International Centre for the Settlement of Investment Disputes
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Riding the Wave of Latin American Arbitration into Prominence and into Oblivion: How Volume, Inconsistencies, and Appearances Could Lead to the Regionalization of Investor-State Arbitration

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I. Introduction

a. ICSID Generally

For much of recent history, aggrieved foreign investors who had contracted with sovereign nations faced the very difficult task of seeking remedies for economic injuries in the courts of the nation where the investment went awry. However, some forty years ago, this scenario began to change with the establishment of the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID). ICSID originated in the 1960's as a forum for the conciliation and arbitration of international investment disputes.[1] Organized through a multilateral treaty format under the auspices of the World Bank, the original treaty establishing ICSID was opened for signature beginning in 1965 and entered into force the following year.[2] While many nations and parts of the world were relatively quick to sign and adopt the ICSID framework, some parts of the world, particularly Latin America, were slower to adopt the ICSID framework.

The underlying purpose of ICSID was quite straightforward: to "remove major impediments to the free international flows of private investment posed by non-commercial risks and the

[1] ICSID, "About ICSID," http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home [hereinafter **About ICSID].**

[2] Id.

absence of specialized international methods for investment dispute settlement."[3] As noted above, "[h]istorically, the settlement of [investment] disputes has been fraught with difficulties, the most significant of which is the inability of the investor to control court access."[4] ICSID, thus, is supposed to be an "*impartial* international forum providing facilities for the resolution of legal [investment] disputes between eligible parties, through conciliation or arbitration."[5] As of 2008, 155 States have signed the ICSID, or Washington Convention, with 143 of these 155 states having depositing instruments of ratification with ICSID.[6] Only one country, Bolivia, has ever withdrawn from the Washington Convention.

While the international investment community and international legal scholars clearly recognized the lack of investor confidence and international rules by which investors and states could be bound in the early 1960's, the road for ICSID was not an easy one. As representative of the new legal footing upon which the Washington Convention rested, five years *after* the opening of the Washington Convention, the International Court of Justice (ICJ) noted that "an aggrieved foreign investor had absolutely no remedy in international law that it could pursue in its own stead."[7] Thus, as is apparent from the concise statement emanating from the ICJ, the notion adopted by the ICSID Convention that an alien investor could assert a claim against the sovereign hosting the investment, in international arbitration, is a very new phenomenon in the

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[3] Id.

[4] Baker, James C. and Lois J. Yoder, *ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment in LCDs*, 5 Ohio St. J. on Disp. Resol. 75, 77 (1989-90).

[5] **About ICSID** (emphasis added).

[6] For a list of contracting states, their date of signature, their date of depositing instruments of ratification, and the date of official entry into force of the Convention, *see* ICSID, "List of Contracting States and Other Signatories of the Convention," http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main.

[7] Global Arbitration Review, *The Arbitration Review of the Americas 2008*: *ICSID Arbitration in the Americas*, *available at* http://www.globalarbitrationreview.com/handbooks/4/sections/7/chapters/50/linkme.

realm of international law.[8] As an indication of the newness of the legal regime and uncertainty surrounding ICSID's use, only twenty-one disputes were submitted to ICSID for resolution between the opening of the Washington Convention for signature and 1984.[9] However, fast forwarding nearly forty years, it is clear that in the realm of ICSID, investors have indeed pursued remedies in their own stead, and they have done so with remarkable success.

As is so often the case, however, success by some means loss by others. To be sure, for countries in Latin America, the development of ICSID undoubtedly meant the development of a more promising avenue for attracting investment. The rationale of ICSID did not avoid them; the more stable the international legal regime is regarding investment abroad, the more investment that will flow abroad.[10] However, given the newfound ability of investors to challenge the acts of sovereigns under the ICSID Convention, Latin America has also been on the losing end of large damage awards arising from ICSID arbitration. For those in the investing world, there was most certainly a time when the thought of Latin America ever adopting a system such as ICSID, under which a great deal of the tradition notion of sovereignty must be ceded, was a pipe dream.[11] However, in the midst of market oriented neoliberal policies being adopted or hoisted upon Latin America, most major countries of Latin America have joined the ICSID system, even if later than much of the rest of the world.[12] Why was it that the investing

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[8] *Id*.

[9] Sedlak, David R., Comment, *ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?*, 23 Penn. St. Int'l L. Rev. 147, 149 (2004-2005).

[10] *See* Baker, *supra* note 4 at 94 (detailing that the creation of ICSID had as one of its primary purposes the encouragement of investment in lesser developed countries such as Latin America by providing a neutral arbitration forum for contract disputes between host states and investors).

[11] *See id*. at 95 (concluding, in a 1990 publication that, while Latin American inclusion into the ICSID framework would be spurred by dropping Calvo contract clauses, that "an overall trend in this direction appears unlikely").

[12] Notably, Brazil has never joined the ICSID system, and continues to show no interest in doing so.

world would be so skeptical regarding Latin America's inclusion into a system such as ICSID? In a word, Calvo.

b. Calvo Doctrine

It is no secret in world history that Latin America has been on the receiving end of what might fairly be termed as raw dealings with the developed world. It is also no secret to those in the investment world that Latin America has traditionally adopted very protectionist policies regarding foreign investment in their countries. As some have aptly described, "the protectionist policies that developed in Latin American countries during the nineteenth and twentieth centuries" were not unwarranted, but rather, "a direct result of colonialism and gunboat diplomacy."[13] The most well known and farthest reaching of these protectionist legal principles adopted by Latin America in previous centuries is known as the Calvo doctrine. Named after an Argentine diplomat and jurist Carolos Calvo who published an 1896 treatise explaining the tenants of the Calvo doctrine,[14] in a nutshell, the Calvo doctrine posits that "governments have a right to be free of foreign intervention of any sort and aliens are not entitled to rights and privileges that are not held by the nationals" of the country.[15] Additionally, the Calvo doctrine posits that all legal disputes involving foreigners conducting any business in the host country must be resolved via local remedies rather than international remedies.[16] These premises underlying the Calvo doctrine were given effect through so-called Calvo clauses, clauses inserted into a treaty between nations, or even in the nation's constitution itself, both of which required

[13] Fulkerson, Bret, Comment, *A Comparison of Commercial Arbitration: The United States & Latin America*, 23 Hous. J. Int'l L. 537, 547 (2001).

[14] Baker, *supra* note 4 at 90.

[15] Fulkerson, *supra* note 13 at 548.

[16] *See* Baker, *supra* note 4 at 75 (detailing why Latin American nations adopting the Calvo doctrine were hesitant to join ICSID in its earlier years).

application of the aforementioned Calvo doctrine.[17] When the Calvo clause was inserted into a treaty, its application was straightforward, and when a country inserted a Calvo clause into their constitution, the doctrine was held to be implied with respect to any foreign investment arising in that nation.[18] Given the lengthy history of the Calvo doctrine in Latin America paired with the purpose and machinery of ICSID detailed above and immediately below, it is little wonder that Latin American nations were hesitant to join. However, as is often the case in the international sphere, when a few major Latin American nations began to join, the rest followed suit. For the great part, the major economic powers of Latin America adopted the ICSID Convention throughout the early to middle 1990's.[19]

To be certain, Latin American nations previously following the Calvo doctrine were not confused in the least with respect to the legal regime they would be adopting. In fact, Article 27 of the ICSID Convention could aptly be described as a counter-Calvo clause of the most explicit kind. Article 27(1) of the ICSID Convention provides:

> No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.[20]

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[17] Fulkerson, *supra* note 13 at 548.

[18] Baker, supra note 4 at 91.

[19] *See* ICSID, "ICSID Annual Report 2008," *Annex* 1, Sept. 4, 2008, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2008_Eng (detailing the entry into force of the ICSID Convention for the following countries on the following dates: Argentina—November 18, 1994; Columbia—August 14 1997; Chile—October 24, 1991; and, Venezuela—June 1, 1995). Notably, Brazil is absent from this list as it has yet to sign or ratify the Convention.

[20] ICSID Convention, Chapter II, Article 27(1).

As is apparent, compliance by Latin American nations with both Article 27(1) of the ICSID Convention and with Calvo clauses is impossible. [21]

In the sections that follow, this paper attempts to detail why the author believes the regionalization of investor-state arbitration is a real possibility in the near future. The paper details how the ICSID system has been built upon the back of Latin America, and how, eventually, without major changes, will fall at the hands of Latin America. Without a doubt ICSID has been successful, at least with respect to issuing decisions in favor of aggrieved foreign investors. However, this success has meant large losses in many Latin American nations generally, and Argentina specifically. In the aftermath of many enormous merits decision awards, and an ICSID system which many believe is structured in the interests of foreign investors, the backlash in Latin America has begun to take hold. Given Latin America's lengthy history with the Calvo doctrine, this backlash against ICSID should maybe come as little surprise. Nevertheless, this backlash from Latin America towards ICSID specifically, and neoliberal institutions and ideals more generally, has persisted much longer than many in the academic community predicted. Recently, this backlash has been evidenced by real steps away from ICSID and heightened rhetoric against ICSID. In but a sliver of the actions taken by Latin American nations in response to the perceived power of ICSID, Bolivia has now withdrawn from the ICSID system with others pledging to do the same.

While much of the backlash in Latin America can be attributed to neo-populist ideals that have gained a foothold throughout some Latin American nations and a long history with the Calvo doctrine, much of the backlash can also be attributed to the decisions of ICSID arbitral panels themselves. Many complaints have been thrown around regarding ICSID tribunals and

[21] Baker, *supra* note 4 at 93.

the decisions they have made. This paper will address a few of the major and recurring complaints plaguing the ICSID system, and will do so greatly through the prism of one country's dealings with ICSID—Argentina. These major complaints plaguing ICSID include: claims of inconsistent application of legal provision included in most bilateral investment treaties (BIT), the documents providing sovereign consent to ICSID jurisdiction; claims of unfair, or expansive interpretations of BIT provisions which some feel is slanted in favor of investors and the therefore the continuation of the ICSID system; closed door proceedings deciding issues of public law; and, the lack of an appeals mechanism. Argentina has not been selected randomly for analyzing the decisions of ICSID tribunals and highlighting these issues. In fact, almost fifteen percent of all cases ever lodged in the ICSID system have been registered against Argentina, with most of these arising out of that country's financial crisis at the beginning of this decade.

