Winter March, 2010

Sovereignty v. Investment Protection: Back to Calvo?

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By

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I. Introduction.

Some Latin American countries are reacting to what seems to be unfairness on the international law of foreign investment as comprised in International Investment Agreements (IIAs). While some of those reactions have similarity with positions assumed by some developing countries in the past, presently there appears to be significant differences.

Those reactions and their counteractions might be initiating an interesting debate on foreign investments and protection; with proponents of investment protection on one side and proponents of protection of the interests of the States and the other side. What would be the outcome of that dynamic is open for all types of forecasts.

One of those possibilities could be the return to the past and the dominance of policies that despise foreign investments. This article explores the reasons for the anti foreign investment policies of the past and the reasons for subsequently abandoning them. It will also look into the reasons for the possible return of those policies to then turn into an analysis of some of the criticisms made to the system of international law of foreign investment and venture into predictions and recommendations.

II. Dichotomy between sovereignty and investment protection

To a large extent the history of the international law of foreign investment has been signaled by a dichotomy between sovereignty and investment protection: states' sovereignty over natural resources conflicting out with State Responsibility for Injury to Aliens; the charter of economic rights and duties of States conflicting out with restrictions for expropriation and the Hull formula for compensation; local laws conflicting out with international minimum standards of treatment; domestic public policy conflicting out with legitimate expectations of investors; litigation in local courts conflicting out with international arbitration.

At the root of the clash one finds the complexity of the foreign investment phenomenon with all its peculiar characteristics. Capital is transferred from one country to another. Host and home States are involved as the capital outflows one and inflows the other. Sometimes they are involved as parties to IIAs, although not necessarily as parties to the disputes. The stakeholders of the foreign investment disputes are on one side a State which is a subject of public international law and an investor which usually is not a subject of public international law but a mixture of private juridical persons scattered all around the world. The interests of the parties in the foreign investment continuum are diverse; on one hand the investor looks for an opportunity to maximize profits, extend market reach or undertake strategic alliances, whereas the State sees the investment as an opportunity to promote the economic growth, obtain modern technology, activate the productivity, create jobs and diminish poverty, among others. For investors the protection shield is the right of property, for States it is sovereignty to rule its internal matters, including the economy and the businesses undertaken within its borders.

Geographically, perhaps the dichotomy has not been more prevalent in any other region of the world than in Latin America. There the antagonism to foreign investments had been the norm until recently. There are probably three reasons for that: a) neocolonialism, many countries perceived that foreign investments were a new way of domination by the old colonies or by new ones; b) protection to local private sector, as countries were avid of creating a vibrant private sector, many believed that protection of the locals against the competition of the foreigners was a wise public policy; c) other sources of capital were available, namely the revenue yielded by the exploitation of natural resources, international credit and foreign aid.

Nurtured by the an arguably justified antagonism to foreign investment and by economic doctrines such as the *dependencia*,[1] whereby imports were to be substituted by local

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production regardless of the cost or quality, many countries in the region armored themselves with public policies, legal instruments and doctrines not only to restrict the flow of alien capital but also to defend themselves against the foreign investors already in the field.

III. Calvo doctrine.

In the past, investors thought they should be entitled to better treatment than local investors because the treatment granted to the latter might be below the internationally accepted minimum requirements.[2] But as the principle of sovereignty ensured the right of host countries to regulate economic activities in their territories; it meant that investors were treated in the same manner that national investors were treated or worse. Likewise, home countries were asked to accept the right of the host country to regulate economic activities operating within their territories, even if citizens of the former were performing those activities.[3] Probably the most illustrative example of this *tête-à-tête*, was the Calvo doctrine[4] and its offspring the Calvo clause.[5]

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[1] *See* EARL H. FRY, THE POLITICS OF INTERNATIONAL INVETSMENT 27-48 AT 28 (1983).

[2] *See* Burns H. Weston, The New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Some Reflections upon the Contemporary International Law Debate, INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURY TO ALIENS, 89-125 (Richard. B. Lillich, ed. 1983).

[3] C. Fred Bergsten and Edward M. Graham, Needed: New International Rules for Foreign Investment, in 7 INT'L TRADE J. 15-41, 1992.

[4] *See* Carlos Calvo, DERECHO INTERNACIONAL TEÓRICO Y PRÁCTICO DE EUROPA Y AMÉRICA, 191 (Durand & Pedone-Lauriel eds., 1st ed. 1868). *See* also Greta Gainer, Nationalization: The Dichotomy between Western and Third World Perspectives in International Law, 26 Howard L. J. 1547, 1983. Latin America can claim authorship to the Calvo doctrine, which had been incorporated into the constitutions of many countries and whereby foreign investors were not entitled to take disputes with host States to the international arena, and is also a reflection of a historic attitude against foreign investments. Accordingly, investors were subject to the same treatment that domestic investors received in the host State, not better. Therefore, they could only claim diplomatic protection from their home

Accordingly, foreign investors were not entitled to a treatment better than local investors and in case of disputes foreign investors had no option but to litigate in local courts. Thus, investors were asked to exhaust the local legal remedies and surrender their right to request diplomatic protection to their home countries respectively. As a corollary, foreign investors were not entitled to international arbitration.

Under the Calvo doctrine aliens were deprived of any protection. It took them to claim for a treatment that met minimum standards.[6] However, there was not a definition of what minimum standards meant.

This doctrine found its way in regional constitutions, many of which provided expressly that disputes between investors and the host States could not be handled by foreign tribunals. [7]

In some cases, the Calvo doctrine was adopted partially as countries allowed international arbitration only in some cases, for some types of contracts or businesses and only after certain conditions had been satisfied, such as exhaustion of local remedies. However, even that compromise solution was not satisfactory to many foreign investors from developed countries.

States in a few restricted cases, and then only after exhausting local legal remedies. *See* also Black's Law Dictionary, 4th edition, West Publishing, Eagan, Minnesota, 1951, p. 257

[5] Calvo clause was the implementation of the doctrine of the same name in contracts and agreements with foreign investors.

[6] The most common minimum standards referred are the right of due process, and the right of property.

[7] For example article 127 of the Constitution of the Republic of Venezuela of 1961.

IV. Calvo has been abandoned.

But come the eighties and the antagonism to foreign investment evaporated. As if it were a pendulum the Latin American public policies on foreign investment swung to the other extreme. Many factors brought about the paradigm change. Of foremost importance was the scarcity of financial resources originated by a drop on the prices on commodities and the reduction of the credit available. With a reduction in the traditional sources of capital, States needed to look at other possible funds to finance their development and many were willing to reconsider their public policies stands vis-à-vis foreign investments in order to attract those capitals.

