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Investment Arbitration in Latin America

The Uncertain Veracity of Preconceived Ideas

by CATHARINE TITI*

ABSTRACT

The habitual description of the Latin American take on investment arbitration as one of hostility fails to capture the complexity and fine nuances of the relationship between Latin America and the investor-state dispute resolution mechanism. The article reconsiders the notion of hostility by canvassing the historical context of Latin American investment arbitration, and evaluating some particular topics that have surged in recent years. These include the particularities of compliance and enforcement in relation to awards delivered against Argentina and Ecuador, negotiations on the creation of a regional arbitration center under the aegis of UNASUR, and considerations of the public interest in arbitrations involving Latin American states. In exploring these topics, the article argues that there is no single Latin American approach to investment arbitration and that, overall, the region's perception of dispute settlement should not be considered as particularly hostile to it.

I. INTRODUCTION

Argentina, Venezuela, Ecuador, Mexico, and Bolivia are the five most frequent respondents in investment arbitration in Latin America.[1] Of these, the first four are also the countries that have faced the most arbitration proceedings in the world.[2] Argentina holds the sad privilege of heading this list with more than 50 investment claims initiated against it,[3] a number corresponding to one tenth of all known claims in the history of investment arbitration.[4] And while recently the

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1 *See* UNCTAD (2013), Recent Developments in Investor-State Dispute Settlement (ISDS), *IIA Issues Note* No. 1 (Revised) May 2013, www.unctad.org/diae, p. 29, Annex 2.

2 *See* UNCTAD (2013), *supra*, p. 29, Annex 2.

3 *See* UNCTAD (2013), *supra*, p. 29, Annex 2.

4 *See* UNCTAD (2013), *supra*, p. 3 in conjunction with Annex 2 on p. 29.

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number of registered cases against Argentina has dropped significantly,[5] Venezuela has started to figure as respondent in the largest number of disputes.[6] In 2008, more than half of all registered claims at the International Centre for Settlement of Investment Disputes (ICSID) were pending against Latin American countries.[7] In 2012, around one quarter of new ICSID disputes involved a Latin American state.[8] It is then little wonder that Latin America should be questioning its – historically ambivalent – relationship with investor-state dispute settlement (ISDS).

It is a truism that, in the aftermath of the first Argentine crisis cases, some Latin American countries started to reconsider the necessity of concluding, or retaining, investment treaties and offering access to arbitration under the ICSID Convention.[9] But the habitual description of the Latin American take on arbitration as one of hostility fails to capture the complexity and fine nuances of this relationship between Latin America and the investor-state dispute resolution mechanism.[10]

To take an illustration, Mexico has been a party to the North American Free Trade Agreement (NAFTA) since 1992;[11] and, despite the 21 known investment treaty claims against it,[12] it is currently taking part in the negotiations on the Trans-Pacific Partnership Agreement (TPPA), alongside, *inter alia*, Chile and Peru.[13] Like other free trade agreements with an investment chapter, the Trans-Pacific Partnership Agreement aims to include access to 'expeditious, fair, and transparent investor-State dispute settlement'.[14] If one country were likely to opt out of this mechanism, it would not be Mexico, Chile or Peru, but Australia.[15] In April 2011, the Australian Government announced its intention to discontinue

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5 E.g. in 2012 the only claim registered against Argentina was Repsol, S.A. and Repsol Butano, S.A. v. Argentina, ICSID Case No. ARB/12/38 (registered on 18 December 2012).

6 *See* UNCTAD (2013), *supra*, p. 2, 29.

7 Jonathan C. Hamilton (2008), A Decade of Latin American Investment Arbitration, in Mary H. Mourra and Thomas E. Carbonneau (eds), *Latin American Investment Treaty Arbitration – The Controversies and Conflicts*, Alphen aan den Rijn: Kluwer Law International; Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *Transnational Dispute Management* 6 (4), p. 6.

8 *See* International Centre for Settlement of Investment Disputes (2013), *ICSID 2012 Annual Report*. Washington: ICSID, p. 27.

9 *See* below, under II (b).