In Part II, this paper will briefly note the concept underlying the ICSID framework. Following this, in Part III this paper will turn to the experience of Latin America with ICSID by analyzing the complaints lodged against ICSID from the perspective of actual arbitral decisions. In Part IV, the paper will turn to issues of enforcement of ICSID decisions. While the enforcement regime of ICSID could be a stand alone paper, this paper will only briefly address the ICSID enforcement regime in order to highlight a few of the shortcomings that could lead to the breakdown of the ICSID system more generally. Next, in Part V, the political backlash against ICSID arising in Latin America will be detailed more fully. Finally, this paper will conclude by analyzing the likelihood and effects of the international system of ICSID breaking down into regional blocks.

II. The ICSID Framework Briefly Noted

While having detailed the purpose of ICSID above, it is important to additionally note what ICSID is, and what it is not. As ably detailed by Professor Gus Van Harten of York University, international investment arbitration is quite unique in that it is a public law system.[22] In other words, it is different because "only one class of parties, the investor, brings claims and only one class of parties, the state (acting as sovereign), is punished for breach of treaty."[23] The system is one designed to punish the acts or overreaching of government officials; it is not a system designed to regulate business in favor of the greater public good. [24] Further, as detailed by Professor Van Harten, investment treaty arbitration greatly lacks openness and independence as a result of investment treaties being written based on the model of private arbitration.[25] As Professor Van Harten goes on to suggest, it is certainly arguable that adopting a model of private international arbitration when dealing with a public-like international legal system, will inevitably produce concerns with respect to legitimacy and fairness.[26]

As briefly noted above, ICSID fundamentally works by making large inroads through traditional notions of sovereignty generally, and protection policies of Latin America specifically. The centerpiece of such inroads resides in Article 25 of the ICSID Convention, which deals with the Convention's jurisdiction. Article 25 of the Convention states as follows:

> "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

[22] Van Harten, Gus, *Commentary: A Case For An International Investment Court*, Investment Treaty News, Sept. 1, 2008, *available at* http://www.investmenttreatynews.org/content/archives.aspx.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *See, e.g.,* discussion *infra* Part III.

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."[27]

The great majority of cases brought before ICSID tribunals arise under BITs between nations, which give each respective nation's consent, in writing, to ICSID jurisdiction. While not completely the same, most modern BITs closely resemble each other and have very similar motives. Therefore, as but an example, the United States Department of State notes that U.S. BITs provide the following six overarching benefits to U.S. investors overseas: (1) first, BITs provide U.S. companies at least equal treatment to that of their competitors; (2) second, BITs limit expropriation and require fair compensation under international legal standards when expropriation does occur; (3) third, BITs allow investors to transfer money in and out of the investment country whenever they desire and at the market rate of exchange; (4) fourth, BITs prohibit host countries from requiring U.S. companies to adopt trade distorting measures; (5) fifth, BITs provide the right to submit investment treaty disputes directly to international arbitration, without use of domestic courts; and (6) sixth, BITs guarantee the right of U.S. companies to employ whomever they wish in managerial positions.[28] For those countries less experienced with BITs or desiring to change their BITs, ICSID now provides numerous model clauses that can be inserted into BITs in order that investors might receive the treatment desired by the State in front of an ICSID Tribunal.[29]

III. Latin America's Experience with ICSID

[27] ICSID Convention, Chapter II, Article 25.

[28] Fact Sheet, U.S. Bilateral Investment Treaty Program, U.S. Department of State Office of Investment Affairs, Nov. 1, 2000, *available at* http://www.state.gov/www/issues/economic/7treaty.html.

[29] *See* ICSID, ICSID Model Clauses, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?actionVal=ModelClauses&requestType=ICSIDDocRH.

a. Introduction

Latin America's inclusion into the ICSID system was vital not only to ICSID's growth, but its very existence. In an article published in 1999, Charles Brower went so far as to call former Secretary-General of ICSID Ibrahim Shihata "the Masterful Missionary"[30] for his "spectacularly successful work in *proselytizing* the *non-believers* among states…[s]pecifically his assiduous *wooing* of Latin American countries, where the Calvo Doctrine for so long was king."[31] The former Vice President of the London Court of International Arbitration also noted in 1991 that an increased caseload for ICSID could be brought about by increased Latin American membership in ICSID.[32] As Brower went on to note in the same paragraph with his praise for Secretary-General Shihata, while the first arbitration against a Latin American state came in 1996, by the time of the article, ten of twenty-five, or forty percent of all cases pending in ICSID arose in Latin America.[33] This trend of a disproportionate amount of cases being brought against Latin America (disproportionate in that 143 member states have deposited instruments of ratification) has not changed.

As noted in the Arbitration Review of the Americas for 2008, about half of the 100-plus cases pending before ICSID involve claims against Latin American nations.[34] This number is not too different from the historical proportion of cases brought against Latin American nations. Approximately forty percent of cases ever registered at ICSID have been brought against a Latin

[30] Brower, Charles N., *Ibrahim Shihata and the Resolution of International Investment Disputes: the Masterful Missionary*, 31 Stud. Transnat'l Legal Pol'y 79, 79 (1999).

[31] *Id*. at 82 (emphasis added).

[32] Sedlak, *supra* note 9 at 158.

[33] *Id*.

[34] Global Arbitration Review, *supra* note 7.

American government.[35] Even discounting the amazing number of cases brought against Argentina[36] in the aftermath of its devastating financial crisis in 2001-2002, approximately twenty-five percent of all cases every registered at ICSID would still be against Latin American nations.[37] Not attempting to overemphasize, but the point should not be lost that while forty percent of all cases ever registered at ICSID have been against Latin America countries, a great majority of Latin American countries did not begin to join the ICSID Convention until the 1990's, twenty-five plus years after it originated.[38]

b. Argentina as a Bellwether

As noted, Argentina endured a serious financial crisis in 2001-2002. While the financial crisis had many fathers and could be analyzed in its own right, it is abundantly clear that Argentina faced a serious financial crisis and that the government acted to respond to that crisis. Of particular interest to international investors in Argentina at the time was the Argentine response to the country's rampant inflation, unemployment, and employment strikes. Beginning with the swearing in of President Duhalde, who blamed the Argentine economic position on the free-market system espoused by institutions such as the International Monetary Fund (IMF) and World Bank, Argentina took concrete steps to stave off a deeper recession—steps that undercut contracts and investment in Argentina.[39] Of major importance, Argentina had previously pegged the Argentine peso to the dollar, but in January of 2006, the Argentine legislature passed legislation ending that regime, with the effect of devaluing the peso by 29% compared to the

[35] *Id*.

[36] *See* discussion *infra* Part III.b.

[37] Global Arbitration Review, *supra* note 7.

[38] *See supra* text accompanying note 19.

[39] *See* Hornbeck, J.F., *The Argentine Financial Crisis: A Chronology of Events*, CRS Report for Congress at 5, Jan. 31, 2002 (providing an in-depth background to the Argentine financial crisis).

dollar.[40] Further the government limited the amount of money individuals in Argentina could withdraw from banks within a given amount of time and also restricted payment of foreign private debt in order to deal with a growing debt crisis.[41] Finally, the government of Argentina instituted price controls in various sectors of the economy, froze tariff regimes, and stopped calculating tariffs in dollars.[42] International investors lost a good deal of money in the aftermath of these regulatory changes by Argentina. With money lost, came ICSID arbitration and the first major test of the ICSID framework in Latin America.

In the coming years, Argentina has been on the receiving end of approximately $750 million in damage awards.[43] Approximately thirty cases are currently pending against Argentina.[44] Not to overemphasize the point, however, as mentioned in the introduction, 143 nations have deposited instruments of ratification with ICSID. Given this fact, the fact that the Washington Convention opened for ratification in 1965, and that Argentina did not join until 1994, the fact that 15% of all cases have been lodged against Argentina is noteworthy to say the least. It is with this background, and through the prism of the many cases lodged against Argentina arising out of a similar set of facts that this paper attempts to analyze some of the complaints lodged against ICSID.

i. Inconsistent, Unfair, and Expansive Application of BIT Provisions

Before launching into the following sections, which detail some apparent inconsistencies arising out of ICSID arbitration, it is important to note that "[a]lthough [ICSID] decisions by one

[40] *Id*.

[41] *Id*. at 5-6.

[42] *See*, *e.g.*, LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Oct. 3, 2006.

[43] ICSID, "Search ICSID Cases," http://icsid.worldbank.org/ICSID/frontservlet.

[44] Global Arbitration Review, *supra* note 7.

arbitral tribunal are not binding on another, they are considered persuasive authority, and tribunals in investor-state cases have recognised a duty to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors toward the certainty of the rule of law."[45]

1. Necessity

With the background of the Argentine financial crisis of 2001-2002 in mind, common sense anticipation could tell us that a nation acting in its own interest—an interest of economic survival—would likely come into conflict with agreements and promises predating that economic crisis that were made with the then-current regulatory regime in mind . This is precisely what transpired with respect to Argentina and international investors.

a. CMS Gas Transmission v. The Republic of Argentina

In the first major decision arising at ICSID in the aftermath of the Argentine financial crisis, CMS Gas Transmission v. The Republic of Argentina, Argentina contended that even should the tribunal find that the underlying BIT was in fact breached by Argentine actions taken during the financial crisis, Argentina should be excused due to the state of necessity existing at the time the measures were taken in light of the severe economic, political, and social crisis.[46] In essence, Argentina argued that the crisis at hand in their country in 2001-2002 would make the regulatory actions taken not wrongful and not susceptible of a damages award under both

[45] Global Arbitration Review, *surpa* note 7 (citing Saipem, SpA v. Bangladesh, Decision on Jurisdiction and Recommendation on Provisional Measures, Mar. 21, 2007, ICSID Case No. ARB/05/07, paragraph 67) (internal quotations omitted).

[46] CMS Gas Transmission v. The Argentine Republic, Award, ICSID Case No. ARB/01/08, Paragraph 304-05, May 12, 2005.

customary international law and under the applicable BIT.[47] However, the tribunal disagreed with Argentina under both customary international law and the treaty regime.

First, under customary international law, the tribunal held that Article 25 of the Articles of State Responsibility represented the current customary international law regarding necessity.[48] As such, necessity required a great deal. In order to prove that actions taken were "necessary," Argentina would have to prove both that the actions taken were "the *only way* for the State to safeguard an *essential interest* against a *grave* and *imminent* peril," and that the actions taken did "not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."[49] Finally, the state must not have contributed substantially to its own undoing.