In addition, Latin American countries *en masse* were convinced of the benefits of economic liberalism. Many were advised on the implementation of a package of public policies better know as the Washington Consensus portrayed as the recipe for development which comprised recommendations for privatization, free trade, markets liberalization, competition, public sector reduction, budget deficit reduction and of course friendliness to foreign investments.[8] Most of those recommendations required legal instruments to be implemented, some of which came under the form of international agreements, such as the Washington Convention and Bilateral Investment Treaties (BITs). Thus, many Latin American countries were willing to be bound by international

[8] *See* Williamson, John, Did the Washington Consensus Fail?, Institute for International Economics, Outline of speech at the Center for Strategic & International Studies, Washington, DC, November 6, 2002, available at http://www.iie.com/publications/papers/paper.cfm?ResearchID=488 (last visited February 20, 2010)

agreements whereby they were relinquishing portions of their sovereignty under the assumption that that would create a positive investment climate which in turn would be beneficial to attract foreign investments.

But there was a very big exception: Brazil. The largest economy in the hemisphere was not willing to compromise its sovereignty in order to enhance its investment climate. And although diplomatically Brazil made good gestures by signing many BITs, none of them have been ratified by the legislative branch and thus have never been in force.

The skepticism of Brazil on the furor awakened by the consensual international law of foreign investment was motivated primarily by the limitations on internal public policies imposed by that regime and by the perceived unfavorable discriminatory treatment to be granted to local investors. Limitations to internal regulatory measures due to its potential expropriatory character were considered too harsh to cope with. Likewise, the possibility of foreign investors but not local investors being entitled to initiate international arbitration against the Brazilian State was not easy to digest. In addition, lack of definition of many terms where vagueness was perceived to prevail deterred many to support Brazil being part of the consensual international law of foreign investment. Strong opposition also manifested against other provisions, such as fair and equitable treatment to foreign investors allegedly a catch-all shield against certain actions of the States; the broad provision of legitimate expectations of investors, where anything and everything seems to fit, and the so called umbrella clause whereby breach of any obligations by the State, for example a contractual one, could also give rise to an investment claim.[9]

V. Is Calvo coming back?

Brazil aside, it seemed that the rest of Latin America was supporting the consensual international law of foreign investment. But recent events might indicate that the pendulum is swinging back. Both Bolivia and Ecuador have denounced the ICSID Convention and have denounced several BITs while their new constitutions contain provisions unfriendly to international arbitration.[10] Venezuela has denounced the popular BIT with The Netherlands,[11] and its legislative branch has asked the President to denounce the ICSID Convention.[12] Nicaragua has threatened to follow the trend. And many doubts have arisen about how and if Argentina will comply with awards issued by ICSID arbitral tribunals.[13] In addition the surge of expropriations has been predominant among these countries.[14]

[9] *See* José Gilberto Scandiucci Filho, The Brazilian Experience with Bilateral Investment Agreements: A Note, UNCTAD expert meeting on development implications of international investment rule making, June 2007.

[10] *See* Article 151 of the Constitution of the Bolivarian Republic of Venezuela. In Ecuador, a new constitution was approved in September 2008, which stipulates, inter alia, that foreign investment is complementary to national investment, and that FDI has to be oriented to the needs and priorities defined in the National Development Plan and in the development plans of the decentralized autonomous governments.

[11] *See* Luke Eric Peterson, Venezuela surprises the Netherlands with termination notice for BIT; treaty has been used by many investors to "route" investments into Venezuela, Investment Arbitration Reporter, Vol. 1. N. 1, May 16, 2008. Available at: http://www.iareporter.com/Archive/IAR-05-16-08.pdf (last visited on February 17, 2010).

[12] 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. http://www.tsj.gov.ve/gaceta/febrero/130208/130208-38869-02.html (Last visited on February 17, 2010)

[13] *See* for example the different decisions related to staying enforcement of awards in the context of annulment procedures such as *Sempra Energy International v. Argentina*, decision of March 5, 2009 or *Enron Corporation*

There are multiple reasons for the seemingly return to foreign investment protectionist policies. The failure of the Washington Consensus policies apparent in the Argentine crisis where a focus on monetary and macroeconomic policies created the circumstances for a subsequent crisis that eroded much of the credibility of the country and the savings of the locals can be signaled as an important driver for the pendulum swing. [15] As a result of that crisis macroeconomic measures taken to protect the local economy affected the interests of foreign investors which in turn through their reactions unveiled the limitations that the consensual international law of foreign investment imposed to domestic public policy maneuvering.

Similarly, social policies were largely neglected as part of the recipe of liberal recommendations presented by the advocates of foreign investment friendliness; a factor of paramount importance in a region considered the most unequal in the world.[16] As a result of the poor not being benefited by the economic policies politicians with apparent social agendas who blamed economic liberalism for the malaises of their countries were brought into power.

Ponderosa Assets, L.P. v. Argentina, decision of October 7, 2008 and *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, decision of November 4, 2008.

[14] Venezuela has expropriated hundreds of businesses. *See* "Venezuelan socialism is based on expropriations", El Universal, January 22, 2010. http://english.eluniversal.com/2010/01/22/en_ing_esp_venezuelan-socialism_22A3319291.shtml (Last visited on February 17, 2010)

[15] U.N.CONFERENCE ON TRADE AND DEVELOPMENT, OCCASIONAL NOTE INTERNATIONAL INVESTMENT DISPUTES ON THE RISE, U.N. Doc. UNCTAD/WEB/ITE/IIT/2004/2 (NOVERMBER 29, 2004).

[16] How Poor and Unequal is Latin America and the Caribbean?, Inter-American Dialogue, November 2009, page 2, http://www.thedialogue.org/PublicationFiles/Social%20Policy%20Brief%20No%201%20-%20Poverty%20and%20Inequality%20in%20LAC.pdf (Last visited on February 17, 2010)

At the same time the price of many commodities, such as oil, increased substantially in the international markets. That provided an incentive for many governments to take a higher share of the business either directly or indirectly, as occurred in the case of windfall profits taxes. [17]

Additionally, the global financial crisis erupted with protectionism becoming fashionable not only among developing countries but also among developed countries. As a result many countries initiated a review of their financial regulatory framework to make it more stringent. [18]

<u>The experience with arbitration.</u>

But one the most important reasons that can explain the apparent fallback of Latin America with the international law of foreign investment lies on the experience many countries have had with international investment disputes. In many respects there is a perception that it has been a bitter experience. For example, countries realized that measures taken for reasons of necessity in order to protect their economies in critical moments were not a defense against the claims of foreign investors as it was indicated in the investment arbitration of *Siemens v. Argentina*.[19] Even in some cases, countries were to learn that the defense was valid for some tribunals and not for others, albeit the

[17] *See* "Investor challenges Ecuadorian windfall tax as breach of oil participation contract", Investment Treaty News, March 2, 2007.

