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A Technical and Policy Analysis of the Denunciation of the ICSID Convention

Cristián Rodríguez – Chiffelle
LL.M. candidate, class of 2013

~~I)~~ Introduction~~.--~~

~~During its fifth Summit~~ on May 29, 2007, ~~the countries that at the time constituted~~ the *Bolivarian Alliance for the Peoples of Our America*, also known as the Bolivarian Alternative (*Alternativa Bolivariana* - ALBA), namely Cuba, Bolivia, Venezuela and Nicaragua, later joined by Ecuador, agreed to denounce the ICSID Convention.[1] ~~As~~ President Evo Morales ~~held,~~ the decision ~~was taken~~ in order to "…guarantee the sovereign right of countries to regulate foreign investment in their national territories." He also stated that ALBA countries vigorously reject legal, media, and diplomatic pressures from certain multinational companies, which having violated constitutional rules, domestic legislation, contractual agreements, and regulatory, environmental, and labor provisions, resist the application of sovereign decisions of the countries by threatening with commencing international arbitration proceedings against the states before institutions such as ICSID."

The International Centre for Settlement of Investment Disputes (ICSID, or the Centre) was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention), ~~done at~~ Washington on March 18, 1965 at the initiative of the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). The Convention entered into force on October 14, 1966 when 20 countries ratified it. As of January 3, 2013 there are 158 signatory states to the Convention. ~~Out~~ of these, 147 states have also deposited their instruments of ratification, acceptance or approval of the Convention with the depositary (the World Bank).

However, this impressive number of members ~~run~~ three states short of the total countries that once ratified the Convention, as the *República Bolivariana de Venezuela*,

[1] This was not applicable to Cuba, as it is not a member or signatory state to the ICSID Convention.

the *Estado Plurinacional de Bolivia* and the *República del Ecuador* have duly denounced ICSID in accordance with article 71 of the Convention.[3] ~~As the last one of these denunciations (Venezuela) took place on January 24, 2012~~ all of them have now ~~complied with~~ the six months termination period set by the Convention~~,~~ and thus are in full effect.

~~But, are the denunciations at hand really in full effect? What about these~~ countries' International Investment Agreements[4] currently in force that grant jurisdiction to the Centre?

~~This is one of the questions I will endeavor to address in this paper.~~ In addition to addressing the technical meaning and implications of ICSID and/or IIAs/BITs[5] denunciations, this work will also look at the historical context in which these withdrawals are taking place, and address the broader policy implications these denunciations will have, such as their impact on the rules of the investor-State Dispute Settlement (ISDS) regime, particularly in Latin America.

Since Bolivia became the first country to denounce ICSID in 2007, followed by Ecuador's withdrawal in 2009 and Venezuela in early 2012, a substantial amount of research has been done on this subject. ~~Many of the relevant academic works on the issue are cited in this paper, and accordingly identified in the footnotes. As the intention of~~ this paper ~~is also~~ to make a novel analysis ~~on~~ the policy ~~matter behind~~ the denunciation, its technical scrutiny of ~~the issue at hand~~, however adequate, does not aim to reach the depth

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[2] Ecuador denounced the Convention explicitly invoking constitutional reasons as a justification (Ecuador's 2008 Constitutional Assembly draft *Carta Magna* proposal included an article that forbids the Country to enter into international agreements that provide for investor-State dispute settlement mechanisms when these include international arbitration jurisdictional clauses, with the exception of Latin American/Regional context agreements).

[3] Bolivia's notice of denunciation was received by ICSID May 2, 2007 (denunciation became effective November 3, 2007); Ecuador denounced ICSID July 6, 2009 (denunciation became effective January 7, 2010). Venezuela's denunciation was notified January 24, 2012 (became effective July 25, 2012).

[4] Including Bilateral Investment Treaties (BITs) and Investment Chapters contained in comprehensive Free Trade Agreements (FTAs).

[5] For the purposes of this paper, I will use indistinctively the acronyms IIAs (International Investment Agreements) or BITs (Bilateral Investment Treaties) to encompass International Investment Agreements.

and level of detail accomplished in many of those extensive works, ~~that may be consulted accordingly by the reader~~.

Background

In recent years, the number of arbitration cases brought before the Centre with Latin American countries as respondents has increased dramatically. According to ICSID, by late 2010, out of about 130 cases pending, over sixty involved es from Latin America.

This trend represents a break with the past as historically these countries widely rejected the ICSID Convention. In the mid-sixties, Latin America revealed its opposition in block to the World Bank's project to create an international agency specializing in settling investment disputes.[6] This opposition was christened by professor Lowenfeld as the "*No-de-Tokyo*" (citing the vote against the ICSID Convention by Latin American countries and others at the 1964 Annual Meeting of the World Bank in Tokyo, Japan).

However, the 1980s introduced a shift. Some Latin American countries, suffering wide economic crises at the time, privatized several of their energy and utility companies, and at the same time began to sign bilateral investment treaties (BITs), in order to stimulate economic growth through direct investment.[7] The trend continued throughout the 1990's and early 2000's, leading to today's "ghetti bowl" consisting of approximately 3000 active IIAs (mostly BITs).

~~As mentioned *supra*,~~ during the 1990's and the past decade, ~~we did~~ not only ~~see~~ an explosion of BITs, but also of the claims filed against states, ging into question the validity of the system and its tendency to favor capital-exporting countries. Questions such as equity and wealth distribution, adverse environmental and health impacts, exacerbation of ethnic conflicts and sovereignty restrictions became ~~a~~ routine speech ~~for~~

[6] Fach Gómez, Katia; "*Latin America and ICSID: David versus Goliath?*" HeinOnLine, 17 Law & Bus. Rev. Am. 195, 2011.
[7] Fach Gómez, Katia; *Id.*

many politicians and government officials of the sub-continent. Furthermore, in the view of countries such as Bolivia, Ecuador and Venezuela, such legitimacy questions are so essential, that they ~~have departed the system~~.