10 E.g. see generally Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra Cf.* Mary H. Mourra (2008), The Conflicts and Controversies in Latin American Treaty-Based Disputes, in Mary H. Mourra and Thomas E. Carbonneau (eds), *Latin American Investment Treaty Arbitration – The Controversies and Conflicts*, Kluwer Law International, p. 9; Sébastien Manciaux (2007), La Bolivie se retire du CIRDI, *Transnational Dispute Management* 4 (5).

11 North American Free Trade Agreement, signed in San Antonio, on 17 December 1992, entered into force on 1 January 1994, 32 ILM 289.

12 *See* UNCTAD (2013), *supra*, p. 29.

13 *See* http://www.ustr.gov/tpp.

14 *See* Office of the United States Trade Representative, Outlines of the Trans-Pacific Partnership Agreement: Enhancing Trade and Investment, Supporting Jobs, Economic Growth and Development, November 2011 http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement.

15 *See* Ft. [20] to Section B: Investor-State Dispute Settlement of the leaked TPPA investment chapter draft, available at: http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf (June 2012), ('*[Section B does not apply to Australia or an investor of Australia. Notwithstanding any provision of this Agreement, Australia does not consent to the submission of a claim to arbitration under this Section.]*'). See also News in Brief: Australia

access to investor-state arbitration in its future international investment treaties.[16] The new Australian Government may, however, abandon this inflexible approach.[17] At the same time, the majority of Latin American investment agreements still provide for some form of international dispute settlement.[18]

Complex questions rarely receive uniform or uncontested answers and the discussion of whether Latin America *is* hostile to arbitration falls squarely within this category. The present contribution starts from the premise that the term 'hostility' is a misnomer and a one-size-fits-all judgment not necessarily borne out by fact. But more than offering a definitive view on whether Latin America is hostile to investment arbitration, the purpose of this article is to question some received ideas about the Latin American approach – or approaches – to investor-state dispute settlement. To do this, it will start with a *tour d'horizon* of the context, including the history of arbitration in Latin America and recent developments that have sparked talk of 'hostility'. It will then canvass the particular issue of award enforcement, examining Argentina's interpretation of Articles 53 and 54 ICSID Convention, and responses to purported failures to enforce investment awards. In a following step, the article will explore the new regionalism in the form of the proposed Latin American dispute resolution center, and it will eventually address the question of the public interest in Latin American arbitration. The final section will conclude.

II. LATIN AMERICAN INVESTMENT ARBITRATION IN CONTEXT

(a) Historical Overview

Traditionally, Latin America has been associated with the Calvo doctrine.[19] Expounded on the basis of the principles of sovereign equality and that of equal treatment between foreigners and nationals,[20] the doctrine requires disputes to be

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to reject investor-state dispute resolution in TPPA *Investment Treaty News* Issue 3. Volume 2. April 2012. http://www.iisd.org/pdf/2012/iisd_itn_april_2012_en.pdf, p. 18.

16 Government of Australia, Department of Foreign Affairs and Trade (2011). *Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity*. April 2011 http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf, p. 14. On the Australian Government's rejection of investor-state dispute settlement, see further J. Kurtz (2012), Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication, *ICSID Review* 27 (1); J. Kurtz (2011). The Australian Trade Policy Statement on Investor-State Dispute Settlement. *ASIL Insights* 15 (22); Luke Nottage (2011), The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's "Gillard Government Trade Policy Statement", *Sydney Law School Legal Studies Research Paper* No. 11/32. See also Catharine Titi (2014), *The Right to Regulate in International Investment Law*, Nomos and Hart Publishing, p. 25, 45 *et seq*.

17 *See* Australian Government Department of Foreign Affairs and Trade, *Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)* https://www.dfat.gov.au/fta/ isds-faq.html and Luke Nottage (2013), *Investor-State Dispute Settlement Back for Australia's Free Trade Agreements* http://blogs.usyd.edu.au/japaneselaw/2013/12/isds_back.html.

18 *See* also *supra* on denunciations of the ICSID Convention.

19 Initially, the Calvo doctrine was famously elaborated in Carlos Calvo (1868), *Derecho internacional teórico y práctico de Europa y América*, Paris: D'Amyot and Durand et Pedone-Lauriel. See also Carlos Calvo (1896), *Le droit international théorique et pratique*, Paris: Rousseau.