While the tribunal found that the regulatory actions taken by Argentina were in response to an essential interest of the state and that there was a grave and imminent peril, it also found that necessity was not properly invoked by Argentina because there were "other (otherwise lawful) means available, even if they may [have been] more costly or less convenient."[50] Further, with respect to whether Argentina had contributed to the state of necessity, the tribunal found that "similar to what is the case in most crises of this kind the roots extended both ways and include a number of domestic as well as international dimensions," which is an "unavoidable consequence of the operation of a global economy where domestic and international factors interact."[51] More importantly, the tribunal found that Argentina's contribution to the state of

[47] *Id*. at Paragraph 306, 308.

[48] *Id*. at Paragraph 315.

[49] *Id*. at Paragraph 316 (citing Articles on State Responsibility, Article 25) (emphasis added).

[50] *Id*. at Paragraph 324.

[51] *Id*. at Paragraph 328.

necessity was *substantial* and included the governmental choices/policies adopted in Argentina beginning in the 1980s and continuing through the crisis in 2002.[52] Since some conditions of the necessity defense were satisfied and others were not satisfied, the tribunal found that Argentina had not satisfied the defense as a matter of customary international law.[53]

Second, the Tribunal also dealt with a claim of state of necessity under the applicable bilateral investment treaty. In this case, Article XI of the Treaty provided:

> "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."[54]

In a somewhat convoluted fashion, over numerous pages, the Tribunal concluded that the emergency clause of the BIT was also not satisfied by Argentina. Of particular note here, the Tribunal concluded that Article XI is not a self-judging clause.[55] The Tribunal stated, "[q]uite evidently, in the context of what a State believes to be an emergency, it will most certainly adopt the measures it considers appropriate . . . [h]owever, if the legitimacy of such measures is challenged . . . it is not for the State in question but for the international jurisdiction to determine whether the plea of necessity may exclude wrongfulness."[56] The Tribunal went on to note in the same paragraph that "clauses dealing with investments and commerce do not generally affect security as much as military events do and, therefore, would normally fall outside the scope of

[52] *Id*. at Paragraph 329.

[53] *Id*. at Paragraph 331.

[54] *Id*. at Paragraph 332.

[55] *Id*. at Paragraph 373.

[56] *Id*.

such dramatic events" necessary to invoke the protection of Article XI.[57] As will be discussed more when detailing the CMS Annulment Decision, a great part of the BIT necessity analysis could be seen as a repeat analysis of the treaty provisions under the framework of the customary international law standard, a fact as much as admitted by the CMS Annulment panel.[58]

b. LG&E Energy Corp, LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic

In LG&E v. Argentina, the Tribunal took a markedly different approach to the defense of necessity in light of Argentina's severe economic crisis. In what should not be overlooked, the LG&E tribunal began not with the international legal standard of necessity, but rather with the BIT provision.[59] While certainly not stating so explicitly, the tribunal seemed to accept the premise that the specific treaty provision between the U.S. and Argentina should be given substantial weight when compared with the customary international legal standard. Nevertheless, the tribunal addressed both. Again at stake in the realm of the BIT was the same Article XI provision that was at issue in the CMS decision.[60] The tribunal again had to decide whether Article XI was meant to be a self-judging provision. In a rather straightforward fashion, the Tribunal held that "[b]ased upon the evidence before the Tribunal regarding the understanding of the Parties in 1991 at the time the Treaty was signed, the Tribunal decides and concludes that the provision is not self judging."[61] Thus, as would be appropriate in interpreting the treaty provision, the tribunal attempted to discern what the parties believed and intended the provision to provide for at the time it was signed. However, of interest, the Tribunal did seem to

[57] *Id*.

[58] *See* discussion *infra* Part III.b.i.2.c.

[59] LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Oct. 3, 2006.

[60] *See supra* note 54 and accompanying text.

[61] LG&E at Paragraph 212.

accept the premise that beginning in 1992, the year following the signing of the Argentine-United States BIT, that the U.S. began to interpret provisions such as Article XI as self-judging.[62]

While Article XI was held to not be a self-judging provision, the Tribunal nevertheless adopted Argentina's argument that "waves of sudden economic catastrophe, massive strikes involving millions of workers, fatal shootings, the shut down of schools, businesses, transportation, energy, banking, and health services,…a plummeting stock market, culminating in a final massive social explosion in which five presidential administrations resigned within a month" qualified as a state of necessity under Article XI.[63] The state of necessity existed, according to the Tribunal, from December 1, 2001, to April 26, 2003[64] because all "of these devastating conditions—economic, political, social—in the aggregate triggered the protections afforded under Article XI . . .to maintain order and control the civil unrest."[65]

In so holding, the tribunal also took a decidedly different approach with respect to whether Article XI was meant to apply almost exclusively to military matters as held by the CMS tribunal.[66] Quite explicitly, the Tribunal stated that it "rejects the notion that Article XI is only applicable in circumstances amounting to military action and war. Certainly, the conditions in Argentina in December 2001 called for immediate, decisive action to restore civil order and stop the economic decline. To conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead."[67] Further the LG&E Tribunal

[62] *Id*. at Paragraph 213.

[63] *Id*. at Paragraph 215 (internal quotations omitted).

[64] *Id*. at Paragraph 229.

[65] *Id*. at Paragraph 237.

[66] *See supra* text accompanying note 57.

[67] LG&E at Paragraph 238.

noted that to decide that the necessity defense did not apply because measures other than those applied were available, such as ending the calculation of tariffs in dollars, would be inappropriate.[68] The Tribunal outright rejected the assertion that just because other possible means of dealing with a crisis existed, that an Article XI Treaty claim could not be maintained, and instead held the response of Argentina to suspend the dollar denominated tariff regime and take other actions to be a "legitimate way of protecting its social and economic system."[69]

After deciding that Argentina was excused under Article XI of the BIT during the time period noted, the Tribunal turned to the international customary law standard. Again here, as in the CMS decision, the Tribunal noted that Article 25 of the International Law Commission's Draft Articles on State Responsibility represented the customary international law standard of necessity.[70] However, in draftsmanship and analysis that should not be overlooked, the LG&E Tribunal used the customary international law standard to support the Tribunal's underlying conclusion with respect to necessity arising under the BIT provision, not vice versa.[71] The Tribunal gave what might be considered a more expansive definition than the CMS Tribunal regarding the state of necessity defense under international law. The Tribunal stated that "a state of necessity is identified by those conditions in which a State is threatened by a serious danger to its existence, to its political or *economical* survival, to the possibility of maintaining its *essential services* in operation, to the preservation of its *internal peace*, or to the survival of part of its

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[68] *Id*. at Paragraph 239.

[69] *Id*.

[70] *Id*. at Paragraph 245.

[71] *Id*.

territory."[72] Under this standard, as detailed here and above in the CMS decision, the tribunal in LG&E differed greatly with the CMS Tribunal with respect to application.

First, the Tribunal noted quite summarily that LG&E had "not proved that Argentina has contributed to cause the severe crisis faced by the country" but rather, the steps taken by Argentina in light of the crisis "has shown a desire to slow down by all the means available the severity of the crisis."[73] While it is difficult to discern the threshold level of evidence that the Tribunal would have required in this regard because little reasoning was given, the result in itself reveals the markedly different approach taken by the LG&E Tribunal versus the CMS Tribunal. One could theoretically argue that if the international standard were taken at its precise wording, as apparently done by the CMS Tribunal, the doctrine of necessity would be dead doctrine from the start, because in some fashion every nation will have contributed to its current economic downturn, especially if one analyzes the policies adopted by successive administrations dating back twenty-five years.[74] With respect to whether the interest at stake was essential and whether that essential interest was threatened by a serious and imminent danger, the Tribunal relied in great part on the same reasoning and facts detailed above in the BIT analysis.[75] Thus, in this case, a case premised on the same essential facts as those of the CMS arbitration, Argentina had acted out of necessity.

c. Summarizing the Inconsistencies

The CMS and LG&E decisions regarding the state of necessity might fairly be said to represent the two goalposts regarding the underlying analysis of the claim. Further, while the

[72] *Id*. at Paragraph 246 (emphasis added).

[73] *Id*. at Paragraph 256.

[74] *See supra* text accompanying note 51.

[75] LG&E at Paragraphs 251-53.

results were quite different indeed, both cases were brought by investors in the Argentine gas sector in response to the freezing of gas prices and the changing of the prevailing tariff regimes.[76] While many other decisions rendered against Argentina have also dealt with the defense of necessity arising out of the same economic crisis and same emergency legislation passed in Argentina, they need not all be mentioned here. Suffice it to say that the two tribunals in the CMS and LG&E decisions took markedly different approaches to analyzing the necessity defense: one Tribunal emphasized the customary international law standard over the treaty provision and gave the defense a very strict reading;[77] the other Tribunal gave preeminence to the Treaty provision and gave a much more fluid reading of the force and applicability of the necessity defense.[78] Other ICSID decisions issued against or for Argentina with respect to Article XI and the state of necessity defense have not settled the dispute on how necessity should be analyzed. As Investment Treaty News quite kindly reported as recently as September 2008, "Argentina has turned to [the Article XI provision] as well as the "state of necessity" standard under customary international law, in other investment arbitrations that relate to emergency measures enacted during its financial crisis; however, tribunals have differed on whether it absolves Argentina from alleged breaches of its investment treaty obligations."[79]

2. Umbrella Clause

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[76] International Institute for Sustainable Development [hereinafter IISD], *Argentina and its defence of necessity in the face of financial crisis claims*, Investment Treaty News, Oct. 15, 2007, *available at* http://www.investmenttreatynews.com.

[77] *See* discussion *supra* Part III.b.i.1.a.

[78] *See* discussion *supra* Part III.b.i.1.b.

[79] *See* Vis-Dunbar, *Continental Casualty Company v. the Argentine Republic*: *Argentina emerges largely victorious in dispute related to country's financial crisis*, Investment Treaty News, Sept. 10, 2008, *available at* http://www.investmenttreatynews.org (detailing that Argentina was again absolved from the great majority of its liability in the Continental Casualty arbitration due to the state of necessity and Article XI defenses resulting from the Argentine financial crisis).