But have ~~they really~~ "escaped" the investment regime by denouncing ICSID?

II~~)~~ **The Technical issue**~~.~~

Relevant provisions

The Convention defines consent to arbitration and the consequences of a state's denunciation in Articles 25(1), 71 and 72. Article 25(1) of the Convention states:

> "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."

Article 71 of the Convention states:

> "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."

Article 72 of the Convention states:

> "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."

Denouncing the Convention

considering article 71 of the *ICSID Convention*[8], we can hastily reach two conclusions, one substantial and one procedural: first, there is no question whether a contracting state may withdraw from the Convention but what consequences are attached to such withdrawal[9], and second, this withdrawal will most likely take effect, in a best case scenario, only six months after the referred notification.

Further developing on the issue of "Parties to the Convention", one must always keep in mind that jurisdiction to ICSID is conferred not only by becoming a Party to the Convention, but also in the "written consent" presented in the relevant IIA/BIT. Therefore, a fundamental question immediately arises: how does one reconcile the fact of a state that has conferred jurisdiction to the Centre in a IIA/BIT currently in force that awards jurisdiction to ICSID (or fictionally in force due to "survival clauses"[10]), with the same state having denounced the Convention? In other words, what becomes of the denouncing state's existing rights and obligations under the Convention at the time of denunciation?[11] Although article 72 addresses this issue, the answer is still unclear.

~~Let's take a step back:~~ ICSID jurisdiction is determined by article 25 of the Washington Convention, being its most essential factor the written consent conferred by the contracting state to the Centre. But, in order to initiate such a procedure, it is also necessary for the investor to accept this offer of consent (which can be done through the existence of a "legal dispute arising directly out of an Investment, …"), for which he necessarily needs to be a national of the other contracting state. Thus, in principle Article 25 is clear in the sense that the jurisdiction of ICSID cannot be established if the country where the investment has been made has ceased to be a contracting state.

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[8] As one author correctly states, "this provision is unconditional and requires only a written notification." Gaillard, Emmanuel; "*The Denunciation of the ICSID Convention*", New York Law Journal, June 2007.

[9] Gaillard, Emmanuel; *Id.*

[10] E.g., article 22.3 of the 2012 U.S. Model BIT reads as follows: "3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments." Also, many older BITs contain much broader and extensive "survival clauses".

[11] Gaillard, Emmanuel; *Id.*

This understanding is consistent with the negotiating history of the Convention, where Mr. Aron Broches, the World Bank's General Counsel and the Convention's "principal architect"[12], stated that the consent would not be binding until an investor had accepted it. If the State were to withdraw its unilateral consent by denouncing the Convention before any investor had accepted it, no investor could later bring a claim before the Centre[13] (in this case, assuming the six-month period referred in article 71 had also passed).

Consequently, it appears that a unilateral offer of consent to the Centre's jurisdiction in an IIA may be revoked by the state before an investor accepts it. However, before asserting this, we must keep in mind that IIAs and BITs are international treaties, subject to international law. Therefore, unless both Parties specifically agree to exclude the ICSID clause from the BIT, a state should either maintain the *Centre's* jurisdiction or terminate the entire treaty[14], in accordance with article 44(1) of the Vienna Convention on the Law of Treaties.

Evidently, the question at hand is, after the denunciation, when does the receiving country cease to be a contracting state?

Article 72 sheds some light in this regard, stipulating that the notice of denunciation by a contracting state "shall not affect the rights or obligations under this Convention of that State … 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."[15]

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[12] Schreuer, C. et al; "*The ICSID Convention: a commentary*", 2nd Ed., Cambridge University Press, 2009.
[13] UNCTAD; "*Denunciation of the ICSID Convention and BITs: Impact on Investor-State claims*", IIA Issues number 2, Geneva 2010. www.unctad.org/diae
[14] UNCTAD; *Id.*
[15] Also in conformity with the customary rules of international law and Article 70(1) of the Vienna Convention on the Law of Treaties (emphasis added).

Hence, Article 72 (which governs the consequences of the denunciation set forth in Article 71), and the notion of "consent to the jurisdiction of the Centre", are essential to the question before us.

As Durney properly points out, the debate focuses mainly on the extent of the protection afforded by Article 72, which provides that the denouncing rights and obligations "arising out of consent to the jurisdiction of the Centre" given before the notice of denunciation are not affected by the denunciation. The question is "whether Article 72 preserves the legal effects of unilateral consent, including the obligation to have recourse to ICSID arbitration, when that unilateral consent is accepted by an eligible counterparty. May an investor justifiably claim that the State's consent to submit a dispute to ICSID arbitration, previously expressed in a BIT, remains effective despite the denunciation?"[16]

If the investor accepts a state's general consent conceded by the state in the IIA/BIT prior to the receipt of the notice of denunciation, or within the six-month period referred in Article 71,[17] rights and obligations of the Parties (and therefore ICSID jurisdiction) seem to remain in force. But, is this also entirely clear?