20 International Law Commission (2002), Addendum to the third report on diplomatic protection by John Dugard, Special Rapporteur, UN: General Assembly, Fifty-fourth session, A/CN.4/523/Add.1, 16 April 2002, p. 3; Guido Santiago Tawil (2011), On the Internationalization of Administrative Contracts,

resolved through the application of local laws by domestic courts and it enjoins investors to renounce applying to their home government for diplomatic protection,[21] at least until available local remedies have been exhausted.[22] Latin America's dalliance with the Calvo doctrine predates the advent of the modern bilateral investment treaty (BIT) world,[23] and it came about as a result of a preoccupation with the use and abuse of diplomatic protection as a means of foreign intervention in domestic affairs.[24]

As an expression of this doctrine, a particular type of provision was elaborated and inserted in most state contracts in Latin America:[25] the so-called 'Calvo clause'. The clause specified that disputes are to be settled by domestic courts, that the applicable law is the domestic law of the host state and that the investor may not apply to its home government for diplomatic protection.[26] Some countries, such as Peru, created a constitutional requirement to include a Calvo clause in all public contracts with foreigners.[27] Later positions came to reinforce the Calvo doctrine, such as Decision 24 of 31 December 1970 of the Andean Commission of the Cartagena Agreement,[28] and the Charter of Economic Rights and Duties of States in the United Nations' (UN) General Assembly Resolution 3281 (XXIX) of 12 December 1974.[29]

In accordance with the tenets of the Calvo doctrine, the initial approach of Latin American countries to arbitration, and, more particularly, to the ICSID Convention was one of skepticism or hostility.[30] In September 1964, when the Board of Governors of the International Bank for Reconstruction and

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Arbitration and the Calvo Doctrine, in Albert Jan van den Berg (ed.), *Arbitration Advocacy in Changing Times*, Alphen aan den Rijn: Kluwer Law International, p. 329.

21 Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 2; Bernardo M. Cremades (2010). La participación de los Estados en el arbitraje internacional. *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* III (3), p. 658; Mary H. Mourra (2008), *supra*, p. 8-9; Wenhua Shan (2007), From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law, *Northwestern Journal of International Law & Business* 27 (3), p. 632; Guido Santiago Tawil (2011), *supra*, p. 329.

22 International Law Commission (2002), *supra*, *passim*.

23 *See* generally, International Law Commission (2002), *supra*, *passim*.

24 International Law Commission (2002), *supra*, p. 15.

25 Mary H. Mourra (2008), *supra*, p. 20.

26 Mary H. Mourra (2008), *supra*, p. 20; Guido Santiago Tawil (2011), On the Internationalization of Administrative Contracts, Arbitration and the Calvo Doctrine, in Albert Jan *supra*, p. 331.

27 Mary H. Mourra (2008), *supra*, p. 20.

28 *See* especially Article 51 Decision No. 24 of the Commission of the Cartagena Agreement on Common Regulations Governing Foreign Capital Movement, Trademarks, Patents, Licenses and Royalties, adopted on 31 December 1970, amended by successive Decisions 37 (1971), 37-A (1971), 70 (1973), 103 (1976) and 109 (1976) http://unctad.org/Sections/dite/iia/docs/compendium/en/46%20volume%202.pdf. The Decision has been replaced by Decision 220 of 1987. See Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 2, ft. 4. See further International Law Commission (2002), *supra*, p. 16; Guido Santiago Tawil (2011), On the Internationalization of Administrative Contracts, Arbitration and the Calvo Doctrine**,** in A. J. van den Berg (ed), *Arbitration Advocacy in Changing Times*, Alphen aan den Rijn: Kluwer Law International, p. 330.

29 International Law Commission (2002), *supra*, p. 15-16.

30 Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 3. See also International Law Commission (2002), *supra*, p. 16, where it is, however, pointed out that, in light of Article 27 ICSID Convention, the Calvo doctrine is not entirely foreign to the ICSID Convention.