[18] *See*, "Garrotes and sticks", The Economist, January 30th, 2010, page 79.
[19] See *Siemens v. Argentina,* ICSID Case No. ARB/02/8, award of 6 of February, 2007, rejecting that defense because a margin of appreciation was accorded under the relevant BIT.

disputes were based on different BITs.[20] In that vein, the Tribunal in *Continental v. Argentina* stated that States had a significant margin of appreciation when imposing economic emergency measures because "a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight".[21]

But in *CMS v. Argentina*,[22] the Tribunal stated that although it did not have jurisdiction over general economic policies taken by Argentina, it did have jurisdiction over measures of general economic policies that affect the investment provided they have been adopted in violation of international law or in violation of commitments made to the investor. "This means in fact that the issue of what falls within or outside the Tribunal's jurisdiction will be subsumed in the determination of whether a given claim is or is not directly connected with specific measures affecting the investment."[23]

Other cases have dealt with regulatory powers of the government and the balance to be guarded vis-à-vis the property rights of foreign investors under international law; something that in many respects have not been welcome by many States.

For example, in the *Metalclad* case, the Tribunal held that article 1110 of NAFTA also includes ". . . covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-

[20] *See* for example *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, award of 5 of September 2008, accepting Argentina's necessity defense.
[21] *Id*, at para 181.
[22] *CMS v. Argentina*, 42 ILM 788 (2003)
[23] *Id* at para 34.

be-expected economic benefit of the property even if not necessarily to the obvious benefit of the host State." [24]

Similarly, during the *Santa Elena* case, the ICSID arbitration Tribunal dealt with the issue of the date of the taking to determine the compensation payable. The Tribunal noted that a measure taken for the purpose of environmental protection that gradually deprived owners of the value of their property was no different from a taking for which full compensation must be paid.[25]

Other awards have pointed to an analysis that balances the investor's property rights and the public good. In *S.D. Myers, Inc. v. Canada*, the Tribunal held that regulatory takings of property might include denying the right to export with intent to transfer ownership.[26] However, the facts did not support that happening to the claimant of that case.[27]

In the *Feldman* case, the Tribunal held that some business problems of a foreign investor are not expropriations under NAFTA, and such was the situation in *Feldman*.[28] Similarly, in the *Azinian* case, the Tribunal stated that not all governmental interference with a foreign investment constitutes an expropriation.[29]

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[24] *Metalclad Corp. v. United Mexican States*, Award of Aug. 30, 2000, ICSID Case No. ARB(AF)/97/1, 16 ICSID REV. – FOREIGN INV. L.J. 168, 195 ¶ 103 (2001).
[25] *Santa Elena v. Costa Rica*, Award of Feb. 17, 2000, ICSID Case No. ARB/96/1, 15 ICSID REV. – FOREIGN INV. L.J. 169 (2000).
[26] *S.D. Myers, Inc. v. Canada*, 40 I.L.M. 625 ¶ 288 (2000).
[27] *Id.*

[28] *Feldman v. Mexico*, 42 I.L.M. 625 ¶ 112 (2002).
[29] *Azinian v. Mexico*, 39 I.L.M. 537 ¶ 83 (1999).

The Tribunal also found no expropriation in the *Pope* case.[30] However, it stated that to determine "... whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property had been 'taken' from the owner."[31]

In *Tecmed v. Mexico*,[32] the ICSID Tribunal stressed the difference between direct, creeping, and de facto expropriation. It mentioned that, although creeping and de facto were kinds of indirect expropriation, the latter referred to conduct or actions that do not state an intent to deprive rights or assets but in fact have that effect,[33] either by "[transferring] assets to third parties different from the expropriating State or . . . without allocating such assets to third parties or to the Government."[34] It then concluded that regulatory actions and measures would not be excluded from the definition of expropriation if they are excessive in proportion to the public interest being protected.[35]

Thus, inconsistency by the arbitral tribunals when deciding similar issues, the perceived interference with domestic public policies and the fragmentation of the international law of foreign investment have played some role in the apparent sudden change of some Latin American countries.

[30]*Id.*

[31]*Pope & Talbot, Inc. v. Canada*, Interim Award ¶ 102 (Jun. 26, 2000).
[32]*Tecmed V. United Mexican States*. 43 I.L.M. 133 (2004).

[33]*Id.*at para 114.
[34]*Id.* at para 113.
[35]*Id.* at para 122.

Likewise, some countries were bought into the realm of consensual international investment law but were cautious. Many signed BITs but required that local remedies be exhausted before international arbitration could proceed. With the surge of more BITs where there was no need to exhaust local remedies but where a most-favored-nation (MFN) clause was provided, arbitral tribunals were faced with the inevitable question of whether the right to arbitrate right away could be transplanted into a BIT requiring exhaustion of local remedies. That was the issue dealt by the arbitral tribunal of *Maffezini v. Spain*.[36] In that case the Tribunal analyzed the MFN clause in the Argentina–Spain BIT in connection with the provisions of the Chile–Spain BIT, which did not require a certain time period before filing a claim with ICSID. The Tribunal noticed two principles: *res inter alios acta* and *ejusdem generis*. According to the first, treaties are valid among the parties; according to the second, the effect of a treaty can be extended via its MFN clause to treaties of the same nature. The Tribunal ruled that, in the absence of express provisions to the contrary, the provisions of investment disputes of another treaty of the same nature can be extended to an investor of a third country because the purpose of the BITs is to protect foreign investors and their rights and because the provisions of investment dispute settlement are inextricably related to investment protection. The Tribunal also stated some exceptions to the ruling, such as when consent to arbitration is conditioned to exhaustion of local remedies, when the parties have the option to choose between local remedies or international arbitration and when the parties have chosen an institutional arbitration. Be it as it may, interpretations of this nature were widely debated and criticized by the advocates of the developing countries.

[36] *Emilio Agustin Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of 25 January 2000.

Additionally, the costs and length of the investment arbitration procedures could have exposed some weaknesses of the system of international law of foreign investment. In average the legal costs of these cases range around $ 2 million in fees with around $ 400 thousand in pure costs under the low range.[37] In some cases the fees have been as high as $ 4 million, as happened in *Metalclad Corporation v. Mexico*[38] and $6 million in the NAFTA *Pope & Talbot* case.[39] And it has been reported that in two investment arbitration cases the legal fees of the Czech Republic reached $ 11 million. Procedures have lasted more than 2 years to reach an award on the merits and with the possibility of requesting annulment and staying enforcement of the awards some cases have lasted more than 10 years. No wonder that many countries have started to realize that the impact of investment disputes is not only in terms of bad publicity.