In general, three different interpretations have been developed in this regard. The first, interpretation is that ICSID has jurisdiction only in disputes in which both the state receiving the investment and the foreign investor have established mutual consent <u>before</u> the denunciation of the Convention. Several authors[18] have expounded the view that the unilateral offer of consent presented by the contracting states in the IIA/BIT is no more than an "offer to consent", which requires acceptance by the investor <u>before</u> the

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[16] Durney, Mariana; "*Legal Effects and Implications of the Denunciation of the ICSID Convention on Unilateral Consent Contained in Bilateral Investment Treaties: A Perspective from Latin American Cases*", Thesis, 2012; Universidad de Chile and Universität Heidelberg LL.M. program in International Law, Trade, Investment and Arbitration (unpublished at the time of this citation).

[17] Professor Gaillard cites article 72 in this regard in "*The Denunciation of the ICSID Convention*"; however, it is likely that he was referring to article 71.

[18] In this sense, professor Cristoph Schreuer believes that the State's consent must be perfected before the notice of denunciation. Schreuer, Cristoph; "*The ICSID Convention, a Commentary*". Cambridge University Press, 2001, p. 1286. Also cited by Gaillard, Emmanuel; *Id.*

denunciation (in this case, article's 71 six-month period would not be covered if the consent has not been perfected before the notification to the Centre). This approach has also been called "Offer and Acceptance".

This was the specific issue at hand argued in *Euro Telecom International (E.T.I.) v. the Plurinational State of Bolivia*, as Bolivia denounced the Convention in May 2007 and within the subsequent six-month period E.T.I. filed a claim against Bolivia before ICSID. Although the Centre decided to register the dispute (in spite of a letter sent to World Bank's President Robert Zoellick by the Bolivian Government, and the Secretary General's prerogative established in Article 36(3) of the Convention), a final decision on jurisdiction (in accordance with Article 41) was never reached, as the claimant withdrew from ICSID proceedings to initiate ad-hoc arbitration[19].

A second interpretation of the issue is that investors could accept the IIA/BITs offer of consent even within six months after the notice of denunciation is received by the depositary of the Convention. This position gives proper sense to the rule established in Article 71, and was also at stake in *E.T.I. v. Bolivia* and the others cases mentioned in footnote number 19.

A third and broader interpretation of Article 72 would be to sustain that consent given to ICSID jurisdiction by a state through an IIA will remain in force as long as the IIA remains in force. This third interpretation contains two variants: first, a very broad option implying in absolute terms that as long as the IIA is in force the Centre will have jurisdiction, and a second one (perhaps more reasonable) stating that as long as the arbitration clause of the IIA constitutes a clear and unmistakable consent to the

[19] Two cases, still undecided, were also registered in 2012 after Venezuela's denunciation but before its effectiveness (6-month period): *Saint-Gobain Performance Plastics Europe v. Bolivian* (sic) *Republic of Venezuela* (ICSID case number ARB/12/13) and *Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela* (ICSID case number ARB/12/18); both of these cases are pending. Also, one case was filed against Ecuador during this 6-month period (*Corporación Quiport S.A. and others v. Republic of Ecuador*, ICSID case number ARB/09/23), but discontinued by an agreement between the parties.

jurisdiction of the Centre,[20] ICSID will indeed have jurisdiction and claims may be brought before it (this is also known as the "Firm Offer Approach").

Authors adhering to the third position believe that "for the purposes of Article 72, it is important to ensure that the wording of the arbitration clause in each investment protection treaty in effect constitutes a state's prior consent to the jurisdiction of the Centre. 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."[21] Thus, according to this approach, an investor will not only be able to file a claim before ICSID as long as the IIA is in force, but also after the IIA has been denounced, through the duration of it's relevant "survival clauses",[22] which normally last between 10 to 20 years after its denunciation.[23]

The validity and interpretation of the "survival clause" is a central issue in *Pan American Energy LLC v. el Estado Plurinacional de Bolivia*, registered before the Centre in April 2010, in a case initiated more that two years after Bolivia's denunciation of the Convention had taken effect. Also, seven Venezuelan cases have been registered after

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[20] For example, when the State is required to perform no further action. E.g., article IX of the *Bolivia –U.S. BIT* provides for ICSID arbitration stating that "each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration" in accordance with such choices and that such "consent…shall satisfy the requirement of Chapter II of the ICSID Convention … for written consent of the parties to the dispute." The expression of consent to the jurisdiction of the *Centre* could hardly be clearer. Cited by Gaillard; *Id.*

[21] Gaillard; *Id.*

[22] E.g., the BIT between Chile and Ecuador states as follows:
"ARTICLE XII
[…]
2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten-year period or at any time thereafter.
3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination."

[23] We could also add a fourth more novel interpretation, reached by Venezuelan professor Andrés Mezgravis and Carolina González, called "Contractual approach but irrevocable offer, if it has created legitimate expectations". In basic terms, the authors hold that "in investment arbitration there is no reason to deny the recognition of the principle of autonomy and independence of the arbitration agreement, universally admitted in commercial arbitrations. In other words, the fundamental purpose of such State act transcends its simple unilateral character into a conventional one." Thus, "under international contractual principles, the offer not yet accepted can be irrevocable in some cases." Mezgravis, Andrés A. and Gonzalez, Carolina; "*Denunciation of the ICSID Convention: Two problems, one seen and one overlooked*", TDM - Transnational Dispute Management, November 2012.

July 25, 2012,[24] when the denunciation became effective,[25] each one of them confronting the issue of the validity of the "survival clause" in the same way as *Pan American Energy*.