Development adopted Resolution No. 214, which consequently permitted the formulation of the ICSID Convention,[31] 19 Latin American countries (alongside Iraq and the Philippines) voted against its adoption, in what later became known as the '*no de Tokio*'.[32]

This attitude changed in the late 1980s and the 1990s, when Latin American states began to conclude bilateral investment treaties. To the exclusion of one bilateral investment agreement, all other Bolivian BITs currently in force, as well as the quasi-totality of Ecuadorian, Chilean, Nicaraguan, and Peruvian BITs, were concluded within this timeframe.[33] Four fifths of all Argentinean BITs in force were signed between 1991 and 1996.[34] Even Brazil's never ratified bilateral investment protection treaties date all from the 1990s.[35] During this same time, Latin American countries started to accede to the Convention establishing the Multilateral Investment Guarantee Agency (MIGA Convention)[36] and, notably, to the ICSID Convention;[37] by the end of the summer of 1995, Argentina, Bolivia, Ecuador, and Venezuela had all ratified the ICSID Convention.[38] Mexico was an exception among Latin American countries in this respect in that it did not become a contracting party to the ICSID Convention (Canada, another NAFTA party, had not adhered to the ICSID Convention until very recently, although it had been a signatory since 2006).[39] But, to the exclusion of Brazil, which has

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31 ICSID (1965), Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965 https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm.

32 The Latin American states that voted against were Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela. See ICSID (1968), *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Washington, D.C.: ICSID, Vol. II-1, p. 606 *et seq*. See also Ignacio Antonio Vincentelli (2009), The Uncertain Future of ICSID in Latin America, *Independent Research Paper* http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=ignacio_vincentelli; Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 3; Nicolas Boeglin (2012), Argentine : Vers un nouveau retrait du CIRDI ? 9 mai 2012, *Comité pour l'Annulation de la Dette du Tiers Monde* http://cadtm.org/Argentine-Vers-un-nouveau-retrait.

33 *See* http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Country-specific-Lists-of-BITs.aspx. The exception among Bolivian BITs is the treaty with Spain, concluded in 2001.

34 *See* http://unctad.org/Sections/dite_pcbb/docs/bits_argentina.pdf.

35 *See* http://unctad.org/Sections/dite_pcbb/docs/bits_brazil.pdf.

36 Convention Establishing the Multilateral Investment Guarantee Agency, opened for signature on 11 October 1985, entered into force on 12 April 1988. See e.g. Paul Peters and Nico Schreijver (1991), Latin America and International Regulation of Foreign Investment: Changing Perceptions, *Institute of Social Studies (Netherlands) Working Paper Series* No. 113 http://repub.eur.nl/res/pub/18951/wp113.pdf, p. 10-11; Horacio A. Grigera Naón (1991), Arbitration in Latin America: Overcoming Traditional Hostility (An Update), *University of Miami Inter-American Law Review* 22 (2/3), p. 222.

37 *See* ICSID (2013), List of Contracting States and Other Signatories of the Convention (as of May 20, 2013) https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English.

38 *See* ICSID (2013), List of Contracting States and Other Signatories of the Convention (as of May 20, 2013) https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English.

39 ICSID (2013), List of Contracting States and Other Signatories of the Convention (as of November 1, 2013) https://icsid.worldbank.org/ICSID/

neither ratified bilateral investment treaties,[40] nor has it become a contracting party to the ICSID Convention,[41] all other Latin American countries eventually embraced the international system of investment protection.[42]

(b) Recent Developments

Despite this eventual endorsement of international investment protections and of international arbitration, since the mid-2000s the acceptance of international arbitration by Latin America has started to come increasingly into question and talk of the 'uncertain' future of arbitration in the region and a purported resurgence of the Calvo doctrine abound.[43] Part of this discussion is not limited in its relevance to Latin American countries. For instance, it has sometimes been pointed out that the United States, traditionally a fierce opponent of the Calvo doctrine, appears to display 'a new-found appreciation for the views of Carlos Calvo' in its recent investment policymaking.[44] In a similar vein, outside the field of investment law, the United States has withdrawn from the jurisdiction of the International Court of Justice (ICJ) under the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes.[45] Australia's policy shift regarding discontinuance of ISDS in future

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FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English. On Canada, see further Stephen L. Drymer and Patrick Dumberry (2008), Canada's Accession to the ICSID Convention and the 2006 Canada-Peru Bilateral Investment Treaty: New Protections and Opportunities for Investors, in Carlos Alberto Soto Coaguila (ed.), *El arbitraje en el Perú y el mundo, Arbitraje comercial y arbitraje de inversión* Lima: Instituto peruano de arbitraje and Magna.