The intention of the States on being part of the consensual international law of foreign investment has been widely ignored. States seek to attract foreign investments because they are a means to promote, foster and finance the welfare of their people and their development. In many cases, tribunals have hesitated to consider economic development as a criterion relevant to determine the protection owed to a foreign investment.[40] As a result of extending that analysis to its extreme foreign investments that damage the environment or human rights or minimum labor conditions or that are driven by

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[37] Richard E. Walck, Current Statistics on Investment Treaty Arbitration, May 2, 2007. Global Financial Analytics LLC.

[38] The U.S. Government asked the losing party, the investor, for payment of $ 4 million in legal costs. This figure does not take into account the costs of a review of the award undertaken by a Canadian court. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, OCCASIONAL NOTE INTERNATIONAL INVESTMENT DISPUTES ON THE RISE, U.N. Doc. UNCTAD/WEB/ITE/IIT/2004/2 (NOVERMBER 29, 2004)

[39] DAVID A. GANTZ, INVESTOR-STATE ARBITRATION UNDER ICSID, THE ICSID ADDITIONAL FACILITY AND THE UNCTAD ARBITRAL RULES 23 (U.S. Vietnam Trade Council Seminar Series, 2004), http://www.usvtc.org/trade/other/Gantz/Gantz_ICSID.pdf. (Last visited on February 17, 2010)

[40] *See Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, award of April 15, 2009 at para 85.

corruption could also be entitled to international law protection, although arbitral tribunals consistently have refused to so.[41]

Finally, policy makers in Latin America have seen the example of Brazil. With an inflow of foreign direct investment of $ 45 billion in 2009 it has been the largest recipient of that kind of capital in the western hemisphere and the second among the emerging economies.[42] Yet, Brazil is not part of the consensual international law of foreign investment. Instead of ratifying IIAs, Brazil has created the conditions for a positive investment climate without making any international commitment to foreign investors. It has made sure that business opportunities exist for foreign investors and that legal guarantees are in place, but the latter have been based on local laws. That has shown many countries that the legal aspect of the investment climate is but only one of many determinants that push foreign investors to choose one country versus another. It has also shown that if the legal edge of the investment climate is sound and transparent but not based on international law foreign investors can still consider it attractive. Of course not all countries in Latin America have the size of the Brazilian economy and abundant business opportunities as that market offers. But that example might put some weight against a system that is perceived biased against the States.

VI. Is Calvo really back?

[41] *See* for example, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, award of August 2, 2006.

[42] UNCTAD WORLD INVESTMENT REPORT 2009, page 64 . http://www.unctad.org/en/docs/wir2009_en.pdf (last visited on Feb 17, 2010)

While many in the world have come to the conclusion that the system of international law of foreign investment is biased against the sovereign States, the facts point out to a system that has many flaws but is more balanced than it seems. For example, statistics show that in the majority of ICSID arbitrations the States have prevailed in 57.7% out of the fifty-two awards finally resolving treaty claims, and investors have prevailed in 38.5%.[43] Likewise, when investors have been awarded damages, they have collected only less than 4% of the amount claimed in average.[44] Facts aside, the reality is that the perception of many States is widely against the system of international law of foreign investment and thus influenced many have reacted.

So the inevitable question comes up: are we in the verge of a return of Calvo doctrine?

Perhaps we are not. If we explore in details we will notice several traits of criticism, no question. But Latin American countries continue making international commitments to foreign investors under IIAs. Moreover, many of those commitments come from countries that one would have imagined had a policy against the consensual international law of foreign investment. For example, Cuba. with more than 38 BITs ratified, provides international legal guarantees to foreign investors, including provisions of for fair and equitable treatment, conditions for direct and indirect expropriation and international

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[43] Susan D. Franck, Empirically Evaluating Claims About
Investment Treaty Arbitration, North Carolina Law Review, Vol. 86, p. 1, 2007, at 49

[44] *Id* at 59. Accordingly in average investors claimed damages for US$343,430,684.88
And were awarded in average US$10,389,459.10. However, Walck, *supre note* 37, refers that up to 2007 for all cases only 11.8% of compensation has been awarded.

arbitration for disputes between investors and States.[45] Recently, it ratified a BIT with China and before that had done the same for the one signed with the United Kingdom and for the one with The Netherlands.

Venezuela might be perceived as a country antagonizing foreign investors primarily after a surge of expropriation and regulations and arbitration cases. However as recent as 2008 the country ratified a BIT with Russia providing for international minimum standards of treatment including international arbitration before the Stockholm Chamber of Commerce.[46] And although Venezuela has threatened to withdraw from ICSID, not only it remains there but has been proactive on defending the cases where it is a respondent State. In the same direction the Venezuelan Supreme Court of Venezuela issued an opinion interpreting provisions of the investment law and reaffirmed its position in favor of international arbitration recognizing crucial arbitration principles such as severability whereby the annulment of a contract does not annul the arbitral clause and *kompetenz-kompetenz* according to which the arbitral tribunal is entitled to decide upon its own competence and jurisdiction.[47] That strategy might be proving successful after major oil players as American CHEVRON and Spaniard REPSOL were announced to be the winners of a bid where oil fields were adjudicated in which investments in the vicinity of 30 billion US$ are expected [48]

[45] UNCTAD, INVESTMENT INSTRUMENTS ON LINE. http://www.unctadxi.org/templates/DocSearch.aspx?id=779 (last visited on February 17, 2010).
[46] BIT Bolivarian Republic of Venezuela and Russia, ratified on June 1, 2009. http://www.tsj.gov.ve/gaceta/junio/020609/020609-39191-9.html (Last visited on February 16, 2010)

[47] *See* BOLIVARIAN REPUBLIC OF VENEZUELA, SUPREME COURT, CONSTITUTIONAL CHAMBER, decision 1541 of October 17, 2009. http://www.tsj.gov.ve/decisiones/scon/Octubre/1541-171008-08-0763.htm (Last visited on February 17, 2010)
[48]"Petroleras enfrentan reto tecnológico en Carabobo", El Universal, Caracas, February 12, 2010. *See* also, Petroleras confían en relación con Chávez para tener futuro en Venezuela, El Universal, Caracas, February 13, 2010.