Of course, the matter is substantially less complicated if the relevant IIA provides an alternative venue to ICSID as a forum or set of rules for being able to resort to international arbitration (e.g. UNCITRAL Rules of Arbitration). But, a relevant number of IIAs only have the option of ICSID and local courts, as it is the case in the BITs signed between Bolivia and Chile, and Ecuador and Chile, the Dominican Republic, El Salvador, France, Nicaragua, Peru and the UK.[26] In these cases, depriving the investor of the alternative to file a claim before ICSID is equivalent to depriving him of any judicial option for the resolution of the matter outside of the home state.

In this scenario, an investor could try to seek jurisdiction in another investor-State forum or through a different set of rules (such as UNCITRAL) by invoking the most-favoured-nation (MFN) clause of the basic treaty.[27] A number of other cases, including *Emilio Agustín Maffezini v. El Reino de España*, have also touched upon the issue of applicability of the MFN clause to procedural issues. Awards in *Plama Consortuim Ltd. V. Bulgaria* and Salini *Costruttori SpA & Italstrade SpA v. Jordania*, for example, stressed that it is not possible to apply the MFN clause to investor-State Dispute Settlement (ISDS) mechanisms, while the above mentioned *Maffezini* case and *Siemens v. Argentina* took the opposite position. Unfortunately, in October 2009 the case featuring

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[24] *Rusoro Mining Ltd. V. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5); *Ternium S.A. and Consorcio Siderurgia Amazonia S.L v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/19); *Blue Bank International & Trust* (Barbados) *Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20); *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/21); *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/22); *Tenaris S.A. and Talta Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/23); and *Transban Investment Corp. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/24).

[25] Cited from Mezgravis, Andrés A. and Gonzalez, Carolina; "*Denunciation of the ICSID Convention: Two problems, one seen and one overlooked*"; TDM - Transnational Dispute Management, November 2012.

[26] UNCTAD; "*Denunciation of the ICSID Convention and BITs: Impact on Investor-State claims*"; IIA Issues number 2, Geneva 2010. www.unctad.org/diae .

[27] See Gaillard, Emmanuel; "*Establishing Jurisdiction Through a Most-Favored-Nation Clause*", New York Law Journal, June 2005.

E.T.I. v. Bolivia was discontinued at the claimant's request to be pursued under ad-hoc rules before the same panel, prior the ICSID tribunal could make a decision on jurisdiction[28].

Based on these facts, successfully invoking the MFN clause to obtain jurisdiction seems very distant. In addition, some of the most recent IIAs contain a U.S. - authored "Mafezzini footnote"[29] (including the U.S. 2004 Model BIT), thus eliminating the possibility to apply MFN to procedural issues.

Furthermore, even if this thesis were to be successful and the investor managed to confer jurisdiction to another fora such as the UNCITRAL rules or an ad-hoc Tribunal, or even to proceed according to ICSID Additional Facility Rules (AFR), there would be still one very relevant difference, because none of the other international investment arbitration mechanisms offer the "direct" enforcement avenue that the Convention provides in its section 6 (Articles 53 to 55). Of course, it is widely known that Argentina holds a parallel thesis on ICSID enforcement, but the immense majority of the other countries, including Venezuela and Ecuador, have historically interpreted an ICSID awards as fully enforceable and in that regard pay for decisions rendered against them. But, of course, if the investor is "outside" the scope of ICSID arbitration (including Additional Facility Rules), he must pursue the enforcement of the award in accordance with a parallel enforcement process such as the New York Convention.

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[28] Remarkably, one of the arbitrators on the *ICSID* panel and then in the ad-hoc panel of *E.T.I. v Bolivia* was Chilean professor Francisco Orrego Vicuña, who presided the Tribunal and authored the decision on jurisdiction at the *Maffezini* case.

[29] A wording similar as this one has been used by the U.S. in its relevant negotiations after *Maffezini*:
"(U.S.) *Note:* The Parties agree that the following footnote will be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favoured-Nation Treatment Article and the Maffezini case. This footnote will be deleted in the final text of the Agreement:
The Parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most-favoured-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction ¶¶ 38-64 (Jan. 25, 2000), reprinted in 16 ICSID Rev. – F.I.L.J. 212 (2002). By contrast, the most-favoured-nation Treatment Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section B of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case."

Finally, it is relevant to note the approach developed by Mezgravis and Gonzalez, who sustained that in addition to all of the above mentioned regarding the denunciation of ICSID, there is "another side of the coin which seems to have been overlooked by authors so far: the obligation which arises out of consent to ICSID jurisdiction when one state undertakes before another state, within an IIA, to provide ICSID arbitration to the nationals of the latter state."[30] According to these authors, Article 72 of the Convention not only governs the right of investors but also the obligations for the states under the Convention, and prior to its denunciation. Therefore, for Mezgravis and Gonzalez consent to ICSID contained in an IIA is "first a state-state bilateral obligation, which becomes binding and enforceable once the treaty enters into force, and then is an arbitration offer from one state to the nationals of the other state."[31]

Denouncing the *BITs*

As explained *supra*, after having been unilaterally terminated, a BIT can remain in effect for up to 20 years according to its survival clause. In this situation, for a state hoping to avoid having its disputes with investors adjudicated at ICSID, the best avenue may be to also withdraw from the BITs, thus ceasing to be not only a "contracting state" but also a "contracting Party"; but, evidently this does not solve the issue of interpreting the "survival clause".