40 *See* http://unctad.org/Sections/dite_pcbb/docs/bits_brazil.pdf.

41 ICSID (2013), List of Contracting States and Other Signatories of the Convention (as of May 20, 2013) https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument &language=English. On the particular case of Brazil, see the dedicated article Jean Kalicki and Suzana Medeiros (2008), Investment Arbitration in Brazil: Revisiting Brazil's Traditional Reluctance Towards ICSID, BITs and Investor-State Arbitration, *Arbitration International* 24 (3).

42 Ignacio Antonio Vincentelli (2009), *supra*, p. 11.

43 Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*; Mary H. Mourra (2008), *supra*, p. 20; Lars Markert (2011), The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States. In M. Bungenberg, J. Griebel and S. Hindelang (eds), *European Yearbook of International Economic Law 2011, Special Issue: International Investment Law and EU Law*, Heidelberg: Springer, p. 147.

44 José Alvarez (2011), *The Public International Law Regime Governing International Investment*, Hague Academy of International Law, p. 311 and *passim*. See also Guido Santiago Tawil (2011), *supra*, p. 343 *et seq*.; Bernardo M. Cremades (2010), *supra*, p. 669; Michael J. Bond (2009), The Americanization of Carlos Calvo, *Transnational Dispute Management* 6 (4).

45 Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, signed in Vienna, on 24 April 1963. On these, see Adam Liptak (2005), US Says It Has Withdrawn from World Judicial Body, *New York Times*, 10 March 2005; Aloysius P. Llamzon (2008), Jurisdiction and Compliance in Recent Decisions of the International Court of Justice, *European Journal of International Law* 18 (5), p. 843-844; Philip V. Tisne (2005), The ICJ and Municipal Law: The Precedential Effect of the Avena and Lagrand Decisions in US Courts, *Fordham International Law Journal* 29 (4), p. 887 *et seq*.; John Quigley (2009), The United States's Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences, *Duke Journal of Comparative & International Law* 19.

It should be noted that the United States and France had earlier withdrawn from the compulsory general jurisdiction of the ICJ, while Australia limited the scope of its consent in 2002. See W. Michael Reisman (1987), The Other Shoe Falls: The Future of Article 36(1) Jurisdiction in the Light of Nicaragua, *American Journal of International Law* 81; Don MacKay (1995), Nuclear Testing: New Zealand and France in the

investment agreements is part of the same rhetoric of distrust vis-à-vis international adjudicatory bodies,[46] as is UNCTAD's recommendation of 'limiting resort to ISDS and increasing the role of domestic judicial systems, [. . .] or even refraining from offering ISDS'.[47] But the question has acquired a particular significance for Latin America, if only because of a limited number of developments that have attracted more than their share of attention in recent years. It is these developments that this section proposes to explore.

(i) Denunciations of the ICSID Convention

In May 2007, Bolivia became the first state in history to denounce the ICSID Convention.[48] The denunciation came a month after all Member States of the Bolivarian Alliance for the Americas (ALBA)[49] declared their intention to leave the ICSID Convention during the ALBA Fifth Summit.[50] In accordance with Article 71 ICSID Convention, Bolivia's denunciation became effective six months later, as of November 2007.[51] In the month that followed, Ecuador notified ICSID, in accordance with Article 25(4) ICSID Convention,[52] that it withdrew its consent to arbitration for disputes concerning the treatment of investment arising from economic activities that relate to the exploitation of natural resources, namely oil, gas and minerals.[53] The effect of such a notification is highly disputed.[54] Notably,

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International Court of Justice, *Fordham International Law Journal* 19 (5), p. 1870; Bob Burton (2005), Australia, East Timor strike oil, gas deal, *Asian Times*, 17 May 2005;

46 *See* above, under I.