Ecuador has withdrawn from ICSID and has denounced several of its BITS but it remains being active in ICSID for the pending cases, appointing arbitrators and submitting defensive arguments. Ostensibly, the strategy might have proved a good one after an arbitration case was dismissed. In fact, after Ecuador prevailed in an arbitration filed by M.C.I. Power Group, L.C. (MCI) and New Turbine, Inc. (New Turbine) where the tribunal rejected the arguments of MCI and New Turbine that Ecuador had violated the fair and equitable treatment and expropriation provisions of the US-Ecuador BIT, an ad hoc committee, established pursuant to the ICSID Arbitration Rules dismissed the annulment application [49]

Nicaragua has threatened to leave ICSID, but noticeably has been the first country to initiate an arbitration case at ICSID against a foreign investor, although the claim was subsequently settled and withdrawn.[50] Likewise, it is part of CAFTA-DR where specific provisions are included to compel the State to grant international minimum standards of treatment to foreign investors. [51]

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[49] Decision on Annulment *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6. http://ita.law.uvic.ca/documents/MCI-Annulment.pdf (Last visited on February 17, 2010).

[50] In April 2008, the General Prosecutor of the Republic of Nicaragua sued Barceló, demanding the rescission of the purchase-sale agreement and the restitution of the Montelimar hotel complex, claiming it had failed to comply with the obligations and commitments emanating from the agreement. On June 24, 2008, it notified Barceló and invoked the Investment Protection and Mutual Protection Agreement with the intention of submitting to arbitration before ICSID.

A negotiation process began and a document titled Frame Agreement between the Government of Nicaragua and Grupo Barceló was signed on June 1, 2009. Article IV provides: “All disputes, controversies and claims arising from this frame agreement in relation thereto or compliance thereof shall be resolved through arbitration before the International Chamber of Commerce”.

[51] CAFTA-DR, Chapter 10, http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf (Last visited on February 17, 2010).

Argentina is the country with the largest number of investment arbitration cases against. In some of the cases, awards have been issued ordering payments to be made to investors. Argentina has submitted request for annulment in those cases using the provisions of article 52 of the ICSID convention.[52] And an argument has been made in public appearances of representatives of the Argentine government that article 54 of the ICSID Convention should be interpreted as meaning that if under the law of a particular State there is a formality to be complied with by a judgment creditor in order to enforce a judgment given against that State, then an ICSID award creditor has to follow the same procedure to enforce an ICSID award given against that State.[53] Yet, the country has decided to remain within the system of international law of foreign investment and has not expressed any intention to leave or to not comply with the arbitral awards.[54]

On the other hand, while many of those countries send mixed signals about their acceptance of the international law of foreign investments other countries in the hemisphere are more explicit on accepting it. Haiti, for example ratified in the ICSID

[52] ICSID Convention, Article 52: "(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:(a) that the Tribunal was not properly constituted;(b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."

[53] Transcript of the hearing of July 14, 2008 ("Transcript"), pp.97-99. *Enron Corporation Ponderosa Assets, L.P. (Claimants) v. Argentine Republic (Respondent)* (ICSID Case No. ARB/01/3) (Annulment Proceeding). Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), October 7, 2008 at para 57. http://ita.law.uvic.ca/documents/Enron-Stay_000.pdf (Last visited on February 17, 2010).

[54] *See* letter addressed by the Deputy Treasury Attorney of the Nation of Argentina to the Secretary General of ICSID on January 14, 2009. *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3. http://ita.law.uvic.ca/documents/VivendiArgentinaLetter14Jan2009.pdf (Last visited on February 17, 2010).

Convention on October 27, 2009.[55] Colombia signed a BIT with India and has developed a model BIT to be used for future negotiations.[56] Uruguay signed a BIT with the U.S. in late 2005.[57] Chile signed a FTA with the U.S. which entered into force in 2004 with a significant chapter devoted to foreign investment under chapter 10.[58] So did Peru in 2006 which entered into force in 2009.[59] Similar treaties have been signed by the U.S.with Colombia and Panama but they have not been ratified by the U.S. Congress yet.[60]

In 2008 Countries of Latin America and the Caribbean concluded six new BITs bringing the total number of BITs for the region to 483. Peru signed three new comprehensive FTAs with Canada, China and Singapore. Chile concluded FTAs with Australia and Turkey, while Colombia concluded agreements with Canada and the members of the European Free Trade Association.[61]

If that were not sufficient to present a rosier picture, one should also mention a big difference between the times of Calvo doctrine dominance and the present time: Latin American countries are no longer solely capital importing, they are also capital exporting.

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[55] *See* ICSID's announcement. http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement23. (Last visited on February 17, 2010).

[56] *See* Latin America's new model bilateral investment treaties, Investment Treaty News, July 17, 2008. http://www.investmenttreatynews.org/cms/news/archive/2008/07/17/in-depth-latin-america-s-new-model-bilateral-investment-treaties.aspx (Last visited on February 17, 2010)

[57] *See* USTR, http://ustraderep.gov/World_Regions/Americas/South_America/Uruguay_BIT/Section_Index.html

[58] *See* Chile- U.S. Free Trade Agreement. http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text (Last visited on February 17, 2010).

[59] Perú-United States Trade Promotion Agreement. http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text

[60] *See* note from USTR. http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta and http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa (Last visited on February 17, 2010).

[61] UNCTAD, WORLD INVESTMENT REPORT 2009, page 71. http://www.unctad.org/en/docs/wir2009_en.pdf (Last visited on February 17, 2010).

Multinational companies such as PETROBRAS, EMBRAER, VALE (CVRD), VOTORANTIN, ODEBRECHT, PDVSA, GRUPO SANTO DOMINGO, PEREZ COMPANQ, TENARIS, LAN CHILE, CEMEX, TACA are all major foreign investors. They are also originally from Latin America. The borders of their countries or those of the region no longer intimidate their operations. In 2007, for example, the Mexican company CEMEX's acquired an Australian company for US$14.2 billion through its foreign affiliates,[62] and Brazilian CVRD acquired Canadian large nickel producer INCO.[63]

More investors from Latin America perhaps with not so familiar names are doing business in developed countries but also in developing countries. Latin American investors exported $63 billion in 2009, [64] a significant increase from US$5.2 billion in 2001.[65]

In a globalized economic scenario where many multinationals from Latin America are foreign investors, the interest of many countries in the region on being part of the consensual international law of foreign investment now has a different motive: to protect the interests of Latin American investors. In absence of the protection granted by the

[62] UNCTAD, WORLD INVESTMENT REPORT 2008: Transnational Corporations and the Infrastructure Challenge, p60, available at www.unctad.org/Templates/webflyer.asp?docid=10502&intItemID=2068&lang=1 (UNCTAD World Investment Report 2008). p81, n77 (Last visited on February 17, 2010).