In 2008, Ecuador terminated nine BITs: with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. Other denounced BITs include those between El Salvador and Nicaragua, and the Netherlands and the Bolivarian Republic of Venezuela.[32] In 2010, Ecuador's Constitutional Court declared arbitration provisions of six BITs (China, Finland, Germany, the UK, Venezuela and United States) to be inconsistent with the country's constitution. It is possible that

[30] Mezgravis, Andrés A. and Gonzalez, Carolina; *Id.* (emphasis added).
[31] Mezgravis, Andrés A. and Gonzalez; Carolina, *Id.*
[32] UNCTAD; *Id.*

Ecuador will take action to terminate these (and possibly other) BITs.[33]

Is Ecuador then "free" from ICSID arbitration with investors from these nationalities? The answer is not clear. Even if the investment was made after the denunciation of ICSID (including the six-month period of Article 71) and the denunciation of the BIT, an investor could appeal to the IIA/BIT survival clause. Moreover, in the cases that the state is yet to denounce the BIT, the matter becomes even more complicated.

Law firms also advised investors to take action before the deadline of six months provided for in Article 71 of the Convention, recommending them to establish Ecuador's general consent to ICSID jurisdiction by submitting a letter to the Ecuadorian government which accepts this consent (measure of questionable efficacy taking into account the case of *ETI v. Bolivia* and the opinions of professor Schreuer and others). Otherwise, claiming investors might as well consider beginning arbitration under the ICSID Additional Facility Rules, against a non ICSID-signatory state. But then again we find the question of consent, and enforcement.

On Venezuela's side, as mentioned, in May 2008 Venezuela gave the Netherlands notice of termination of their BIT. The Venezuelan-Dutch BIT, which entered into force in November 1, 1993, had been highly criticized by the Venezuelan government, which argued that non-Dutch companies incorporated in Holland had fraudulently intended to profit from it.[34]

The breaking point was a claim filed on October 10, 2007, by Exxon Mobil Corporation (*Mobil Corp. v. Bolivarian Republic of Venezuela*.)[35] Despite its U.S. origin, Exxon invoked ICSID protection under the Netherlands-Venezuela BIT, arguing that the oil project in Venezuela was meant to be developed by a Dutch company (Shell), and that

[33] UNCTAD; *Id.*
[34] Fach Gómez; Katia; *Id.*
[35] Mobil Corp. v. Bolivarian Republic of Venezuela, ICSID (W. Bank) Case No. ARB/07/27 (2010).

the project was a covered investment under the Netherlands-Venezuela BIT.

Regardless, as no arbitral tribunal has yet decided the issue, one must remain very alert of upcoming and future ICSID decisions on such jurisdictional issues, as the abovementioned (and failed) case of *E.T.I. v. el Estado Plurinacional de Bolivia* and *Corporación Quiport S.A. v. Republic of Ecuador* (where parties settled the case by agreement before a decision could be made on jurisdiction), or *Pan American Energy LLC v. el Estado Plurinacional de Bolivia* (pending) and the other pending Venezuelan cases referred to in footnote 24.

Enforcement of the Awards

This issue is intrinsically linked to ICSID denunciation, as ICSID enforcement is in most cases preferable for the investors, as these awards must be recognized and enforced in all contracting states as if they were final judgments of the local courts (one of ICSID's "trademarks"). As previously noted, other regimes leave enforcement to domestic laws, or to other treaties such as the New York Convention.[36]

Some authors writing on the subject have somehow overlooked this issue. However, Wick correctly analyzes the matter, stating, "ICSID seemingly creates a mandatory duty to recognize the awards of ICSID tribunals." However, after further analysis, she also concludes that not always resorting to non-ICSID arbitration will be more detrimental to an investor or more advantageous to a State[37] (ICSID, for example, is normally cheaper on procedural and arbitral costs, because of its fixed fees).

Nevertheless, this is an important point in our discussion, since if the investor exercises the option of claiming jurisdiction through Additional Facility or UNCITRAL rules, he will not have recourse to the ICSID Convention enforcement provisions.

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[36] Wick, Diana Marie; "*The Counter-Productivity of ICSID Denunciation and Proposals for Change*." The Journal of International Business & Law, August 2012.
[37] Wick, Diana Marie; *Id.*

III) The Policy issue: the **historical framework in Latin America**. –

At present, in most of Latin America, international investment arbitration is at a crossroad. As mentioned earlier, the 1980s saw a shift in Latin American countries' approach to arbitration, with the beginning of the wave of bilateral investment treaties, signed with the purpose to stimulate economic growth through direct investment (and, frankly speaking, sometimes also with the sole purpose to serve as a highlight to a diplomatic visit or as means to show good bilateral relations).

During the 1990's, with the goal of attracting Foreign Direct Investment (FDI), the immense majority of Latin American countries continued a prolific wave of BIT negotiations. They perceived FDI and BITs as key to injecting foreign capital and resources into their economies, with the aim of boosting development.

For example, Chile signed over 50 of these agreements, as most of the Latin American countries did. Negotiations were swift, and the content of the agreements initially were not of the essence, as often time governments did not realize the kind of commitments they were undertaking when signing BITs, in particular with regards to ISDS mechanisms.

Now, 20 years later, we have seen an explosion in the number of ISDS cases that include Latin-American parties. Of 400+ known ISDS cases, about 90% of them fall under ICSID or UNCITRAL rules of arbitration. Argentina, Mexico, Ecuador and Venezuela single-handedly already count as respondents in a little less than 100 cases and, just as an example of the amounts implicated, in *Siemens v. Argentina* the claimant was awarded US$238 million; or, only in procedural costs (not considering the revision and annulment processes), in *Victor Pey Casado y la Fundación Presidente Salvador Allende v. Chile* parties total expenses raised to US$23 million, in the longest case in the history of ICSID arbitration that was only terminated at the annulment stage in mid-

December 2012 resulting in a complete victory for the state (the initial ruling had awarded the claimant around USD$10 million).