47 UNCTAD (2012), *Investment Policy Framework for Sustainable Development*, New York and Geneva: UN, p. 43, see also p. 44.

48 *See* ICSID (2013), List of Contracting States and Other Signatories of the Convention (as of May 20, 2013) https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English.

49 ALBA counts currently nine members: Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Nicaragua, Saint Vincent and the Grenadines, Santa Lucia and Venezuela. See ALBA's official website http://www.alianzabolivariana.org.

50 Emmanuel Gaillard (2008), Anti-Arbitration Trends in Latin America, *New York Law Journal* 239 (108), 5 June 2008; Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 12. However, this declaration is subject to a minor contradiction, since Cuba is not party to the ICSID Convention.

51 Article 71 ICSID Convention provides that: 'Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.' *Cf.* Article 72 ICSID Convention. See also ICSID (2013), List of Contracting States and Other Signatories of the Convention (as of May 20, 2013) https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English.

52 Article 25(4) ICSID Convention provides: 'Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).'

53 Ecuador's notification is available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=regular&AnnounceNo=9.pdf

54 For a discussion of the legal effects of a notification under Article 25(4) ICSID Convention in arbitration, see PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, paras 144 *et seq*. See further Emmanuel Gaillard (2008), *supra*.

while Article 72 ICSID Convention deals with the 'rights or obligations' arising out of a denunciation of the Convention under Article 71 ICSID Convention, no corresponding provision exists for Article 25(4).[55] Yet, in this case, the dilemma proved of little significance: in July 2009, Ecuador became the second country to denounce the ICSID Convention.[56] In January 2012, Venezuela followed suit.[57]

Other discussed denunciations, including those of the ALBA parties, have not taken place. For instance, despite an announcement in April 2008 that Nicaragua was considering withdrawing from ICSID, the state remains to this date party to the Convention.[58] More recently, speculation started on whether Argentina was about to withdraw from the ICSID Convention.[59] A Draft Bill from March 2012[60] and ensuing public statements by Eduardo Barcesat, chief legal advisor to Argentina's Treasury,[61] triggered this talk of an imminent withdrawal, but here again no such step has been taken so far.

Withdrawal from the ICSID Convention is one of the most widely-canvassed tokens of Latin America's skepticism towards ISDS.[62] In the political sphere, denunciation of the ICSID Convention may function as a statement of censure towards the international system of investment protection.[63] But it is also possible that such a decision simply evinces a rejection of one particular institution that

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55 Emmanuel Gaillard (2008), *supra*.

56 ICSID News Release (2009), Ecuador Submits a Notice under Article 71 of the ICSID Convention, 9 July 2009.

57 ICSID News Release (2012), Venezuela Submits a Notice under Article 71 of the ICSID Convention, 26 January 2012.

58 *See* Emmanuel Gaillard (2008), *supra*.

59 *See* Argentina faces 65bn dollars in claims; plans to abandon international litigations court (*sic*), 28 November 2012 http://en.mercopress.com/2012/11/28/argentina-faces-65bn-dollars-in-claims-plans-to-abandon-international-litigations-court; S. Perry (2013). Is Argentina about to leave ICSID? *Global Arbitration Review* 25 January 2013; Hogan Lovells (2013). International Arbitration Alert: If Argentina withdraws from the ICSID Convention: Implications for foreign investors, 4 February 2013 http://ehoganlovells.com/cv/675f9a9cdbacdf1cb602217222c2aaef2d834bd2.

60 Derogación de la ley 24353 de adhesión de la República Argentina al Convenio sobre Arreglos de Diferencias relativas a Inversiones entre Estados y nacionales de otros Estados adoptado en Washington – Estados Unidos de América – el 18 de marzo de 1965, 1311-D-2012, 014 (21/03/2012) http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=1311-D-2012http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=1311-D-2012.

61 *See* Argentina faces 65bn dollars in claims; plans to abandon international litigations court (*sic*), 28 November 2012 http://en.mercopress.com/2012/11/28/argentina-faces-65bn-dollars-in-claims-plans-to-abandon-international-litigations-court.