One of the major clauses inserted into most BITs is a so-called umbrella clause. Essentially, an umbrella clause is a clause through "which the host states agree in the treaty to comply with any obligation they have undertaken with respect to investors and/or investments of the other state."[80] Admittedly, at first blush an umbrella clause would seem to be an ultimate protection for the investor, and some tribunals have interpreted it as such. Nevertheless, tribunals have not been overly consistent in their application of umbrella clauses as detailed in the case comparison immediately below. The issue is whether an umbrella clause can elevate what would otherwise be only a breach of the investment agreement into a violation of the investment treaty itself.[81]

a. SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (SGS)

While not a case dealing with a Latin American country, the Tribunal in SGS was the first Tribunal to decide the precise issue posed—can a simple breach of the underlying contract or investment agreement be transformed into a treaty violation by virtue of an umbrella clause? Further, the case provides a nice background to analysis provided in different arbitration proceedings brought against Latin American countries. The umbrella clause at issue in SGS stated as follows: "Either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the investors of the other Contracting Party."[82] The Tribunal summarized SGS's argument as to application of the umbrella clause as follows: "Article 11 of the Treaty is characterized by the Claimant as an umbrella clause which says that each time you violate a provision of the contract,…you also

[80] Global Arbitration Review, *supra* note 7.

[81] *Id*.

[82] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, Aug. 6, 2003, Paragraph 97.

violate norms of international law, you violate the treaty by the same token."[83] While one could argue based upon the wording of most umbrella clauses, and this umbrella clause specifically, that this line of analysis was reasonable, the Tribunal did not buy the argument. In fact, even counsel for the claimant in this case admitted that such an analysis was "far reaching."[84]

The Tribunal did not hide its agreement with claimant's counsel that the claim was far reaching. It stated that "[c]onsidering the widely accepted principle . . . that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law, and considering further that the legal consequences that the Claimant would have us attribute to Article 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced by the Claimant."[85] Given this long winded quote, as one could imagine, the claimant was not able to provide the necessary evidence to overcome the Tribunal's understanding of the umbrella clause. [86]

b. LG&E Energy Corp. v. The Argentine Republic

While the language of the SGS Tribunal might have seemed to foreclose any chance that another tribunal would find that a contract violation could be elevated into a treaty violation, that has not been the case. In the LG&E decision referenced in the previous section, the Tribunal also dealt with a treaty based umbrella clause. There, the clause provided that "[e]ach party shall

[83] *Id*. at Paragraph 99 (internal quotations omitted).

[84] *Id*. at Paragraph 163.

[85] *Id*. at Paragraph 167.

[86] *Id*. at Paragraph 171.

observe any obligation it may have entered into with regard to investments."[87] The Tribunal there described the purpose of umbrella clauses quite differently than the Tribunal in SGS, stating that an umbrella clause "is a general provision . . . that creates a requirement for the host State to meet its obligations towards foreign investors, including those that derive from a contract. Hence such obligations receive *extra protection by virtue* of *their consideration under the bilateral treaty*."[88] Clearly, the premise from which the SGS and the LG&E tribunals began when analyzing the umbrella clause claims differed greatly. Given the starkly different approach to analyzing the umbrella clause, one is not surprised to find that the LG&E Tribunal found that a claim based upon an investment agreement could be elevated to a treaty-based violation.[89] The Tribunal held that Argentina abrogated guarantees under their statutory framework, by enacting new laws and regulations to deal with the financial crisis, which violated the claimant's investment assurances.[90] Because Argentina advertised for and attracted foreign investment through the enactment of the laws and regulations predating the financial crisis, these "laws and regulations became obligations within the meaning of [the umbrella clause]."[91] This finding became a direct contradiction to the finding of the SGS Tribunal.

c. Other Umbrella Clause Decisions and Argentina

Other Tribunals, such as that constituted for the Enron v. Argentina case, have also held in accordance with the LG&E Tribunal on umbrella clause reasoning. The Tribunal in the Enron arbitration held that "Argentina's failure to comply with the obligations it had assumed

[87] LG&E at Paragraph 169.

[88] *Id*. at Paragraph 170 (emphasis added).

[89] *Id*. at Paragraph 175.

[90] *Id*.

[91] *Id*.

under its agreement with the investor and in its domestic regulations constituted a violation of the treaty's umbrella clause."[92] However, the CMS Annulment Committee, reviewing the original CMS arbitration detailed in the necessity defense section above, seemed to find flaws with the line of reasoning adopted by the LG&E and Enron Tribunals.

The Annulment Committee in the CMS case stated explicitly what the CMS Tribunal below had adopted as its position. It clarified that the "Tribunal concluded that the obligation under the umbrella clause of Article II(2)(c) of the Treaty has not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty."[93] While the Annulment Committee ended up annulling the umbrella clause portion of the award based upon the fact that there was a lacuna in the Award (read: no reason given for the decision),[94] the Tribunal also went to great lengths to note its disagreement with the idea that a stand alone investment agreement breach could be transformed into a treaty violation.[95] Of particular emphasis, the Tribunal stated that "[t]he effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law."[96]

Clearly, the question of whether a violation of an investment agreement or contract can be elevated to constitute a violation of international law—a violation of an investment treaty—

[92] Global Arbitration Review, *supra* note 7.

[93] CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Annulment Proceeding, Sept. 25, 2007, Paragraph 93.

[94] *Id*. at Paragraph 96-97.

[95] *See id*. at Paragraph 95 (detailing six reasons why such a "broad interpretation" was troubling to the Annulment Committee).

[96] *Id*. at Paragraph 95(c).

has confounded ICSID arbitrators. Further, the reasoning in the decisions above does not appear to differ in degree, but rather, differs in basic approaches and understandings of the interrelationship of contract claims and treaty-based claims. There appears no easy way to merge such differing understandings of the meaning of umbrella clauses.

ii. Closed Door Proceedings Deciding Issues of Public Law/Importance

Another of the recurring complaints heard from Latin America regarding ICSID arbitration is that it lacks greatly in transparency,[97] which is somehow worsened by the fact that the ICSID Tribunals are deciding issues of public importance. However, as detailed below, whatever grain of truth this complaint held in the past, ICSID has now dealt in great part with many of its potential shortcomings with respect to transparency. It is the fact that ICSID has responded, more than the validity and importance of the complaint, why this section is included in the paper.

After many ICSID cases debated the efficacy of allowing amicus briefs in arbitration proceedings, ICSID finally, and for the first time, have detailed procedures by which Tribunals should consider amicus briefs.[98] Arbitration rules now provide that "after consulting both parties" the Tribunal may allow an amicus brief when it decides that "(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the

[97] Global Arbitration Review, *The Arbitration Review of the Americas 2008: Venezuela: Does International Arbitration Have a Future?*, *available at* http://www.globalarbitrationreview.com/handbooks/4/sections/8/chapters/49/linkme.

[98] Born, Gary, et. al., *Investment Treaty Arbitration: ICSID Amends Investor-State Arbitration Rules*, Wilmer Hale, Apr. 14, 2006, *available at* http://www.wilmerhale.com/ealert_4_14_06/.

scope of the dispute; [and] (c) the non-disputing party has a significant interest in the proceeding."[99]

More specifically in response to the closed door proceedings deciding issues of public law argument, ICSID also recently amended Arbitration Rule 32 to allow the public to attend hearings, but only when all parties to the proceeding agree.[100] Amended Rule 32(2) provides that "[u]nless either party objects, the Tribunal . . . may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts . . . to attend or observe all or part of the hearings, subject to appropriate logistical arrangements."[101] While those with an axe to grind against ICSID might still lodge the complaint that any multinational corporation can prevent the proceedings from being open to the public by withholding their consent, there is little indication that most claimants would have any desire to do so. Further, arbitration has traditionally been a much more private venue that traditional courts and parties have full knowledge of this reality when issuing their consent to arbitration. In fact, in the years to come, given the fact that countries are the respondent in most ICSID arbitration proceedings, it would be interesting to see what proportion of those denying consent under Arbitration Rule 32(2) are in fact the state rather than the investor.

Finally, anybody familiar with the ICSID website would know that its decisions are made available to the public. Notwithstanding this fact, previous ICSID rules only gave Tribunals the discretion to publish excerpts of awards revealing the legal reasoning employed.[102] Now,

[99] ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Chapter IV, Article 37.

[100] Born, *supra* note 98.

[101] ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Chapter IV, Article 32.

[102] Born, *supra* note 98.

however, while awards may not be *published* without the consent of all parties, excerpts of legal reasoning used in the awards *shall* be included in publications.[103]

iii. Lack of an Appeals Mechanism

Another of the recurring complaints regarding ICSID, both inside and outside Latin America, is that there is no appeals mechanism. Rather than adopting a traditional appeals structure, as an Anglo American lawyer would understand, the ICSID Convention adopted an annulment structure. While other Articles of the ICSID Convention allow for such things as the correction of patent defects in the award[104] and revision of awards based upon the discovery of new and substantially important facts,[105] the major review mechanism of ICSID Tribunals lay in Article 52 of the Convention. Article 52(1) provides in full:

> 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.[106]

A quick reading of Article 52 will disclose that the standard of Article 52(1) most salient with respect to reviewing the substance of a merits decision is part (b), namely, "that the Tribunal has manifestly exceeded its powers."[107] A quick and common sense analysis would also suggest that annulment under Article 52(1)(b), based upon the words employed, is to be an

[103] ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Chapter VI, Article 48.

[104] ICSID Convention, Article 49

[105] ICSID Convention, Article 51.

[106] ICSID Convention, Article 52(1).

[107] *Id*.

extraordinary thing. Of course, one can understand that annulment in arbitration would probably not look like appeals in a traditional court system precisely because one of the greatest benefits of arbitration is the efficiency and cost savings it provides. Making the standard for annulment high ensures that efficiency and cost savings remain benefits of the ICSID system.[108] The annulment provision also has the sharp focus of finality; independence from the domestic judicial systems of signatory nations was of paramount interest to those establishing ICSID.[109]

While many would point to the fact that certain decisions have been annulled as evidence that ICSID awards are substantively reviewed, and decisions have been annulled, the former Secretary-General of ICSID captured the intent of the ICSID draftsmen when he said that they intended to "(a) assure the finality of ICSID awards; (b) distinguish carefully an annulment proceeding from an appeal; and (c) construe narrowly the grounds for annulment so that this procedure remains *exceptional*."[110] The power of this intent and the language of Article 52(1) are exemplified by the annulment proceedings in the aforementioned CMS arbitration. While the Annulment Committee dealt with more than the ruling on Argentina's defense of necessity, it was the annulment committee's ruling in that regard that turned the most heads.

