Washington Convention (in case of having BITs with unqualified consent language still in force); then, it would be possible to arrive to the counter-intuitive conclusion that in many situations exclusion is a more radical move than denunciation.

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

In 1968, Alcoa entered into an investment contract with Jamaica for the construction of an Alumina refining plant, in exchange for a series of tax concessions, including a ‘no-further-tax’ clause, and long-term leases for the mining of bauxite. This agreement contained an ICSID arbitration clause. In 1974 the Jamaican government indicated that the revenue from the mining of bauxite would be unilaterally increased; but, since the parties could not reach an agreement in this issue, the government imposed a new tax on bauxite by enacting the Bauxite Act, which dramatically increased the government’s revenue from the mining of bauxite. However, prior to the enactment of the Bauxite Act, the Jamaican government notified the Centre, in accordance with §25(4), the exclusion of disputes arising out from investments related to natural resources. For this reason, when Alcoa decided to sue Jamaica before ICSID, Jamaica, relying in §25(4), did not appear before the ICSID Tribunal. Nonetheless, the Tribunal found jurisdiction by deciding the issue of whether Jamaica’s notification had the effect of withdrawing natural resources investment disputes from the scope of Jamaica’s prior consent to arbitrate.

Alcoa’s Tribunal ruling on the consent to arbitrate is of crucial importance today. The tribunal found that the sole agreement of the parties to stipulate an ICSID arbitration clause constituted the consent required by §25(1), which may not be unilaterally withdrawn thereafter. §25(4)’s notification, according to the Tribunal, only operates for the future. A decision finding

146 See Emmanuel Gaillard, Anti-Arbitration Trends in Latin America
147 Id.
149 Id., at 206.
otherwise, “would very largely, if not wholly, deprive the Convention of any practical value.”

To celebrate this decision an author wrote that “the Alcoa Minerals result demonstrates the success of the ICSID Convention in dealing with the problem of State obligation to arbitrate, and the decision is a reassurance to the many investors presently relying upon ICSID arbitration clause.”

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

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

The jurisdictional outcome of these four cases would be extremely important for the Ecuadorian economy, and also, for the future of the ICSID in the region. If the ICSID tribunals decide to assert jurisdiction in these cases, Ecuador may be on the eve of facing a potential disastrous financial distress. On the one hand, such events could accelerate and give momentum to a move in the Latin American region against ICSID. On the other hand, these eventual decisions, as happened with the Alcoa case in the 70’s, may “better secure the good faith performance of investment agreements […] by showing that foreign investment need not be subject to national whim.” Arguably, such scenario could positively impact the fate of ICSID in the long run.

b. Venezuela

i. Background

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150 Id., at II.
152 See Emmanuel Gaillard, Anti-Arbitration Trends in Latin America, Id.
153 According to a major Ecuadorian newspaper, as of June 2008, Ecuador had outstanding “12 international arbitration cases that could, in the worst-case scenario for the nation, end in it having to cough up US$12 billion.” See El Universo, El Ecuador enfrenta 12 poderosos casos de Arbitraje, edition of June 18, 2008.
154 See John T. Schimdt, Id., at 108.
The father of Venezuelan opening for FDI in the early 90’s was President Carlos Andrés Pérez, whose second term in office lasted four years. After an impeachment on corruption charges, the Supreme Court ousted him from power in 1992. Pérez presidency undertook a major reform in the country that has been called ‘neo-liberal.’ Among the most relevant aspects of such reform were: (i) a major privatization of the country’s public companies, including a national airline, the national phone company, and different electricity companies; (ii) a liberalization of the interest rates, which, up until then were fixed by the Ministry of Finance; and (iii) a raise of the price of gas.

These reforms proved to be very unpopular. In fact, Pérez second term in office, experienced great political turmoil. The first major hardship of Pérez presidency took place only 25 days after taken the presidential oath, on February 27, 1989. An unprecedented social revolt (known as the “Caracazo”) marked the unpopularity of the free-market reforms proposed by Pérez in his presidential campaign. Years after the Caracazo, Pérez suffered two failed coup-d’Etats, in February, and November of 1992 respectively. A highlight of the February 4, 1992 coup-d’Etat was appearance on television of Lieutenant Hugo Chávez, who was one of the heads of the defeated rebels; in a brief speech addressed to his colleagues, Chávez called for cease-fire, personally assumed the responsibility, and recognized the failure of the coup “for now (por ahora...).”