[63] *Id* 2009, page 66.
[64] *Id* 2009, page 65
[65] *Id*.

international law of foreign investment many of those investors could be considered -- in the words of a prominent arbitrator-- “orphan investors”[66]

Obviously, foreign investors have been doing business for many years without many of the protections granted today through the consensual international law of foreign investment. When it comes to business, investors take rational decisions where what matters is that benefits exceed the costs. If an investors finds a suitable business opportunity and there is a potential for non-commercial risk different avenues are available. For example, a local partner could get involved in order to share and eventually mitigate the local risks. Or investment guarantees programs could be obtained. Under the Multilateral Investment Guarantee Agency of the World Bank group investors can acquire insurance against risks such expropriation given certain conditions.[67] Bilateral investment protection insurance can also be obtained for example under OPIC in the U.S. ECGD in the United Kingdom or even private investment private insurances can be obtained.

Alternatively, investors can rely on diplomatic protection of their own countries vis-à-vis the host country. But historic evidence has shown that home countries can be hesitant to strongly advocate on behalf of investors[68] or can politicize the dispute as part of the dynamic of their international relations policy.[69]

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[66] Yves Fortier at the conference 50 years of BITs, Frankfurt, Germany, December 1- 3, 2009.
[67] *See* MIGA, http://www.miga.org/guarantees/index_sv.cfm (Last visited on February 17, 2010).

[68] South Africa. *See* Crawford von Abo v The Republic of South Africa. The Claimant looked to South Africa for diplomatic protection and obtained a court order to that effect in 2009: Von Abo v Government of the Republic of South Africa & Others (2009) 2 SA 526. On 5 February 2010, Prinsloo J of the High Court of South Africa delivered a

Thus, Latin American “orphan investors” are likely to undertake “treaty shopping”, whereby the investment is devised in a way that it benefits from an existing IIA with the host country. In other words, investors can seek to structure their investments so as to take advantage of the protections of BITs between other states. Thus, regardless of the real nationality of the ultimate foreign investor, the capital appears to flow from a country with which the recipient State has committed to grant international law protection. The investor is usually a corporate vehicle with the nationality of the other country.[70]

Treaty shopping has been considered acceptable by many commentators and legal under the current system of international law of foreign investment.[71] However, many IIAs tend to limit the conditions upon which treaty shopping can be undertaken, requiring for example that the investor be established or incorporated in the home jurisdiction in order to acquire the protections of the BIT and many arbitral tribunals have scrutinized the corporate structure of the investors to determine their real nationality.[72]

follow-up ruling, stating that the South African government was in breach of his previous order to provide the Claimant with diplomatic protection.

[69] This has been one of the reasons for the creation of ICSID: to depoliticize investment disputes.

[70] Although, if the IIA provides so the corporate vehicle could be registered in the host country and yet be considered a foreign investor if it is controlled by a person with nationality than that of the other signatory country. *See* García-Bolívar, Omar, The issue of a foreign company wholly owned by national shareholders in the context of ICSID arbitration, TRANSNATIONAL DISPUTE MANAGEMENT, Volume 2, issue #05 - November 2005, available at http://www.transnational-dispute-management.com (Last visited on February 17, 2010).

[71] Christopher Schreuer at the conference 50 years of BITs, Frankfurt, Germany, December 1- 3, 2009.

[72] *See Amco Asia et al. v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389 at 404-405. In this one the Tribunal rejected the search for indirect control beyond the first level of control and found that the search was restricted to the immediate control of the parent company over the local company. *See* also SOABI v. Senegal, Decision on Jurisdiction, 1 August 1984, 2 ICSID Reports, 182-183. In the last one the Tribunal went beyond direct control and found that Belgian nationals in effect controlled SOABI.

In addition, Latin American "orphan investors" are likely to face competitors who have international law protection. That, in and of itself will not be a deterrent to succeed in the current global economy but could increase the risk of the investment for purposes of obtaining credit or investment protection insurance; a factor that will play against the benefit versus cost equation. Under those circumstances, a strong advocacy on behalf of the consensual international law of foreign investment is likely to come from within many Latin American countries through the domestic investors. In some cases, many of the Latin American foreign investors are public companies, where many citizens have invested their savings. Thus, pressure from common citizens could play a role in the design of the investment policies of many countries. In other cases, the State itself is the sole or main shareholder of the investor and would be interested in securing the maximum level of protection to the investments it makes overseas. The previous two examples can be exemplified with PETROBRAS where the State owns a portion of the shares along with investors who have acquired ownership in the public market. Recent events with investment of PETROBRAS in Bolivia show that international investment protection might be needed. When Bolivia took steps to nationalize the energy industry, Brazilian gas company PETROBRAS reportedly considered bringing investment claims against Bolivia for treaty violations by invoking the rights of its subsidiaries in Argentina and the Netherlands.[73]

Another factor that might help make a case on behalf of the consensual international law of foreign investment is the surge of the sovereign wealth funds. Investments by funds

[73] *See* Luke E Peterson, 'Analysis: Foreign Investors Still in the Dark as to Terms of Bolivian Nationalisation', Investment Treaty News, May 16, 2006.

directly owned by the States have been a recent phenomenon. To a large extent they operate globally and are expected to continue its exponential growth.[74] Funds from China, Norway, Russia, Arab Emirates and Singapore, among others, have been managed with purely private business interests on looking for the best opportunities to maximize their profits. On operating with a peculiar business model those funds have proved to be hugely successful and are developing a trend likely to be followed by other countries. Latin America will not only be recipient of investments to be made by those funds, but some countries in the region are likely to set up their own sovereign wealth funds which in turn will become key foreign investors in other countries. So far, Chile has set up a rainy fund with the excess of revenues from the sale of cooper. Venezuela has established a controversial stabilization fund with the excess of revenues from oil sales, although allegedly the funds have been used for political purposes.[75] Brazil has recently discovered important oil reserves from which extraordinary revenues could flow to the public coffers and potentially to some kind of investment fund.[76] If any of these funds or any to be set up by other governments follow the model of the Norwegian sovereign fund for example on investing globally, many States will have an additional reason to consider being part of the consensual international law of foreign investment.

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[74] See "Sovereign-wealth funds: asset-backed insecurity", The Economist, March 25, 2008. See also, "Norway's pension fund: passive aggressive", The Economist, February 6th, 2010, page 82.
[75] *See* for example, Venezuela Boosts Oversight of $18 Billion Fund, Bloomberg, February 26, 2007. http://www.bloomberg.com/apps/news?pid=20601086&sid=ahP0nXC7YKm0&refer=latin_america (Last visited on February 17, 2010).

[76] *See* Tupi oil is 'second independence for Brazil', upstreamonline.com, 04 May 2009. http://www.upstreamonline.com/live/article177455.ece (Last visited on February 17, 2010).

VII. If not Calvo then what?

Thus, a return to the Calvo doctrine and a system of gunboat diplomacy to protect foreign investments seems unlikely. But that does not mean that the current system of international law of foreign investment does not have flaws.