In the CMS annulment proceeding, the Committee considered precisely whether the Tribunal below had manifestly exceeded its powers with respect to its decision that Argentina did not act either in a state of necessity under customary international law or in keeping with Article XI of the applicable BIT.[111] In concluding that the Tribunal had, as a lay person might

[108] *See* Buckley, Ross P., *Comment*, *Now we have come to the ICSID Party: Are its Awards Final and Enforceable?*, 14 Sydney L. Rev. 358, 362 (1992).

[109] *Id*.

[110] *Id*. (citing Report of the Secretary-General to the Administrative Council, ICSID Doc No AC/86/4, Oct. 2 1986 at 3) (emphasis added).

[111] *See* CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Annulment Proceeding, Sept. 25, 2007, Paragraphs 128-136.

describe, really messed up, the annulment committee nevertheless stated that "it has only a limited jurisdiction under Article 52 of the ICSID Convention . . . [and] cannot simply substitute its own view of the law and its own appreciation of the facts. [Therefore,] notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers."[112]

If one wanted a clear statement regarding the limits of Article 52 of the ICSID Convention, it would appear that the CMS Annulment Committee provided such a focus. The Committee reasoned that the Tribunal below erred in not distinguishing between whether the defense of necessity was a primary or secondary rule of law.[113] As the Committee explained, if state of necessity means no breach could arise under the BIT, then the state of necessity defense would be a primary rule of international law.[114] In that case, Article XI of the BIT and the customary international standard would thus "cover the same field and the Tribunal should have applied Article XI as the *lex specialis* governing the matter and not Article 25."[115] On the other hand, if the customary international law standard goes to the issue of state responsibility, then it would be a secondary rule of international law.[116] In such a case, as the Annulment Committee described, the Tribunal would be required to first consider whether there had been a breach of the BIT, and only if there was a BIT violation, "would it *have had to consider* whether Argentina's responsibility could be precluded in whole or in part under customary international law."[117] As

[112] *Id*. at Paragraph 136.

[113] *Id*. at Paragraphs 133-34.

[114] *Id*. at Paragraph 133.

[115] *Id*.

[116] *Id*. at Paragraph 134.

[117] *Id*. (emphasis added).

detailed above, the Tribunal took neither of these two approaches, and the Annulment Committee found that such a mistake "could have had a *decisive* impact on *the operative* part of the Award."[118] Going further than it was required, the annulment committee went on to state that if "the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground."[119] However, as we know, Article 52 of the ICSID Convention is not intended to be, and does not resemble an appeals process in the domestic context. As such, while the Tribunal's faulty application, or lack there of, of Article XI of the BIT likely had a decisive impact on the final decision of the Tribunal, the Annulment Committee was powerless to do anything and the "financial bottom-line for Argentina remains unchanged" in that they still owed $133 million.[120]

iv. Other Complaints

Numerous other complaints arising from Latin America have also plagued ICSID. While the details of all these complaints could be detailed and argued endlessly, here only a couple more potentially damaging complaints are briefly mentioned.

First, the issue of impartiality of Tribunal members has been questioned on occasion. As an introductory note to the underlying complaint, the ICSID system seemed to occasion somewhat of an embarrassment recently when Argentina was attempting to have an arbitrator removed from three separate Tribunals. The other two arbitrators, in deciding whether to uphold Argentina's challenge to the arbitrator, admitted that the English and Spanish versions of the ICSID Convention at least appeared to set different standards with respect to challenging an

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[118] *Id*.

[119] *Id*. at Paragraph 135.

[120] IISD, *Argentina must respect award despite ICSID finding that it has errors of law*, Investment Treaty News, Oct. 15, 2007, *available at* http://www.investmenttreatynews.com.

arbitrator.[121] It seems that the standard in English calls for arbitrators to exercise "independent judgment" while the Spanish version calls for the arbitrator to be a person that "inspires full confidence in his impartiality of judgment."[122] However, the tribunal held that the standard was an objective standard, not a subjective standard.[123]

As to the underlying complaint, some such as Bolivian Ministry of Foreign Affairs have fairly noted that "some of these arbitrators, or their law firms, act at the same time as lawyers for other investors in similar disputes."[124] While this fact has not been completing alleviated, ICSID has again at least responded in part to this complaint. Previously, Arbitration Rule 6 provided that an arbitrator must only disclose past or existing relationships with parties.[125] Now, however, Arbitration Rule 6 provides that arbitrators have "an ongoing duty to report any relationship with the parties or any circumstances that might cause a party to question the arbitrator's "reliability for independent judgment."[126] As noted by some, the change in the language is intended to require arbitrators to disclose more and to do so on a continuing basis so that there is greater confidence in the independence of ICSID arbitrators.[127] However, one should note that these are merely rules of disclosure; it is up to the remaining arbitrators on the Tribunal to decide whether or not the challenged arbitrator can remain neutral given his or her potential conflicts.

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[121] IISD, *Argentina fails in bid to have arbitrator removed from water services arbitrations*, Investment Treaty News, Nov. 30, 2007, *available at* http://www.investmenttreatynews.org.

[122] *Id*.

[123] *Id*.

[124] IISD, *Bolivia expounds on reasons for withdrawing from ICSID arbitration system*, Investment Treaty News, May 27, 2007, *available at* http://www.investmenttreatynews.org.

[125] Born, Gary et. al., *supra* note 98.

[126] *Id*.; ICSID Arbitration Rule 6.

[127] Born, Gary et. al., *supra* note 98.

Second, and finally, some have complained regarding Tribunals' treatment of the so-called fair and equitable treatment provisions of BITs. Fair and equitable treatments are basically what they sound like; host nations are obliged to treat investments in their country by foreigners in a fair and equitable manner. While this much is clear, Argentina and others have argued for a strict reading of the provision while investors have argued for a broad reading of the provision. A great example is the recent decision issued by the Tribunal in an arbitration proceeding by Siemens against Argentina.[128]

In the Siemens case, Argentina argued that the fair and equitable treatment provision obliged it to act "in good faith and in a reasonable and consistent manner vis-à-vis foreign investors."[129] On the other hand, the claimant argued for a much more onerous standard on the government, namely that governments must meet the legitimate expectations of investors.[130] The tribunal sided with Siemens in holding that not only must the claimant not show bad faith on the part of the government, but that the legitimate expectations of investors is a major part of the fair and equitable treatment provisions of BITs.[131] In this case, actions such as delaying payment to the claimant and failing to conclude agreements with Argentine provincial governments as the government had promised Siemens it would fell short of the fair and equitable treatment standard.[132] Clearly, by adopting an analysis of the fair and equitable treatment provision of BITs that includes the legitimate expectations of investors, as have many other Tribunals, the Siemens Tribunal chose a relatively broad reading of such provisions. This broad reading is

[128] For a detailed discussion of the arbitration proceeding *see* IISD, *Analysis: Argentina liable for multiple treaty breaches in Siemens case*, Investment Treaty News, Feb. 19, 2007, *available at* http://www.investmenttreatynews.org.

[129] *Id*.

[130] *Id*.

[131] *Id*.

[132] *Id*.

neither in keeping with the spirit of the clause or fair to a host nation simply attempting to govern, argues Argentina and others.

Hopefully, one can appreciate that the narrowness or broadness of a Tribunal's interpretation of a BIT's fair and equitable treatment provision can be determinative. It is determinative not only of the resulting arbitral decision, but should also, if consistency in analysis were present, be determinative in the shaping and language of BITs at the outset. In other words, if ICSID arbitrators could settle on a somewhat consistent definition or analysis of fair and equitable treatment provisions in arbitration, parties to BITs could, at arms length and in advance, decide with clarity their respective positions on such clauses.

IV. ICSID's Enforcement Regime: Flawed at Origination

The ICSID founders established a two stage regime under Articles 53—55 of the ICSID Convention to ensure the enforcement of arbitral awards. First comes recognition, then execution. As noted in some respects throughout this paper, by joining ICISID, a member country is supposed to be agreeing to the finality of and enforceability of ICSID awards within their respective territories. Recognition of awards is set out in Articles 53 and 54. Article 53(1) of the Convention provides as follows:

> The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.[133]

[133] ICSID Convention, Article 53(1).

Thus, as detailed previously, the only possible change to an award would come in an annulment proceeding. To give Article 53(1) teeth within the sovereign territories of member nations, Article 54(1) provides:

> Each contracting State shall recognize an award rendered pursuant to this convention as binding and enforce the pecuniary obligations imposed by the award within its territories *as if it were a final judgment of a court in that state*. A Contracting State with a federal constitution may enforce such award, as if it were a final judgment of a court of a constituent state.[134]

There have been little to no problems with respect to the enforcement stage of ICSID arbitration.[135] However, simply recognizing an ICSID award does not end the matter because "a holder of a recognized ICSID award has only an executory title, especially if the losing party is the state party."[136] The reason that a winning party, especially an investor, would hold only executory title to the award rendered is that the ICSID Convention does nothing to displace or override sovereign state rules with respect to sovereign immunity.[137] While the scope of this paper does not include a detailed discussion of sovereign immunity, a limited discussion is necessary and follows.

Until at least the time of World War II, the overwhelming majority of nation-states applied the doctrine of absolute sovereign immunity.[138] The doctrine of absolute sovereign

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[134] ICSID Convention, Article 54(1) (emphasis added).

[135] Nmehielle, Vincent O. Orlu, *Enforcing Arbitration Awards Under The International Convention For The Settlement Of Investment Disputes*, 7 Ann. Surv. Intl'l & Comp. L. 21, 30 (2001).

[136] *Id*.

[137] *See id*. (suggesting that this enforcement regime creates a large loophole in favor of state parties, creating an inequality between investors and state parties).