After Pérez impeachment the head of the Venezuelan Congress, Ramón J. Velásquez, served for the remainder presidential term. In 1993 elections, former President Rafael Caldera was elected for a second term in office. During Caldera’s second presidency, Venezuela experienced a rapid downward economic spiral; the government’s response included the continuation of several of the unpopular economic measures adopted by Pérez. Among the measures implemented in the framework of a program called Agenda Venezuela, were: the liberalization of the interest rates; the raise of the price of fuel; the devaluation of the currency rate; the imposition of a foreign currency exchange control regime; and the further opening of the oil sector to FDI, through the continuation of a program called the Apertura Petrolera.155

However, the social, economical, and legal scenario would radically change in Venezuela after the December 1998 elections, when Chávez gained power. The arrival of a former insurrectionist to power, four years after being condoned by the incumbent President Caldera, would drastically halt the free-market measures implemented by the past governments. In fact, when President Chávez took office in February 1998, he promised a major reform of the National Constitution, and the instauration of a new economic system. In 1999, a new Constitution was passed by a National Constituent Assembly, and following the pass of the new Constitution, the Chávez Administration gradually implemented a major legal reform, including the enactment of a new Hydrocarbons Law in 2001. Such reforms gave momentum to major strikes and public manifestations of discontent, which resulted in the ousting of Chávez in April

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155 The Apertura Petrolera program was based on a lax interpretation given to §5 of the Organic Law that Reserves to the State the Industry and Trade of Hydrocarbons of 1975 (a.k.a., the Nationalization law). This article provided for the joint participation of private capital along with the State, in: (i) operating agreements; (ii) strategic associations (e.g., Cerro Negro, Petrozuata, Sincor, and Hamaca upgrading projects); and (iii) association agreements. By the same token, the State had to retained control over these projects, in accordance with the same §5 of the Nationalization Law. The program was gradually implemented in three stages or ‘rounds.’ The first and second rounds took place during Pérez, and Velázquez, and the last one was carried out by Caldera.
of 2002 for two days. Short after his return to power, Chávez became more drastic in the implementation of his programs. Finally in February 2005, President Chávez said for the first time that his programs and policies were all directed towards the “Socialism of the 21st Century.”

Meanwhile, the Chávez Administration announced the strict application of the Hydrocarbons Law of 2001 through the implementation of the programs Plena Soberanía Petrolera, and Siembra Petrolera. These programs involved a process of renegotiation of the oil contracts with private investors, and a consequent dramatic increase of the country’s share in the profits. The Apertura Petrolera had died. Yet, some of the investors resisted until the end, to the mandated process of migration from a private to a mixed corporate form, involving a majority stake in the hands of the State. These investors, ExxonMobil and ConocoPhillips, preferred to sue Venezuela before ICSID during the last trimester of 2007.

Whilst announcing the arrival of Socialism to Venezuela, Chávez commenced a series of expropriations and nationalizations changing the panorama for foreign investors and FDI. The first expropriations were targeted to agricultural farms; two of the highest-profile cases were Hato La Marquesa, and Hato El Charcote. The latter belonged to the Vestey Group, from the United Kingdom, who decided to sue Venezuela before ICSID in 2006. Recently, some other strategic areas that have been targeted by the government include: telecommunications, by the announcement of the de-privatization of the national phone company –CANTV--; electricity, by the announcement of the de-privatization of the Caracas’ power company –Electricidad de Caracas--; and cement, by the announcement of the acquisition of the four largest cement companies (Andino, Caribe-Holcim, LaVega-LaFarge, and Vencemos-Cemex). These cases have also resulted in two ICSID claims against Venezuela.

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157 The Plena Soberanía Petrolera program was announced by President Chávez in his weekly television program Aló Presidente number 207 on October 10, 2004. See Plena Soberanía Petrolera: Al Pueblo lo que es del Pueblo, brochure printed by the Ministry of Information and Communications. Available at: http://www.gobiernoenlinea.ve/docMgr/sharedfiles/Folleto_Soberania_Petrolera.pdf last visited on November 30, 2008). Such program involved the de-internationalization of PDVSA; the adoption of a policy of dividends; the integration of PDVSA’s offshore subsidiaries; and the renegotiation of the existing operating agreements. See Plena Soberanía: Auténtica Nacionalización, at http://www.pdvsa.com (last visited on November 30, 2008).