62 From among the prolific literature on denunciations of the ICSID Convention, see UNCTAD (2010), Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims. *IIA Issues Note* No. 2 December 2010, www.unctad.org/diae, p. 4 *et seq*.; Emmanuel Gaillard (2007), The Denunciation of the ICSID Convention, *New York Law Journal* 237 (122) ; Christoph Schreuer (2010), Denunciation of the ICSID Convention and Consent to Arbitration, in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin (eds), *The Backlash against Investment Arbitration: Perceptions and Reality*, Alphen aan den Rijn: Kluwer Law International; A. A. Mezgravis and C. González (2012), Denunciation of the ICSID Convention:Two Problems, One Seen and One Overlooked, *Transnational Dispute Management*, November 2012 (provisional issue); Antonios Tzanakopoulos (2011), Denunciation of the ICSID Convention under the General International Law of Treaties, in Rainer Hoffman and Christian Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*, Baden Baden: Nomos.

63 E.g. see Sébastien Manciaux (2007), *supra*; Catharine Titi (2014), *The Right to Regulate in International Investment Law*, *supra*, p. 23, 72.

belongs to the World Bank.[64] In the legal domain, the impact of a denunciation is more uncertain. Certainly, it imposes limitations on a distinctive feature of international investment law, which is encouragement of forum shopping,[65] but it does not close the door to investment arbitration, at least not to the extent that the applicable investment treaty provides access to other arbitration *fora*.[66] As an illustration, bilateral investment treaties concluded by Bolivia generally also provide access to the ICSID Additional Facility,[67] UNCITRAL arbitration,[68] the International Chamber of Commerce (ICC)[69] or the Stockholm Chamber of Commerce (SCC).[70] Concrete problems arise only for treaties that, such as the 1994 Bolivia-Chile BIT, do not provide access to another international dispute resolution mechanism.[71] In any case, denunciation of the ICSID Convention leaves open a number of complex questions, including whether consent to arbitrate in an investment treaty remains valid notwithstanding the denunciation, whether the nature of consent or a 'standing offer' to arbitrate differs from treaty to treaty, depending on each instrument's specific language, and who 'holds' the right to arbitrate given that while the treaty is concluded between states, it confers rights on individuals.[72]

(ii) Terminations of Bilateral Investment Treaties

ICSID Convention denunciations aside, some Latin American countries have started to reassess the usefulness of retaining their investment agreements. Ecuador, which has not signed any bilateral investment treaties since 2001,[73] terminated nine BITs in 2008, among which eight treaties concluded with Latin

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64 Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 14.

65 Emmanuel Gaillard (2003), L'arbitrage sur le fondement des traités de protection des investissements, *Revue de l'arbitrage* 3, p. 862-863.

66 Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 14.

67 E.g. BLEU-Bolivia BIT (1990), Bolivia-UK BIT (1988), Bolivia-Spain BIT (2001).

68 E.g. this is the case of the BITs between, on the one hand, Bolivia and, on the other, Argentina (1994), Austria (1997), Cuba (1995) and Spain (2001).

69 E.g. BLEU-Bolivia BIT (1990), Bolivia-UK BIT (1988).

70 E.g. BLEU-Bolivia BIT (1990).

71 *See* Article X Bolivia-Chile BIT (1994).

72 *See* generally Christoph Schreuer (2010), Denunciation of the ICSID Convention and Consent to Arbitration, in M. Waibel, A. Kaushal, K.-H. Chung and C. Balchin (eds), *The Backlash against Investment Arbitration*, Alphen aan den Rijn: Kluwer Law International; Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (2009), The ICSID Convention: A Commentary, Second edition, New York: Cambridge University Press, p. 1278 *et seq.*; Emmanuel Gaillard (2007), *supra*; Fernando Mantilla-Serrano (2008), La denuncia de la Convención de Washington, ¿Impide el recurso al CIADI?, *Revista Peruana de Arbitraje* 6; Oscar Garibaldi, On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy, *Transnational Dispute Management* 6 (1); Sébastien Manciaux (2007), *supra*; Michael Nolan and F. G. Sourgens (2007), The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study, *Transnational Dispute Management* (Provisional Issue, September 2007); Andrés Mezgravis and Carolina González (2012), Denunciation of the ICSID Convention: Two problems, one seen and one overlooked, *Transnational Dispute Management* 9 (7).