[138] Chukwumerije, Okezie, *ICSID Arbitration And Sovereign Immunity*, 19 Anglo-Am. L. Rev. 166, 170 (1990).

immunity essentially held that sovereign states were exempted from the jurisdiction of other sovereign states and therefore courts in most nations granted absolute immunity to states from execution of awards against those states.[139] Execution against a state and its property was thought to represent too much of an intrusion upon the prerogative of the sovereign and a detriment to the comity of all nations.[140] However, about the time of World War II, countries began to think more pragmatically regarding the acts of sovereigns and their immunity from suit and execution of suit based upon those acts. Thus arose the restrictive theory of sovereign immunity, which "grants immunity to public acts of states (i.e., *acta jure imperii*), but denies immunity to their private acts (i.e., *acta jure gestionis*)."[141] In other words, when a state steps outside of its governmental role and acts in the market place as a private actor would act, then it relinquishes its right to sovereign immunity. This so-called commercial activity exception and the restrictive theory of sovereign immunity is now the more common legal regime in the majority of nations of the world.[142] With that background in mind, we now turn to the final Article of the ICSID Convention dealing with enforcement generally, and execution specifically.

The ICSID founders were quite purposeful in establishing a recognition and enforcement process that could prove difficult precisely because that is what many nations insisted upon in establishing the Convention. This desire not to have the doctrine of sovereign immunity displaced by ICSID arbitration decisions is borne out in Article 54(3), which provides:

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[139] *Id* at 169-70.

[140] *Id*. at 170.

[141] *Id*.

[142] *Id*. at 172.

> Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.[143]

A very early report of the Executive Directors of the World Bank drove the point home by stating that "Article 54 requires contracting states to equate an award rendered pursuant to the Convention with a final judgment of its own courts . . . [not to] go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed."[144]

While the title of this sections states that the ICSID enforcement regime was flawed from origination, this is not to suggest that ICSID arbitration awards are never complied with by losing parties. Quite the opposite is true, as "most arbitral awards are complied with in a large number of cases"[145] and many cases once registered under the ICSID system are eventually settled between the country and investor before arbitration begins or is concluded.[146] To be clear, however, a small number of nations still abide by the absolute doctrine of sovereign immunity and even in the majority of countries that have adopted the restrictive form of sovereign immunity, the door has been left open to national courts via Article 54(3) where interpretation regarding the scope of the respective country's restrictive theory could vary greatly. Thus, execution of ICSID awards remains a precarious task.

V. The Political Backlash in Latin America: Was Calvo Merely Hibernating?

[143] ICSID Convention, Article 54(3).

[144] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 4 I.L.M 524, 530 (1965).

[145] Nmehielle, *supra* note 135 at 29.

[146] *See, e.g.*, ICSID, "List of Concluded Cases," http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded.

Given the fact that Latin American countries have been the respondent in approximately twenty-five percent of all arbitration ever filed at ICSID and given that within those decisions there have been some relatively high profile inconsistencies as detailed in Part III, one would expect some kind of response. While not in complete concert, Latin American countries have indeed begun to fight back against an ICSID system that they, generally speaking, feel is undermining their sovereign prerogative in the name of serving deep-pocketed investors. While this response has admittedly been little more than rhetoric in some instances, concrete responses have also been taken. Two of the most concrete steps taken have been the formation of the Bolivarian Alternative for the Americas (ALBA) and the first ever withdrawal from the ICSID Convention by a member state, Bolivia, in 2007.

a. The Bolivarian Alternative for the Americas (ALBA)

The Bolivarian Alternative for the Americas is an "alternative" for the ICSID framework. In fact, ALBA has declared that it will be establishing its own arbitration system precisely to counter the arbitration system at ICSID.[147] ALBA is currently composed of the six member nations of Venezuela, Bolivia, Nicaragua, Cuba, Dominica, and Honduras. While one might be hard pressed to locate Dominica on a map and while Cuba has never been a member of ICSID, the other four nations either have been or continue to be members of ICSID. While much of the media attention regarding ALBA has occured in the past two years, the ALBA actually celebrated its 5th annual ALBA Congress in 2007, at which time Bolivian President Evo Morales announced that all ALBA members had decided to withdraw from the ICSID Convention.[148] As of the time of this paper, however, Bolivia is still the only country to have withdrawn from the

[147] Global Insight, *New Wave of Accords Sealed at "Bolivarian Alternative" Summit*, Apr. 30, 2007, available at http://www.globalinsight.com/SDA/SDADetail9103.htm.

[148] IISD, *South American alternative to ICSID in the works as governments create an energy treaty*, Investment Treaty News, Aug. 6, 2008, *available at* http://www.investmenttreatynews.org.

ICSID Convention when it sent letter of intent to withdraw to ICSID on May 1, 2007.[149] As reported by the International Institute for Sustainable Development, two other ICSID member nations, Venezuela and Nicaragua have sent mixed signals with respect to their indirectly announced intention to withdrawal.[150]

For its part, Nicaragua has stopped referring to ICSID as the jurisdiction of choice in its bilateral investment treaties for over a year, but the country's Attorney General reportedly stated that Nicaragua was closely following Bolivia's experience with withdrawal before proceeding with their own withdrawal.[151] Venezuela, a country traditionally host to very large investments in its lucrative petroleum industry also seems to be playing a game of wait-and-see with respect to Bolivia's experience. While Venezuela's National Assembly did pass a resolution allowing for Venezuela's withdrawal from the ICSID Convention, only a week later the country asked Exxon Mobil to move an arbitration proceeding from European arbitration courts to ICSID.[152] Honduras, a recent ALBA inductee has chartered its own course.

With respect to Honduras, while some may have been surprised regarding the very recent addition of a steadfast ally of the United States, it is important to note that in return for joining ALBA, Venezuela offered to purchase $100 million in Honduran bonds and to provide Honduras with $30 million in credit for farming uses.[153] Given the return Honduras received for joining ALBA, one is right to question whether Honduras and other nations will remain members or supporters of ALBA in light of the sharp decline in oil prices and Chávez' associated economic

[149] *Id*.

[150] *Id*.

[151] *Id*.

[152] *Id*.

[153] *Zelaya plays the Chavez card*, The Economist, Oct. 30th, 2008, *available at* http://www.economist.com/world/americas/displaystory.cfm?story_id=12522958.

power.[154] Still, for years, many have dismissed the ALBA and similar initiatives in part because Chávez has spearheaded the effort; but evidence of recent membership gains and the very concrete step taken by Bolivia in withdrawing from ICSID should at least give pause to those who would dismiss such an organization as fueled only by rhetoric or a passing phase. As has been reported, the President of Haiti, the Foreign Affairs Minister of Ecuador, and representatives from Uruguay and other Caribbean nations have all taken part as observers at ALBA Summits in the past.[155] Neo-populism in Latin America, in short, is not on the decline, and a World Bank institution such as ICSID sits as a primary target.

b. Bolivia's Withdrawal from ICSID

As noted, in 2007, Bolivia became the first nation to ever withdraw from the ICSID Convention. In the words of Bolivian President Evo Morales, Bolivia "emphatically rejects the legal, media and diplomatic pressure of some multinationals that . . . resist the sovereign rulings of countries, making threats and initiating suits in international arbitration."[156] However, not lost on investors is the fact that ICSID jurisdiction is conferred by BITs. Therefore, Bolivia's withdrawal from the ICSID Convention is not an automatic end to ICSID jurisdiction over investor-state disputes arising in Bolivia. Therefore, Bolivia must also, and is in fact pursuing revisions to its BITs. Further, most BITs, including those signed by Bolivia, contain survival clauses that ensure BITs agreed to in the past will continue in force some 10 to 20 years after termination for those investments made prior to the termination of the BIT[157] In that regard,

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[154] *Id*.

[155] Global Insight, *New Wave of Accords Sealed at "Bolivarian Alternative" Summit*, Apr. 30, 2007, *available at* http://www.globalinsight.com/SDA/SDADetail9103.htm.

[156] IISD, *Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions*, Investment Treaty News, May 9, 2007, *available at* http://www.iisd.org/investment/itn.

[157] *Id*.

Bolivia's Charge D'affaires for Trade stated in an interview with respect to renegotiating existing BITs that Bolivia "wants to limit the definition of an investment to those that truly generate value for the country . . . [and] is aiming to limit investor-state arbitrations to domestic fora rather than international venues such as ICSID."[158] In a statement that would ring true in the ears of Calvo himself, President Morales has also stated that it is necessary to counter ICSID because such organizations are used by multinational organizations to loot natural resources and elude Bolivian laws and regulations.[159]

While the statements of Bolivian government officials noted above might lead one to believe that Bolivia has had a slew of dealings with ICSID arbitration much like Argentina, that couldn't be farther from the truth. In fact, Bolivia has only been on the receiving end of one concluded case at ICISD, which was withdrawn from the ICSID system after the company and Bolivia settled.[160] Bolivia's most widely followed case at ICSID involved Bechtel Corporation's takeover of Bolivia's water system.[161] After Bechtel sharply raised water rates, Bolivians responded with a rash of protests, culminating in Bechtel leaving the country and registering a complaint with ICSID.[162] After years of notable public pressure, however, Bechtel ended up abandoning its attempts to recover the money.[163] While it might be easy to conclude based upon the lack of ICSID decisions against Bolivia that Bolivia's withdraw is nothing but politics, it is

[158] *Id*.

[159] Delgado, Conchita, *Cuba is not with OAS and is not dead*, El Universal, April 30, 2007, *available at* http://english.eluniversal.com/2007/04/30/en_pol_art_cuba-is-not-with-oa_30A861699.shtml.

[160] ICSID, "List of Concluded Cases," http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded.

[161] *See Bechtel v. Bolivia*, The Democracy Center, http://www.democracyctr.org/bolivia/investigations/water/bechtel-vs-bolivia.htm (providing a timeline of the Bechtel, Bolivia fight over water control and payments).

[162] *Id*.

[163] *Id*.

unclear whether that might represent a more powerful trend that cannot be affected by anything ICSID does or does not do. One might be wise to ask that precise question of Bechtel.

c. The Greater Latin American Response

While most Latin American countries have not taken such serious, concrete steps as has Bolivia in response to perceived ICSID power, a host of other Latin American nations have each responded to ICSID's perceived intrusion into their respective domestic affairs (among other things) through different means.