It seems a much more balanced system of international law of foreign investment is at call. Many of the criticisms made to the current system might be based on perception rather than in reality, but a consensus is growing around the need to change the perspective on certain issues.

<u>Economic development and foreign investments.</u>

One of those issues is the role economic development should play when defining a protected investment. Obviously, to a large extent it is up to negotiators to include specific references to economic development in the relevant IIAs, not only in the preambles but also within the text of the treaties themselves. Many Latin American countries have matured in their treaty negotiation skills and are likely to explicitly include provisions about the development dimensions of the investment in future agreements. But arbitrators should also be called to look into the intention and raison d'être of the States when interpreting the IIAs. In that sense, international protection will be granted to foreign investments if and when economic development has been fostered.

There are ways for a tribunal to ascertain the contribution to economic development of a foreign investment. Although the litigating party could not be asked to prove the negative, the tribunal could look at all the facts and find that there has not been a contribution to the economic development of the country when, for example the investor has not complied with the local law, or has violated human rights, or has damaged the environment or has been based on corruption. Tribunals in many cases have already reached decisions where protection has been denied to foreign investments based on any of the failures above mentioned. Those decisions have been taken on the merits, not for jurisdictional purposes. Thus, all those factors can also be part of a holistic analysis to determine the contribution to economic development of a given investment.

Be it as it may, tribunals have the needed tools to ponder whether the investment exceeds the outer limits for protection. If an investment is contrary to public interest, has not left any knowledge to the host country, has not enhanced the economy or its productivity, has not increased the standards of living of the host country or the labor conditions, it has probably made no contribution to the economic development of that country. Given specific references in the relevant IIAs, that investment should be denied protection either at a preliminary jurisdictional stage or at a final merits stage. In some cases, factors other than those mentioned here should be taken into account, and in most cases all these factors should not be considered concurrently, but the rationale of countries on granting international protection to foreign investment should be taken into account for adjudicating a sustainable outcome.

A perspective of the international law of foreign investment that takes into account the development dimension will avoid abusive practices such as, for instance, local investors being disguised as foreign investors or granting protection to investments detrimental to the environment.

Interpretation of the IIAs that take into account the intention of the parties should be the rule in a balanced system of international law of foreign investment. Arbitral tribunals seem to be leaning in that direction and potentially be reversing prevalent positions created by previous tribunals that are detrimental to the host States. For example, in *Tza Yap Shum v. Peru*,[77] the Tribunal declined to do a broad interpretation of the MFN clause of the BIT and additional claims for breach of other treaty provisions, including a clause guaranteeing fair and equitable treatment were dismissed. It emphasized that the interpretation very much depended on the specific MFN clause in the specific treaty as "[E]ach MFN clause is a world in itself, which demands an individualized interpretation to determine its scope of application",[78] and that to determine the scope and meaning of the MFN clause, it needed to establish the intentions of the contracting parties.[79]

<u>Obligations for the foreign investors under IIAs.</u>

Likewise, the current system of international law of foreign investments contains obligations to the States but the beneficiaries of the protection are the foreign investors. Obligations to foreign investors in connection with the environment, human rights, labor

[77] *See Tza Yap Shum v. Republic of Peru,* ICSID Case No. ARB/07/6, Decision on Jurisdiction of June 19, 2009.
[78] *Id* at para. 198
[79] *Id* at paras 196, 206

standards and corporate social responsibility should be part of the new perspective of the international law of foreign investment. Perhaps BITs, due to their bilateral character are in a better position to create a mandatory framework for foreign investors. As BITs become local law, foreign investors will be subject to specific obligations once the investment is established within the host country.

As UNCTAD has been advocating for some time, a way to balance private and public interests would be to establish investors' responsibilities directly in IIAs rather than only leaving the host country with the right to impose them through its domestic laws.[80] In many cases the obligations could be passive, that is to refrain from doing certain activities detrimental to the interests of the country, for example corruption. But some obligations could be active such as the obligation to make a development contribution,[81] say in satisfying certain and specific health or educational needs of the population of a place where the investment is taking place. Of course the issue that negotiators will have to deal with is how to the host State can ascertain the liability of the foreign investor as a whole and not only the liability of the domestic corporate vehicle in case the obligation is breached.

Thus, it seems the trickiest point would be devising the enforcement mechanisms of those obligations, especially when it pertains to extraterritorial enforcement. However, some avenues could be explored with the future IIAs. For instance, there is a need to amend the

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[80] UNCTAD, DEVELOPMENT IMPLICATIONS OF INTERNATIONAL INVESTMENT AGREEMENTS. IIA MONITOR No.2 (2007) page 6. Also UNCTAD, POSITIVE CORPORATE CONTRIBUTIONS TO THE ECONOMIC AND SOCIAL DEVELOPMENT OF HOST DEVELOPING COUNTRIES. 2005 and UNCTAD, WORLD INVESTMENT REPORT 2003.
[81] *Id*.

practice whereby the legal personality of the foreign investor can be disregarded for purposes of granting international law protection to a host State incorporated subsidiary while the same is not contemplated for purposes of liability of the parent company. The policy of granting international law protection to wholly owned subsidiaries incorporated in the host State is good and makes sense. Nevertheless, to make the foreign parent company liable for the doings of the local subsidiary, the same criterion should be applied and under certain circumstances, the personality of the local subsidiary could be disregarded.

Permanent investment disputes tribunals.

The inconsistency of the investment arbitral tribunals has been a source of great criticism. Of course that apparent inconsistency has to do with the fragmentation of the international law of foreign investment. That fragmentation is inherent to the system itself since it is largely based on bilateral treaties most of which although seemingly similar are different in substantial parts. However, the disputes that arise under the international law of foreign investment are unique in terms of the subjects and the objects. The interpretation of concepts and principles that are peculiar to States and public international law cannot be left to the view of ever changing arbitrators. Because of that the use of concepts borrowed from international commercial arbitration need to be reconsidered for purposes of foreign investments. It has been said that international arbitration is similar to local arbitration just as sea lions are similar to jungle lions: just in the name. The same can probably be said of investment arbitration and international commercial arbitration. Whereas in the former issues of international law and public policy and the interests of sovereign States are frequently present in the latter that is rarely the case. Hence, different procedural avenues have been developed with IIAs, such as annulment procedures and appellate tribunals. However, some countries in Latin America have hinted the possibility of creating a special investment disputes resolution center.[82] In many respects the idea of such a center has to do with the perception that the investment arbitral tribunals are biased against States, but it also has to do with the fact that the majority of arbitrators in investment disputes have been from developed countries. In fact, although Latin American countries have been respondents to more than 40% of ICSID disputes, only 16% of the arbitrators have been from Latin America.[83] Obviously, under the ICSID Convention the parties are free to appoint arbitrators without regard to nationality and even outside the list of arbitrators designated by the country members, but under certain conditions ICSID can appoint arbitrators. It is unclear how many of the arbitrators appointed by ICSID have come from that list. One could estimate that the percentage of Latin American arbitrators appointed directly by ICSID under article 38 of the Convention is less than 13 %.[84] Even less should be the percentage of Latin American arbitrators appointed from the ICSID list or panels of arbitrators formed