Notwithstanding that Venezuela has settled four of the six cases already concluded before ICSID, and the only two cases that have reached to an arbitral award did not involve large amounts. Recently, Venezuela has taken some anti-arbitration measures, directly targeted to potential claims that may arise out of the recent expropriations and nationalizations. Aside from the hostile political discourse against ICSID, the two most important anti-arbitration steps taken by the country are the denunciation of the Venezuela-Netherlands BIT, and the Supreme Tribunal’s Decision number 1541 of October 17, 2008. Yet, it remains to be seen the effects of these anti-arbitration measures in the other four cases against Venezuela currently outstanding before ICSID, and in any other potential claim that may be filed in the near future.

### ii. Decision 1541

This decision was delivered by the Constitutional Chamber of the Venezuelan Supreme Tribunal, which is the highest court in the country, and also the only court whose decisions set binding judicial precedent (erga omnes effects). An interesting aspect about this decision is that it was rendered after a petition for the interpretation of §258 of the Venezuelan Constitution, filed by representatives of Venezuela’s Attorney General Office. Such constitutional mandate provides that “the law shall encourage arbitration, conciliation, mediation and any other alternative means for resolving conflicts.” The object of the Attorney General’s petition of interpretation was to limit the constitutional reach of §22 of the Law Concerning the Promotion and Protection of Investment (LPPI), thereby excluding any consent of the Republic to arbitration on the basis of a unilateral consent contained in this provision. §22 of the LPPI establish that:

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163 The Venezuelan cases that have been decided on the merits by an ICSID Tribunal are: Autopista Concesionaria de Venezuela v. Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction (2001) (in which the tribunal awarded the investors $12 million of the over $150 million requested); and, Fedax NV v Netherlands, Award, ICSID Case No ARB/96/3; IIC 102 (1998) (in which, the tribunal awarded the investors with approximately $810,000, when $600,000 were recognized by Venezuela).


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

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

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

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

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

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

Thus, the Supreme Tribunal held that the meaning of the phrase “shall be submitted to international arbitration under the terms provided for in the respective treaty or agreement” contained in §22 of the LPPI, “denotes […] that the intent of the legislator relates expressly and unequivocally to the internal content of the respective treaties,” and not to a unilateral of the

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169 See §22 of the LLPI (Ley que establece el Régimen de Promoción y Protección de Inversiones), Published in the Official Gazette number 5390, dated October 22, 1999 (free translation from the Spanish text of the Law).

170 See Decision 1541 at 3 (free translation from the Spanish text of the decision).

171 Id. at 47 (free translation from the Spanish text of the decision).

172 See Christoph Schreuer, Consent to Arbitration, February 27, 2007. Available at: http://www.univie.ac.at/intlaw/con_arbitr_89.pdf (last visited on November 30, 2008).

173 Id. at 51 (free translation from the Spanish text of the decision).
Republic to submit any investment dispute to arbitration. According to the Tribunal, a converse interpretation would result in the absurd that a sole mention to the Washington Convention by the Municipal Law of a country would automatically translate into the assertion of the country’s consent, required by §25(1) of the Convention, to submit a particular dispute to arbitration.\footnote{174}{Id. at 51, 53.}

By the same token, it is important to remark that the Supreme Tribunal found its decision to be consistent with the accepted principles of International Law in this matter.\footnote{175}{Id. at 39.} For this reason, the Tribunal referred to the criterion developed by an ICSID tribunal in the case Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt,\footnote{176}{See Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction of April 14, 1988, 16 Y.B. Com. Arb. 28 (1991).} according to which “even though the consent contained in a law may not be interpreted broadly or narrowly, it can only be interpreted objectively under the principle of good faith[...].”\footnote{177}{See Id. at 48 (free translation from the Spanish text of the decision), the Supreme Tribunal paraphrased the Southern Pacific Properties decision.} Therefore, the Supreme Tribunal distinguished the Venezuelan provision from similar provisions of other countries, such as the one discussed in Egypt Southern Pacific, finding this reading to be in accord with the international principle of good faith.