Ecuador, besides attending ALBA meetings in the past, also announced on the heels of Bolivia's withdrawal from ICSID and Ecuador's status as respondent in many ICSID arbitrations that it intends to terminate its own investment treaty with the United States.[164] On the heels of that announcement, Ecuador notified ICSID, pursuant to Article 25(4) of the ICSID Convention, that it was withdrawing from ICSID jurisdiction any disputes related to natural resources such as petroleum and gas.[165] Further, in 2008 Ecuador announced its intention to denounce at least nine of its existing BITs and to update its domestic laws to combat the reach and effect of international arbitration.[166] Finally, in August of 2008, pursuant to its Article 25(4) notification noted above, Ecuador announced that it will consider its contracts with oil companies terminated unless ICSID is removed as the venue for arbitration of disputes.[167] Ecuador's Oil and Mining

[164] IISD, *Ecuador announces that it wants out US investment treaty*, Investment Treaty News, May 9, 2007, available at http://www.iisd.org/investment/itn.

[165] ICSID News Release, *Ecuador's Notification under Article 25(4) of the ICSID Convention*, Dec. 5, 2007, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement9.

[166] Vis-Dunbar, Daman, *Analysis: Latin America's new model bilateral investment treaties*, Investment Treaty News, July 17, 2008.

[167] Cabrera Diaz, Fernando, IISD, *Ecuador threatens cancellation of oil contracts unless ICSID nixed as arbitration forum*, Investment Treaty News, Aug. 29, 2008, *available at* http://www.investmenttreatynews.org.

Minister stated quite frankly that Ecuador has doubts about the impartiality of ICSID as a venue for arbitration.[168] As one might imagine, the oil industry is an enormous part of Ecuador's economy. In 2007, the oil and mining industries accounted for nearly 22% of Ecuador's gross domestic product.[169] Should Ecuador prove successful in deterring natural resource arbitration from ICSID jurisdiction pursuant to Article 25(4), ICSID would face the loss of numerous potential claims.

Brazil, an economic heavyweight in Latin America, as noted previously, has never joined the ICSID Convention. Further, Brazil has never in its history signed a BIT with another nation and "has indicated that it is unlikely that its congress would agree to an investment treaty, particularly if it allowed for disputes settlement through international arbitration."[170] This sentiment in Brazil seems to be shared by many in Latin America, as Argentina, Bolivia, Colombia, Ecuador, and Venezuela are all reported to be at differing stages of remodeling the traditional structure of their BITs.

Colombia, an ICSID member, has been on the leading edge of redrafting BITs in the previous few years. As stated by Colombia's Director of Foreign Investment and Services, their new model BIT "reflects the fact that a developing economy is more likely to be a respondent in arbitration."[171] The changes to the Colombian model BIT include: increasing the time that must pass between notice of arbitration and registering a claim from six months to one year; allowing for the dismissal of frivolous claims; preventing investors from suing in multiple venues; and,

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[168] *Id*.

[169] United Stated Department of State: Bureau of Western Hemisphere Affairs, *Background Note: Ecuador*, Aug. 2008, available at http://www.state.gov/r/pa/ei/bgn/35761.htm.

[170] Vis-Dunbar, Daman, *Analysis: Latin America's new model bilateral investment treaties*, Investment Treaty News, July 17, 2008.

[171] *Id*. (internal quotations omitted).

drawing clearer distinctions between what would comprise a treaty claim versus what would comprise a contract claim.[172]

Finally, while there has certainly been no shortage of political rhetoric emanating from Argentina in response to the major ICSID decisions rendered against that nation, the more important response with respect to Argentina resides in its notable resistance to respecting and enforcing the awards of ICSID tribunals. As remarkable as Argentina's downfall may have been at the start of the decade, Argentina's economic return has been even more remarkable.[173] This economic recovery in the ensuing years after the financial crisis has given Argentina an "ace in the hole" so to speak. As President Nestor Kirchner firmly announced in a 2005 speech, "to renegotiate concession contracts, companies have to make a gesture to the country. And a gesture means withdrawing court cases in international tribunals."[174] President Kirchner emphasized by stating that if foreign investors "want to work in the country, they should have an attitude of solidarity, and we will open the way for them to create wealth here."[175] While it might not be characterized as an attitude of solidarity, many companies that had registered or were considering registering cases at ICSID against Argentina have decided to drop or abandon such ideas in light of the pressure form the Argentine government and out of necessity to renter the Argentine market.[176]

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[172] *Id*.

[173] *See, e.g.*, *Economists Analyze Argentina's Economic Expansion at 5 Years*, Center for Economic and Policy Research, April 10, 2007, *available at* http://www.cepr.net/index.php/press-releases/press-releases/economists-analyze-argentina-s-economic-expansion-at-5-years/ (stating that since the country's economic collapse "Argentina has now completed five years of the fastest economic growth in the Western Hemisphere, with GDP increasing by 47 percent and more than nine million people pulled over the poverty line").

[174] *Buenos Aires steps up anti-ICSID offensive*, LatAm Energy, Jul. 27, 2005, http://www.accessmylibrary.com/coms2/summary_0286-31165889_ITM.

[175] *Id*.

[176] *Id*.

Outside of the political pressure to turn away from ICSID, Argentina has also put up a hearty fight against those holding large decisions against the country. First, Argentine officials have stated on numerous occasions that they will not comply with ICSID decisions, but will instead challenge such awards before the ICJ or domestic courts.[177] Most importantly in this regard, an Argentine court ruled in 2004 that Argentine courts may review and even set-aside ICSID decisions based upon the fact that while treaties are superior to local Argentine law, they are not superior to Argentina's constitution.[178] Second, the track record of Argentina actually paying the damages awards in the major decisions issued against it is not good. As detailed by Enron Corporation in its argument to have a stay of payment denied pending an annulment decision in their case against Argentina, "seven ICSID awards have been given against Argentina, . . . none has ever been paid by Argentina [and] . . . Argentina has gone so far as to divert assets away from New York to avoid their attachment pursuant to a United States court order obtained by CMS to enforce the award in the *CMS* case."[179]

d. Energy Council for South America

One of the more recent and promising developments in opposition to ICSID arbitration has been the development of the Energy Council for South America. Unlike ALBA, the Energy Council for South America is represented by energy ministers from all 11 South American sovereign nations.[180] The group had its first meeting in May of 2008, which ended with an

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[177] Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No ARB/01/3, Annulment Proceeding, Oct. 7, 2008, Paragraph 14(b)(i).

[178] *Id*. at Paragraph 14(b)(iv) (referencing Corte Suprema de Justicia, June 1, 2004, *Cartellone c. Hidronor, Fallos* 327-1881).

[179] *Id*. at Paragraph 88.

[180] Cabrera Diaz, Fernando, *South American alternative to ICSID in the works as governments create an energy treaty*, Investment Treaty News, Aug. 6, 2008, *available at* www.investmenttreatynews.org.

agreement to "design a legal mechanism to settle investor-state disputes related to the energy sector."[181] In other words, the Energy Council is meant to completely replace ICSID as the forum for arbitration with respect to energy disputes in South America.[182] One would only need to scroll through the list of pending and concluded cases on the ICSID website to understand that if the Energy Council of South America were ever to come to fruition and replace ICSID as the venue for arbitrating energy disputes in South America, ICSID would lose a great deal of its case load. Nevertheless, it is difficult at this point to suggest how likely such a development would be. Still, it is important to note the importance of energy investment in Latin America and the fact that the Energy Council is not comprised of a few "rogue" nations, but rather, all of South America.

VI. So What?: Is the Regionalization of Investor-State Arbitration Possible and What Effect would such a Development have?

a. Is Regionalization Possible?

Given the sheer number and percentage of arbitrations registered against Latin American nations,[183] the history of protectionist policies in Latin America such as the Calvo clause,[184] the inconsistencies in ICSID arbitral decisions,[185] the potential appearance of unfairness in ICSID decisions and practices,[186] the difficulty enforcing ICSID awards,[187] and a growing Latin

[181] *Id*.

[182] *See id*. (detailing additionally that member countries announced at the initial July meeting that they would attempt to finalize the Energy Security Treaty within six months).

[183] *See* discussion *supra* Part III.a.

[184] *See* discussion *supra* Part I.b.

[185] *See* discussion *supra* Part III.b.i.

[186] *See* discussion *supra* Part III.

[187] *See* discussion *supra* Parts IV, V.c.

American backlash against the ICSID system that has seen rhetoric followed by action,[188] one should wonder whether the ICSID system can retain or regain the trust and membership of Latin America countries individually and Latin America as a whole. While such developments, particularly given the survival clauses included in BITs, would be slow to develop, it now appears that there is a real chance for the regionalization of investor-state arbitration . . . at least in the Western hemisphere.

How would such a system develop? Certainly the progression away from an exclusively ICSID based system to an ICSID system countered by regional investor-state arbitration in Latin America will not happen overnight. However, as indicated in the pages above, the groundwork has been laid. In recent years the original four members of ALBA—Venezuela, Cuba, Nicaragua, and Bolivia—has grown to include Honduras and Dominica, with numerous other nations now participating as observers.[189] Bolivia has begun testing the waters of withdrawal from ICSID,[190] Ecuador has begun testing the waters of sector specific withdrawal of ICSID jurisdiction under Article 25(4) of the ICSID Convention,[191] Nicaragua has now stopped referring to ICSID as its jurisdiction of choice in BITs,[192] and Brazil shows no intention of ever joining a system such as ICSID let alone signing a BIT.[193] The experience of Bolivia and Ecuador, in particular, in the coming years will in great part help determine whether ALBA remains an organization mostly characterized by politics and resolutions, or an organization that

[188] *See* discussion *supra* Part V.

[189] *See* discussion *supra* Part V.a.

[190] *See* discussion *supra* Part V.b.

[191] *See* discussion *supra* Part V.c.

[192] *See* discussion *supra* Part V.a.

[193] *See* discussion *supra* Part V.c.

can rise to challenge ICSID in the Western Hemisphere. To be perfectly frank, given that Bolivia and Ecuador's respective actions in this regard have come in the previous two years, it is too early to tell which direction we will go. That appears to precisely be the thinking of countries like Venezuela, a major economic power in the region.