[82] *See* BOLIVARIAN REPUBLIC OF VENEZUELA, SUPREME COURT, CONSTITUTIONAL CHAMBER, decision 1541 of October 17, 2009. http://www.tsj.gov.ve/decisiones/scon/Octubre/1541-171008-08-0763.htm (Last visited on February 17, 2010), referring to the 3rd meeting of the Presidents of the Judiciaries of Union of the South American Nations (UNASUR) and the Nueva Esparta Declaration, which proposed the creation of a regional dispute resolution center to hear disputes between States and States and its nationals and nationals of other countries.
See also 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 February 17, 2010).
See also Final Declaration of the 7th ALBA Summit http://www.alternativabolivariana.org/images/declaracionVIIcumbrealba-tcp.pdf. (Last visited on February 17, 2010).
[83] ICSID Case load- Statistics. http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics (Last visited on February 17, 2010).

[84] *Id.*

as per article 12 of the Convention. That has originated criticism by some countries to ICSID and to the usefulness of the panels.[85]

Perhaps based on those factors some countries insist in the need of moving the investment disputes resolution away from ICSID. Although the message portrayed by those countries might not take into account the good things they have under the ICSID system that are not present in other arbitration procedures, such as the economic development defense, and can also be interpreted as a rejection to the return of the Calvo doctrine; it contains a claim for permanency and predictability on solving investment disputes. It is still not clear how those two things could be achieved under the purported regional investment disputes resolution centers.

One possibility yet to be further explored could be the creation of permanent tribunals to know of foreign investment disputes. Those tribunals will be composed by judges, not arbitrators. As opposed to arbitration, the judges will not be chosen by the parties, but will form different tribunals within a center to which the disputes will be allocated at random. In case of conflict of interest another judge from the center will be called. The judges will be appointed to the tribunals in advance by the dispute resolution center and will be called upon when the claims are submitted. In other words, the judges will not be precluded from undertaking other professional activities before they are called to know of

[85] Hildegard Rondón de Sansó, Los Problemas Jurídicos Planteados En Los Arbitrajes Internacionales De Inversión. Caracas, junio de 2009, In EL OTRO LADO DEL ARBITRAJE INTERNACIONAL DE INVERSIONES. CICLO DE CONFERENCIAS, julio 2009. PDVSA, Caracas, February 2010. *See also* http://www.pdvsa.com/index.php?tpl=interface.sp/design/readsearch.tpl.html&newsid_obj_id=7864&newsid_temas=0 (Last visited on February 17, 2010).

a case. The appointees will have to have certain ethical and professional conditions such as knowledge of international law of foreign investment. This format will guarantee that investors are satisfied with the level con competency of the judges and States are satisfied with the permanency, transparency and predictability of the dispute resolution framework.

Legal aid funds.

On a different matter the call for a more balanced system of international law of foreign investment also entails a criticism to the current level of costs of the procedures. Investment disputes are complex and require a level of expertise that sometimes has not been developed internally within the bureaucracy of many developing States. The level of expertise needed to cope with many of the investment disputes is highly expensive. As a result many Latin American countries have struggled with the possibility of retaining internationally capable professionals. Because of that some multilateral organizations have proposed the creation of legal aid funds to help some countries with the expenses involved in investment disputes.[86] For example, recently many Central American countries, some of which are the poorest of the hemisphere, have been respondent to some cases in connection with the investment chapter of the DR-CAFTA agreement.[87] Considering how politically sensitive the approval of that agreement was in many

[86] From personally experience: The Organization of American States, the Inter-American Development Bank and the United States Agency for International Development have been discussing this possibility.
[87] Accordingly, at least 4 claims have been presented against Central American countries based on CAFTA-DR since it entered into force in 2005. *See* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending And http://www.state.gov/s/l/c33165.htm (Last visited on February 17, 2010).

countries, multilateral and bilateral organizations will be wise to consider ways to cope with the bad perception that those cases might create internally; a portion of which arises from the high costs. Similarly, multilateral organizations have proposed ways to develop the internal capacity for the States to be able to litigate the investment disputes that are presented against them. A solution along those lines will be fair. Currently, foreign investors have ways to finance the costs of investment arbitration. For example, under the form of third party funding investors can obtain financing from investors and banks[88] in exchange for a portion of the amount to be awarded if the claim is successful. The mechanism can save a party costs upfront and lower the risk of pursuing a claim. Of course, that avenue is also open to States if they have a sizeable counterclaim. Thus, it seems that as part of the upcoming international law of foreign investment, financing the costs of the litigation either through institutionalized legal aid funds of through third party funding will be a permanent factor.

VIII. Conclusion.

The dichotomy between sovereignty and investment protection is innate to the international law of foreign investment. It has been present in the past and it is likely to be present in the future. For the investor, generally speaking, the investment is a means to generate profits. For the host State, the investment is usually received to foster economic development. The legal tool that protects the investor's interests is the right of property.

[88] For example *Credit Suisse Securities* has a division devoted to provide third part financing under the name of Litigation Risk Strategies Group.

For the host State, it is its sovereignty. Thus, during the foreign investment process, the dissimilar interests of the parties could converge or diverge. In the latter case, a dispute between the investor and the Government of the host State could arise. In normal circumstances, such a dispute must be resolved according to the laws and mechanisms of the host State. In the past, and when the dispute had to be inexorably resolved according to the mechanisms of the host State, investors requested diplomatic intervention from their home States. However, this contingency took the control of the dispute away from the investor, and disputes were usually resolved according to the interests of the home State, frequently disregarding the interests of the real stakeholder: the investor.

In Latin America investors were asked to seek redress for grievances only before local courts. With the change of attitudes against foreign investments investors have been allowed to initiate international arbitration against States. The experience with those arbitrations has been mixed, although it has been widely perceived that the system of international law of foreign investment is biased against the States.

With certain reactions against that system it might seem that there could be a return to the Calvo doctrine. Different factors point to a different direction, one where a much more balanced system of international law of foreign investment would emerge.

In an interdependent and multipolar world where countries are both capital importing and capital exporting it would be reasonable and fair to improve certain aspects of the international law of foreign investment. That is a task for the negotiators, but also for the arbitrators and possibly for the administrators of the dispute resolution centers. Be it as it may, it can be said that when it comes to international law of foreign investment the return to the past is not the way forward.