It is likely that the most important effect of decision 1541 would be that, if an ICSID tribunal asserts jurisdiction on the basis of the unilateral consent of the Republic contained in §22 of the LPPI, a potential adverse award would not be enforceable within the boundaries of Venezuela. In fact, the Supreme Tribunal expressly stated that “[...] in case that the decision of the respective organism violates the internal juridical system, such decision would be unenforceable in the Republic.”\footnote{178}{See Id. at 29.}

An interesting study of the issue of consent to ICSID arbitration contained in §22 LPPI disagrees with the Supreme Tribunal’s finding.\footnote{179}{See Thomas Pate, The Past, Present, and Future of the Foreign Arbitration Clause in Foreign Investment Legislation: In Pursuit of The Balance, Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1261267} The author of this study tries to reconcile a textual interpretation of the norm, with the ultimate goals of the investor-State system of protection, by stating that: “[t]he fact that the law uses the term “shall” and not “may” could be of tremendous importance if a foreign investor were to rely on this provision to bring a case before ICSID, as it could make the allegation that the state committed itself to arbitrate.”\footnote{180}{Id. at 75.} Nonetheless, the appreciation of this author regarding the future of this topic (as expressed in a footnote) proved to be exactly correct: “In any event, in recent years Venezuela has been involved in several significant international arbitrations that have been distasteful for the government and as a result it may be expected that Venezuela will move to reduce its exposure to international arbitral jurisdiction as, indeed, it has done with respect to the new petroleum sector joint ventures signed in early 2006.”\footnote{181}{Id. at 75, footnote 230.} Another, more recent study, has also been prophetic about this particular issue and the potential effects of decision 1541:
“Venezuela is nonetheless very likely to seek all possible injunctions in order to avoid international arbitration. [...] Even if a plaintiff company is able to subject Venezuela to an international arbitration tribunal's jurisdiction and subsequently win on the merits, unless there has been a separate waiver of immunity from enforcement of any successful arbitration award, a state or state enterprise may still claim sovereign immunity from enforcement of the award.”\(^{182}\) (bolds added)

A final aspect to highlight on the decision 1541 is its reference to the country’s consent contained in BITs. In one part of the decision, the Supreme Tribunal stated that depending on the language of a particular BIT, by subscribing it the country may be pledging its consent to further arbitrations.\(^{183}\) However, in the last part of the decision the Supreme Tribunal added an ambiguous paragraph, whose interpretation would define Venezuela’s future approach to ICSID:

“Finally we reiterate that the sole subscription of the ICSID Convention, by one, several, or all the States linked in the subject of investments by BITs, or MITs, does not constitute an automatic submission of the respective disputes to the procedures contained in such Convention; being essential, at all times, the existence of a written unequivocal consent to arbitrate.”\(^{184}\) (bolds added)

The polar question that remains open with Venezuela is whether it will further accept the Centre jurisdiction, and potential adverse awards, in cases where consent has arisen both from the LPPI, and a BIT in effect; or, whether Venezuela will adopt more radical solutions, as it would be a withdrawal à la Bolivia, or an exclusion à la Ecuador.

In order to answer those questions, an element to consider would be the interlocutory decision of the Political and Administrative Chamber of the Venezuelan Supreme Tribunal, in the case Autopista Concesionada de Venezuela (Aucoven).\(^{185}\) In such case, the Supreme Tribunal dismissed a motion to dismiss for lack of subject matter jurisdiction, filed by the foreign investor, on the grounds that the Nation waived its right to sue in domestic courts by including an arbitral clause in the concession agreement with the foreign investor. Indeed, by the time this decision was rendered an ICSID arbitral tribunal had already asserted jurisdiction over the case. However, in Aucoven, the Supreme Tribunal established that the Venezuelan tribunals had to have jurisdiction to hear the case, notwithstanding the existence of a concession agreement with an arbitration clause vesting the ICSID with exclusive jurisdiction over the subject matter.\(^{186}\)


\(^{183}\) See, Decision 1541, at 47 (2\(^{nd}\) paragraph).

\(^{184}\) Id. at 56.