While one can rightfully be hesitant in thinking that ALBA will ever include a majority of Latin American nations, let alone the institutional framework to support a system of investor-state arbitration comparable to ICSID, ALBA's progress, as marked by increased membership and the concrete steps of nations away from ICSID detailed immediately above, is more forwards than backwards. Relatively and economically speaking, Venezuela certainly has more to lose by withdrawing from ICSID than Bolivia does, but with a National Assembly resolution in hand permitting such a withdrawal,[194] Chávez and Venezuela hold a wild card that could propel ALBA ahead in a major fashion. In the end, however, while ALBA's progress is more forwards than backwards, because of the time needed to establish any sort of comprehensive investor-state arbitration and the time needed for current BITs to run their course, any prominent role of ALBA will likely be a few years away. Nevertheless, the development of an ALBA system now is a real possibility. Just as interesting, in the immediate future, is the prospect of the regionalization of sector specific investor-state arbitration in Latin America, particularly with respect to natural resources.

As mentioned in Part V of this paper, Ecuador recently invoked Article 25(4) of the ICSID Convention.[195] Article 25(4) of the ICSID Convention is easily invoked. That Article provides that "[a]ny Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes

[194] *See supra* text accompanying note 152.

[195] *See supra* text accompanying note 165.

which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States."[196] It is the ease of invoking Article 25(4), the fact that at least one Latin American country has done so, and the inclusive nature of the Energy Council of South America[197] that makes the sector specific regionalization of investor-state arbitration a real possibility. Further, one should note the interrelationship of ALBA and the Energy Council for South America. Given the fact that the newfound Energy Council is inclusive and therefore more politically and economically potent, it may even overwhelm ALBA. Given the fact that much of the ICSID arbitration in Central and South America is related to energy resources, a powerful move by the Energy Council could undermine ICSID in all the important ways desired by ALBA members. Certainly, at this point, the progression of either ALBA or the Energy Council of South America is speculative. Nevertheless, not only is the ground work laid as detailed above, but ICSID's continued inconsistency and the current worldwide economic downturn could pair to propel an even more powerful counter-ICSID movement in the near future.

Anyone with a television understands the precarious nature of the worldwide economic situation, which by all accounts, does not appear to be improving.[198] Anyone with an understanding of the ICSID arbitration arising out of the Argentine financial crisis seven years ago also understands that ICSID has not established a consistent definition of necessity under either customary international law or BITs.[199] Given these two realities, a collision course could

[196] ICSID Convention, Article 25(4).

[197] *See* discussion, *supra* Part V.d..

[198] *See*, *e.g.*, Knowlton, Brian, *Obama Warns of Further Economic Pain*, N.Y. Times, Dec. 7, 2008, *available at* http://www.nytimes.com/2008/12/08/us/politics/08obama.html (quoting President-elect Obama as saying that "this is a big problem, and its going to get worse").

[199] See discussion supra Part II.b.i.1 (detailing the inconsistencies of ICSID arbitration arising out of the Argentine financial crisis).

ensue. Argentina has already provided the framework for not only ardently pursuing the claim of necessity under BITs and international customary law, but they have also been a model for how to continually challenge the enforcement of awards and the desire of award holders to do so.[200] While one might hope that decisions such as that of the CMS Annulment Committee would help solidify the treatment of necessity claims,[201] the inconsistencies detailed in Part III above are, at least in part, the direct result of an ICSID Convention that has chosen strictly defined annulment proceedings over the ability to appeal arbitration awards.[202] Equally important, with economic hardships that may very well develop from the worldwide economic recession, along with already well entrenched neo-populist sentiments in Latin America,[203] expansive interpretations of BIT umbrella clauses and fair an equitable treatment clauses could only further entrench opposition to ICSID.

When one Tribunal can quickly determine that a BIT umbrella clause can propel an investment agreement violation into a treaty violation, while another Tribunal takes the time to state that "[c]onsidering the widely accepted principle . . . that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law, and considering further that the legal consequences that the Claimant would have us attribute to Article 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced

[200] *See* discussion *supra* Part II.b.i.1, Part V.c. (detailing both how Argentina has relentlessly argued the case of necessity in arbitration proceedings arising out of its financial crisis and how Argentina has used its later economic upswing to deter investors from bringing or continuing arbitration proceedings at ICSID).

[201] *See* discussion *supra* Part III.iii.

[202] *See* discussion *supra* Part III.iii.

[203] *See*, *e.g.*, text accompanying note 156 (revealing President Morales' populist tendencies).

by the Claimant,"[204] one should question not whether additional backlash against such a system will ensure, but rather, why it would not.

While one might hope that ICSID could substantively change course to correct some of the weaker parts of the ICSID system, for example, the lack of an appeals mechanism, the ICSID Convention itself ensures that such changes, at least with respect to amending the Convention, are not easy.[205] While Article 65 of the ICSID Convention makes amending the Convention a possibility, Article 66 effectively ends any possibility of that actually coming to fruition. As Article 66(1) states, "Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that *all Contracting States have ratified, accepted or approved the amendment*." [206] With any background in international politics (*see, e.g.,* United Nations) and an appreciation for the diversity represented by the 143 nations that have deposited instruments of ratification with ICSID, one immediately recognizes the possibility of amending the ICSID Convention rests somewhere between the impossible and the impossible. Therefore, the Articles of the ICSID Convention noted throughout this piece will likely remain unchanged. What that means is that while ICSID will continually be able to adapt with respect to procedural rules, major changes, such as replacing annulment proceedings with more appeals-like proceedings, are not likely to develop.

Nevertheless, ICSID is not just battling rules, awards, procedures, and the like in Latin America. It is battling appearances. To ICSID's credit, it appears to have recognized this and has taken steps to counteract the appearances of impartiality and of arbitrators taking on sovereign governments behind closed doors, by amending procedural rules to allow for such

[204] SGS v. Pakistan, Paragraph 167.

[205] Sedlak, *supra* note 9 at 157.

[206] ICSID Convention, Chapter IX, Article 66(1) (emphasis added).

simple things as amicus briefs, open hearings, clear rules for challenging arbitrators, and the like.[207] If further complaints arise that have merit, and that can be easily dealt with by amending the Arbitration Rules, ICSID should undoubtedly continue this trend. However, appearances emanating from inconsistent application of important BIT clauses, such as umbrella clauses and fair and equitable treatment clauses, cannot be easily manipulated due to the fact that inconsistency is very much tolerated in the ICSID system.

In the end, ICSID has a battle in front of it to maintain its Latin American membership, at least to maintain Latin American members as fully participating members. To be sure, in some respects ICSID cannot do anything to respond to misgivings in Latin America about investors' arbitral success. An investor with a valid claim and a resultant award will always provide the political backdrop needed by populist leaders in Latin America. Still, one can never get too far from the fact that ICSID awards, as detailed by the experience of Argentina, have been inconsistent. While inconsistency may have been referred to as a complaint in previous sections, it is really much more than that. With inconsistent decisions comes uncertainty for both investors and states. With uncertainty, we see the withdrawal of jurisdiction for specific disputes and more. Finally, inconsistency with respect to specific BIT clauses, such as umbrella clauses and fair and equitable treatment clauses, will eventually lead nations to redraft contracts and investment treaties to quarantine the power and purpose of such clauses. When this happens, one need not look to ALBA, the Energy Council for South America, or any other opposition to ICSID. The opposition that would potentially undermine ICSID would come from within by limiting and shaping what it is that arbitrators would be deciding.

b. What Effect Would Regionalized Investor-State Arbitration Have?

[207] *See* discussion *supra* Part III.b.ii.

In great part, the effect that regionalization of investor-state arbitration in the Western Hemisphere would have, is the subject of future research. It is the subject of future research because any sound analysis awaits the further development of trends in this regard. What experience will Bolivia, and potentially others have with respect to withdrawing from ICSID? What experience will Ecuador and others have with respect to withdrawing sector specific jurisdiction from ICSID? How will these experiences be incorporated into a new investor-state arbitration system? How will investors respond to such actions in light of a global economic recession? Can investors afford to protect investments nation by nation and sector by sector, or would they instead choose a viable alternative to the current ICSID system? Clearly, more questions than answers remain. The point, and a purpose of this paper, is to sound the warning bell so those with an interest in maintaining a truly international investor-state arbitration body might take seriously the challenge brewing to that body's existence and act accordingly. Nevertheless, below this paper concludes by very briefly detailing some initial thoughts about what a regional investment dispute body would mean for ICSID and for investors.

i. For ICSID

For ICSID, the development of a regional alternative to its own jurisdiction in Latin America could prove devastating. As noted in the opening parts of this paper, historically forty percent of all cases at ICSID have been registered against Latin American countries. Currently, approximately fifty percent of all pending cases are against Latin America nations. If Latin American countries do begin to withdraw from ICSID in greater numbers and establish a counterpart to ICSID, ICSID's prevalence may slip significantly. After all, the former Secretary-General of ICSID Ibrahim Shihata was praised for his "spectacularly successful work in *proselytizing* the *non-believers* among states…[s]pecifically his assiduous *wooing* of Latin

American countries, where the Calvo Doctrine for so long was king."[208] This spectacular work has sustained ICSID over at least the past decade. While purely speculative, if ICSID would lose forty to fifty percent of its arbitration load, the development of investor-state arbitration law would likely slow greatly.

ii. For Investors

Building upon the previous section, if the development of investor-state arbitration slows dramatically at ICSID due to the arrival of a Latin American regional alternative, investors would face great uncertainty. First, the purpose of ICSID was to undercut the uncertainty that plagued investment abroad.[209] With the withdrawal of forty to fifty percent of cases that would otherwise be registered at ICSID, uncertainty would follow. Further, nobody could predict what type of system might develop in Latin America under the auspices of ALBA or other initiatives. Would the Calvo doctrine rear its head again in a concrete fashion? If so, the uncertainty of facing a domestic court in Latin America would rightly send shivers down the backs of most investors. In the end, however, one can be relatively sure in assuming that investment will continue to flow to Latin America. There is a reason, besides a history of protectionist policies, that nearly half of the current cases pending before ICSID are against Latin America. First, there is an abundance of untapped natural resources and a lack of up-to-date infrastructure in Latin America. This does not change with the regionalization of investor-state arbitration. Second, Latin America forever remains just to the south of the nation that perpetually invests more private capital abroad than any other nation. Thus, it would appear that if investors and other nations do not successfully petition for substantive changes at ICSID, uncertainty, the arch

[208] Brower, Charles N., *Ibrahim Shihata and the Resolution of International Investment Disputes: the Masterful Missionary*, 31 Stud. Transnat'l Legal Pol'y 79, 82 (1999).

[209] *See supra* text accompanying note 3.

enemy of investment, will prevail. This, of course, is the rather direct effect that an institution like ALBA desires.