What brought about this shift in Latin America towards arbitration? Developing countries (especially from Latin America and Eastern Europe) learned the hard way that ISDS was not to be taken lightly as BITs guaranteed foreign investors rights such as fair and equitable treatment, compensation in case of expropriation and free transfers of funds, among others, and grant jurisdiction to pass judgment on investment disputes to international arbitration forums (such as ICSID), despite of local courts.

Subsequently, when these countries allegedly breached the agreements, investors seeking for large amount of compensations filed hundreds of claims before international tribunals. There, responding countries learned that former "holy" concepts, like local court jurisdiction and sovereign policy measures, had little effect on binding international commitments undertaken in the BITs.

Because of the perception that the system favors the rights of foreign investors and undermines national sovereignty, some Latin American countries have begun to severely criticize international investment regimes. As noted, Bolivia, Ecuador and Venezuela have even got to the point of denouncing many of their BITs and the Washington Convention. Not even Argentina, confronting 50+ claims, had gone that far. While some substantive obligations have been particularly criticized, by far the main target of disapproval and critique has been World Banks's-based ICSID.

Critics sense the entire system is unbalanced, with a clear pro-investor inclination (including arbitrators and procedure), and that costs of arbitration, usually based in developed countries (Washington, Paris, London) are overwhelming. Critique has also been directed at contradictory decisions, the inexistence of a revision or appeal mechanism, and lack of transparency.

Also, countries like Argentina, while not (yet) leaving the system, have severely questioned it through the interpretation they make of its enforcement provisions, preventing or at least heavily delaying the payment of compensations.

As Fach Gómez points out: *Nicaragua v. Barceló* is another recent example of how the tables are now turning regarding the relationship between Latin America and ICSID: "host states are beginning to resort to ICSID for their own benefit, just as investors have been doing for decades."[38]

On June 2008 Nicaragua filed before the Centre a USD$30 million claim against the Spanish touristic operator Barceló. Nicaragua argued that Barceló did not comply with some periodic payments owed to the government regarding a tourist center operated by the investor, in a rare state v. investor claim brought before ICSID (as it is highly unusual that a state, rather than a private investor, files a claim before the Centre).

In this case, the Spain-Nicaragua BIT was used as a "bargaining chip" by Nicaragua in order to force the investor to settle the case. The strategy was successful. Nicaragua and Barceló reached an agreement, resulting in Barceló's reinvestment in Nicaraguan infrastructure,[39] and also in a particular understanding that any future disputes would be resolved not resorting to ICSID but to the International Chamber of Commerce (ICC).[40]

Bolivia, Ecuador and Venezuela's rejection to ICSID have also manifested through an increase in the recourse to direct negotiation between states and the investors. Cases such as *Petrobras v. Ecuador, Andes Petroleum v. Ecuador, Perenco v. Ecuador, Glencore v. Bolivia, Aguas del Illimani S.A. v. Bolivia, Repsol YPF v. Bolivia, Pluspetrol v. Bolivia, British Gas v. Bolivia, Matpetrol v. Bolivia, Total S.A. v. Venezuela, Statoil v.*

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[38] Fach Gómez, Katia; *Id.*

[39] Fach Gómez, Katia; *Id.*

[40] *Entendimiento Marco Entre el Gobierno de Nicaragua y cl Grupo Barceló* (Understanding Between the Government of Nicaragua and the Barceló Group), June 2009. http://www.cornap.gob.ni/imagenes_notas/caso_motelimar_cornap_2009.pdf

Venezuela, BP PLC v. Venezuela and Eni v. Venezuela[41] involve claims highlighting not only the state's but also the investor's preference to follow the avenue of direct renegotiation and settlement over an ICSID arbitration. Many times, these investors have long-term, continuing interests in the host state, often because they have other current or projected investments there, and as such prefer to negotiate, even if that means that in one particular case they might suffer a loss.

IV) **Alternatives to the ICSID Convention**. -

Before considering alternative paths, one must say that amending the Convention and clarifying the meaning of Article 72 and related provisions, could first settle the discussion presented above. The problem is that amending ICSID seems extremely difficult given the Convention's broad membership and the variety of interests involved. Nevertheless, the European Commission recently unveiled its plans to work towards amendment of the Convention, albeit with a different purpose - in order to enable the European Union to accede ICSID as a block.[42]

Additional Facility Rules

The Additional Facility Rules of ICSID authorize the ICSID Secretariat to administer certain types of proceedings between states and foreign nationals which fall outside the scope of the Convention, in particular in situations where either the state party or the home state of the foreign national is not a contracting state. The ICSID Convention does not apply to such proceedings; furthermore, the Additional Facility Rules were not created by the Convention but by ICSID's Administrative Council in 1978. These rules are designed to open access to the Centre in certain situations when ICSID's

[41] Fach Gómez, Katia; *Id.*

[42] See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy, 7 July 2010, COM (2010) 343 final, p.10.

jurisdictional requirements are not met,[43] as is exemplified by the Mexican ICSID arbitration cases (Mexico is not a signatory state to the Convention), and by the Canadian NAFTA cases, as Canada has signed,[44] but not ratified the Convention.[45]

As of January 2010, 28 cases had been filed under the *Additional Facility Rules*; including a recent Venezuelan case. As it is seen, this might as well be another avenue chosen by investors pursuing claims against states that have denounced the Convention (but, of course, you need the state to extend jurisdiction too).

In this regard, the 1997 BIT between Costa Rica and Venezuela is interesting to note. Its dispute settlement clause contains an express rule in case of withdrawal from the ICSID Convention: in the event that one of the contracting parties ceases to be member of ICSID, any dispute will be settled by reference to the Additional Facility Rules. If both Parties cease to be members, this provision refers the dispute to ad hoc arbitration under UNCITRAL Rules.[46] This leaves Costa Rican investors with a clear avenue to resort to dispute resolution after Venezuela's withdrawal.