\(^{186}\) This case never reached to a decision on the merits because on February 10, 2004 the Republic desisted on the claim by stating that: “after the ICSID award rendered on November 23, 2003, [...] it would be meaningless to maintain this claim when there is no object to decide” (free translation from the Spanish text). See Press Release from the Venezuelan Supreme Tribunal, Aclaratoria de la Sala Político Administrativa en caso de la autopista Caracas-La Guaira, published on February 2, 2006. Available at: http://www.tsj.gob.ve (last visited on November 29, 2008). Presumably, if the ICSID award would not have favored the Nation (by awarding $12 million out of the $311 million requested), the Republic would not have desisted on its counter-claim before Venezuelan courts.
This should provide indication of the willingness of Venezuelan courts to recognize the jurisdiction of an arbitral tribunal in every case.

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

3. Conclusions - ICSID and Latin America: a gray and uncertain future

A few decades ago it was argued that the Washington Convention filled the lacunae left by the famous Barcelona Traction\footnote{See Barcelona Traction, Light & Power, Co., The International Court of Justice (ICJ) 3, Judgment of February 5, 1970.} case.\footnote{See Charles Vuylsteke, Foreign Investment Protection and ICSID Arbitration, Ga. J. Int’l & Comp. L. 343, 345.} In that case, the ICJ held that a State could make a claim when investments by its nationals abroad were prejudicially affected in violation of the right of the State itself to have nationals enjoy certain standards of treatment previously agreed in a treaty or special agreement.\footnote{See Summary of the Barcelona Traction Judgment (Second Phase), provided by the ICJ. Available at: http://www.icj-cij.org/docket/files/50/5389.pdf (last visited on November 30, 2008).} Yet, the common situation when no such treaty or special agreement existed, thereby covering the particular conflict, was that investors would be left unprotected. Here, the Washington Convention, and today’s system of protection, as configured by the simultaneous existence of BITs and MITs, fits perfectly to cover this hole in the laws.

However, such assertion would only make sense if the countries in question are interested in seeking the ultimate goal of the investor-State system of protection: that of facilitating the flows of capital. In fact, also thirty years ago, Paul Szasz pointed out that one of the reasons why Latin American Nations initially rejected the Convention was that not every country was keen to attract foreign capital.\footnote{See supra footnote 52.} At the time, it seemed reasonable to suspect that an anti-capitalistic government would avoid FDI.

However, today we live in a different World. Even when the resurgence of the Left in the governments of Latin America have given momentum to a wide variety of anti-FDI measures; in today’s World, the flow of capital between countries is a reality. Investors, whether from capitalistic, anti-capitalistic, or mixed economies, seek protection to their investments abroad. This reasoning may not apply, however, in cases where public and not private funds are at stake. By mentioning the new positioning of Venezuela as a capital-exporter country in Latin America,\footnote{See UNCTAD, Trade and Development Report, 2008, Chapter II: Commodity Price Hikes and Instability, p.29. Available at: http://www.unctad.org/en/docs/dr2008_en.pdf (last visited on November 30, 2008).} we may find an explanation to some of the anti-FDI measures commented. Yet, this
explanation comes with a caveat: first, even when the traditional forms of FDI protections are being rejected, new forms of protections will likely appear; and, second, the flows of capital will be impacted by the fluctuations of the price of oil.

The fate of ICSID and the Washington Convention is still uncertain in Latin America. It is probably too early to predict what would be the ultimate consequences of Bolivia’s withdrawal, Ecuador’s exclusion, and Venezuela’s growing reluctance to the Centre. In fact, in a recent Summit of UNASUR, Venezuela has fiercely promoted the creation of an alternative – maybe regional – center of investor-State dispute resolution, as an alternative to ICSID. This proposal, if accepted and adopted by Latin American countries, could jeopardize the future of ICSID, especially, if Brazil agrees to join it. At such uncertain moment, one would expect the arising of a new wave of scholarly disagreement in the issue of the viability of an ICSID withdrawal in mass. If such time actually comes, we would find ourselves discussing the issue of consent.

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

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192 The Union of South American Nations is a regional multilateral effort, which tries to integrate the Andean Community Pact, and MERCOSUR. See http://www.uniondenacionessuramericanas.com/ (last visited on November 30, 2008).
193 See For the TSJ, all cases are relevant, we do not discriminate. Interview with Luisa Estella Morales, Chief Justice of Venezuelan Supreme Tribunal of Justice. Published in El Universal Online, on October 16, 2008. Available at: http://www.eluniversal.com/2008/10/16/en_pol_esp_for-the-tsj,-all-ca_16A2073343.shtml (last visited on November 30, 2008).
194 See John Schmidt, supra at 108.