UNCITRAL Arbitration Rules. A good parallel avenue?

"Young" international investment law is in continuous evolution, and therefore regular evaluation and adjustment of IIAs and arbitration rules are indispensable. With regards to the ICSID rules, its 2006 modification was an important step forward adding

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[43] Wick, Diana Marie; *Id.*

[44] December 15, 2006.

[45] Although one could argue these countries find themselves in a similar situation tan Venezuela, Bolivia and Ecuador, the difference is that they do "follow" the system and have complied with the awards (UNCITRAL or ICSID *Additional Facility Rules*) accordingly, even without the necessity of the Convention's "direct" enforcement provisions.

[46] Article 11 (2) states (Spanish version available only):

"…

b) en caso de que una de las Partes Contratantes dejase de ser Estado Contratante del CIADI, la controversia se resolverá conforme al Mecanismo Complementario para la Administración de Procedimientos de Conciliación, Arbitraje y Comprobación de Hechos por la Secretaría del CIADI.

c) a un tribunal de arbitraje ad hoc establecido de acuerdo con el Reglamento de Arbitraje de la Comisión de las Naciones Unidas para el Derecho Comercial Internacional (CNUDMI), en caso de que ambas Partes Contratantes dejasen de ser Estados Contratantes del CIADI."

transparency, consolidation and other positive amendments. However, for many Latin American countries, ICSID is today as much a political forum as a technical one (its linkage to the World Bank is not a minor issue in this regard), and therefore evolution of alternative arbitration rules is crucial for the survival of the investment regime in this region. And this is where the other most commonly used rules in ISDS arbitration come into play: UNCITRAL rules (the Rules) of arbitration.

Established in 1976, mainly for private international commercial arbitration, the Rules remained unrevised for 30 years until the Commission understood that the scope of the Rules had been broadened. At the present time, they serve not only commercial arbitration, but also ISDS, and even a related UNCITRAL Model Law on International Arbitration is incorporated today in the majority of the world's jurisdictions. Therefore, a much-needed revision process was launched in 2006. UNCITRAL's Working Group II (WGII)[47] - Arbitration and Conciliation - finished the revision of the rules February 2010, creating a more streamlined structure and updating the Rules in line with the realities of modern methods of arbitration (as can be seen in enhancements such as the regulation of joinder and multi-party disputes, or the procedural amendments to enhance arbitral efficiency introducing a greater role for appointing authorities and a review procedure for the tribunal's fees). Furthermore, from October 2010, the WGII is now working on an annex to the Rules, exclusively on transparency provisions applicable to ISDS.

For Latin America, this work is very relevant. With ICSID being questioned in many jurisdictions, UNCITRAL rules present themselves as a very important forum for future investment disputes in the region. Consequently, Latin American countries should give the highest significance to the Rules' amendment processes, such as the current addition of transparency provisions.

Evidently, UNCITRAL will still be different from ICSID in regard to enforcement provisions (considering that, in spite of an interpretation by Argentina, it is generally

[47] I served as Chile's Delegate to the WG II in 2009, 2010 and 2013, and co-authored the book "*The New 2010 Rules of Arbitration of the United Nations Commission on International Trade Law"*; Editorial Legis, 2011 (published in Spanish in several Latin American countries).

accepted that awards in themselves have merit to be enforced without having to resort to an external enforcement procedure). But, when ICSID is (or will be in the future) "out of the question" as in the cases pertaining this work, UNCITRAL rises up as the most consistently used and perhaps more convenient alternative to keep the option for the investor to resort to an international ISDS forum.

A new ISDS regional forum? The UNASUR project

In May 2008, the "Constitutive Treaty of the Union of South American Nations" (UNASUR) was created for the purpose of bringing together the Andean Community, MERCOSUR and Chile, Guyana and Suriname. As UNASUR was established, several working groups and relevant discussion subjects were created, one of them being investment arbitration.

In June 2009, at the thirty-ninth Session of the General Assembly of the Organization of American States, Ecuador's Foreign Minister Fander Falconí proposed that UNASUR should create an arbitration center, which "would allow Latin America to free itself from any foreign tutelage." During his term as temporary president of UNASUR, Rafael Correa endeavored to promote this project, that limits dispute resolution proceedings to regional forums.[48]

The UNASUR dispute settlement system negotiations are substantially advanced, and expected to come to a close in 2013, providing the sub-continent with its own set of rules for ISDS. Of course, the question remains if investors are going to be willing to embrace those rules in spite of ICSID or other international rules/fora.

From a sectorial perspective, in April 2007, the first UNASUR South American Energy Summit took place. It established the South American Energy Council and set out to create an Energy Security Treaty, which would establish, among other things, an entity

[48] On June 25th, 2009, President Correa declared at the U.N., "if a system has failed, we cannot expect a solution from those who created that system. Instead, we have to look to others, like our own people."

to resolve energy disputes in the region. That treaty was heavily negotiated from 2008 to 2010[49], before talks stalled gradually in 2011 and 2012. Venezuela has announced, through governmental channels, that it would be re-launching the initiative next year.

As it can be seen, countries that are exiting the system are making efforts to come up with alternatives, but the validity of those alternatives before international investors is a completely different question that should be further explored elsewhere. Another outstanding question is the support that countries playing "on both fields" will ultimately give in to those initiatives. Chile is an interesting case study, being both an OECD member and an active negotiator at UNASUR, other regional forums and at the G-77.

V) The Way Forward: **Final policy considerations**. -

There is a question as to what will happen in the Latin American energy sector in the coming years. While a country like Venezuela may have strained relations with many first-world countries, it remains an important oil exporter to countries like the United States. Thus, while political relations between these two particular countries are deteriorating, bilateral economic interests remain active.[50]

Is it plausible then for Venezuela to completely leave the system? It does not seem likely, as their complementarity with economies such as the U.S. in sectors like the oil business is highly relevant for both countries (as the Venezuelan Government itself owns a relevant number of assets in the refining and downstream oil business in the United States, such as *CITGO* Gas Stations).

However, Venezuela, Ecuador, and Bolivia are developing a series of initiatives aimed at undermining ICSID's relevance in the system. Efforts include resorting to the Constitution to attack ICSID awards (the case of Ecuador is very clear in this regard, as it

[49] I represented Chile's Ministry of Foreign Affairs at these negotiations, held in Caracas, VE.
[50] Cesar Alvarez and Stephanie Hanson; "*Venezuela's_Oil Based Economy*". Council on Foreign Relations, February 2009. http://www.cfr.org/publication/12089/venezuelas_oilbased_economy.html .

is specifically referred to by the 2008 Constitution), promoting national courts' reactions against ICSID, drafting international contracts that avoid ICSID arbitration, withdrawing from the ICSID Convention, using BITs to "combat" ICSID, creating national agencies to react against ICSID arbitrations, and developing a regional arbitration center aimed at replacing ICSID.[51]

On the technical issue depicted in this paper, as Durney correctly deduces, "there is not one simple and automatic answer when it comes to the effect of the denunciation of the ICSID Convention on the consent to jurisdiction contained in a given instrument. What is clear is that the denunciation does not per se abrogate consent. Denouncing the Convention will not necessarily exempt denouncing countries from appearing before ICSID."[52] Therefore, in the coming years we will be witness a thorough scrutiny of these relevant rules, that will most likely be solved on a case by case basis by arbitrators.

However, there is a deeper and larger policy issue in this regard. In my view, the solution to the problem of ISDS for Latin American countries is not the rebellion against the system, or its complete desertion. Rather, I would advocate for the exact opposite. What the region must do is to dramatically increase its influence on and participation in the system itself. It must become a key player in the revision processes of ISDS rules, and their investment negotiators need to be as prepared as possible to confront the most skilled counterparties when seating at an IIA negotiating table.

Why is leaving the system not a solution? Because, for the world economies, the point of no return in globalization and international exchange of capital flows was passed long ago, and FDI is today a primary need for every country (specially developing ones). While it's unclear that entering into a BIT empirically increases FDI, there is evidence that undermining the system results in a decrease in FDI. In many occasions, by departing the system, existing FDI could flee, and new investors might be less attracted to enter a

[51] Fach Gómez, Katia; *Id.*
[52] Durney, Mariana; *Id.*

country that abandoned the guarantee of a third party resolution in case of a dispute, in the end causing a negative impact on development and welfare of its people.

Brazil's example has many times been raised as an argument to the opposing position, considering the country does not have any investment treaties in force and is nonetheless one of the world's major hubs for foreign investment. To argue against that, one must simply point out that not many capital-importing countries have been graced with the resources, geographical location and economy such as the Brazilian. And, although Brazils has no FDI treaties, they are known for having an internal framework highly respectful of foreign investment. And even with that in mind, Brazil is re-evaluating its internal policy on FDI frameworks and has recently held a few negotiating rounds with Chile, with the aim of concluding a BIT.

Hence, we start from the promise that an international foreign investment framework is positive. But, on the other hand, and according to principles of international law (and also common sense), a nation should not be forced to "play" with international rules that do not satisfy them, or they do not feel are fair. Hence, the solution, instead of desertion, is action.

Latin America's focus should be on elevating the "state-oriented" standards of IIAs, and accordingly give the necessary protection to the states in regard to safeguarding its public policy without breaching its international commitments. At the same time, Delegates must take a leading role in all investment forums such as UNCITRAL, ICSID, UNCTAD and the OECD, which provide adequate platforms to deal with investment-related concerns.

Possible paths for addressing concerns about the ISDS system include, *inter alia*, mechanisms to strengthen the legal capacity of host countries (e.g. through the creation of an Advisory Facility in the case of disputes), the fostering of dispute avoidance and preventive mechanisms (e.g. through the more frequent use of alternative dispute resolution (ADR), and techniques such as conciliation and mediation, championed by

UNCTAD in the past few years), and efforts to improve the consistency, coherence and development dimension of IIA interpretation. Multilateral engagement, including by sharing visions, experiences and best practices in an open, transparent and inclusive process, can contribute to identifying the best possible policy options in this regard.[53]

Another interesting possibility would be to include a clearer provision, either on the IIAs or the Convention, addressing state counterclaims, enhancing existing Article 46 of the Convention. Two very recent ICSID decisions, reaching entirely different conclusions on the issue of jurisdiction over state counterclaims (*Spyridon Roussalis v. Romania* and *Goetz v. Burundi*), reinforce the need to address this issue in a more systematic way.

At the end, a healthy balance between the protection of the rights of investors and of the host state is the only way for the ISDS system to endure over time.

[53] UNCTAD, *Id.* See the discussions at UNCTAD's World Investment Forum (WIF), more specifically the Ministerial Round Table and the IIA Conference, both of which addressed concerns with respect to investor-State arbitration and possible ways of addressing them. http://unctad-worldinvestmentforum.org/page/about_wif .