73 *See* http://unctad.org/Sections/dite_pcbb/docs/bits_ecuador.pdf.

American countries.[74] Following jurisprudence of that state's Constitutional Court deeming a number of arbitration clauses in Ecuadorian BITs unconstitutional,[75] Ecuador has further attempted to withdraw from other BITs, including those with France, Germany and the United Kingdom, and it has terminated its BIT with Finland.[76] More recently the focus has turned to the uncertain fate of another eight bilateral investment treaties, among which those with Argentina, Bolivia and the United States.[77] Other denounced Latin American investment treaties include the BITs between Bolivia and the United States,[78] El Salvador and Nicaragua,[79] and the Venezuela-Netherlands BIT.[80] According to some reports, Argentina may also be considering whether to terminate its BITs.[81]

However, it is probable that Argentina will eventually decide to renegotiate its bilateral investment treaties in order to bring them in line with new generation agreements, rather than follow Ecuador's example in denouncing them.[82] Renegotiation is also a policy that may be adopted by Bolivia, at least in part, given a 'transitory disposition' in the latter's 2009 Constitution, pursuant to which, within four years of the election of 'the new Executive Organ, the Executive shall renounce and, in that case, renegotiate the international treaties that may be contrary to the Constitution'.[83] In accordance with this provision, the Bolivian Government has already announced its intention to renegotiate a number of agreements.[84]

By way of a closing remark, it should be observed that Latin American states are not the only ones to terminate bilateral investment treaties. South Africa offers a

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74 *See* UNCTAD (2010). Denunciation of the ICSID Convention and BITs, *supra*, p. 1, footnote 3.

75 R. Jijón-Letort and J. M. Marchán (2012), National and International Arbitration in Ecuador, *The Arbitration Review of the Americas 2012*. Global Arbitration Review/Pérez Bustamante & Ponce, p. 43; UNCTAD (2010), Denunciation of the ICSID Convention and BITs, *supra*, p. 1, ft. 3; see also UNCTAD (2010). *World Investment Report 2010: Investing in a Low-Carbon Economy*, New York and Geneva: UN, p. 85-86.

76 *See* Office of the United States Trade Representative, Sixth Report to the Congress on the Operation of the Andean Trade Preference Act as Amended, 30 June 2012 http://www.ustr.gov/webfm_send/3488. See also http://unctad.org/Sections/dite_pcbb/docs/bits_ecuador.pdf (most recent update at the time of writing: 1 June 2013).

77 Paula Hodges, Charles Kaplan and Peter Godwin (2013), Further steps given by Ecuador to terminate its bilateral investment treaty with the USA, 20 March 2013 http://www.lexology.com/library/detail.aspx?g=659d64fa-f050-456d-9cd7-85edfcfcbb38.

78 *See* Notice of Termination of United States-Bolivia Bilateral Investment Treaty, US Federal Register Vol. 77, No. 100, FR Doc No: 2012-12494, 23 May 2012.

79 UNCTAD (2010), Denunciation of the ICSID Convention and BITs, *supra*, p. 1.

80 UNCTAD (2010), Denunciation of the ICSID Convention and BITs, *supra*, p. 1.

81 *See* Argentina faces 65bn dollars in claims; plans to abandon international litigations court (*sic*), 28 November 2012 http://en.mercopress.com/2012/11/28/argentina-faces-65bn-dollars-in-claims-plans-to-abandon-international-litigations-court.

82 For a pro-renegotiation view, see Federico M. Lavopa, Lucas E. Barreiros and Victoria Bruno (2013), How to Kill a BIT and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties, *Journal of International Economic Law* 16 (4).

83 Ninth Transitory Disposition of Bolivia's Constitution of 2009. On Bolivia's Constitution and international arbitration, see also below, under II (b) (3).

84 Fernando Aguirre B. (2012), Bolivia, in Jonathan C. Hamilton, Omar E. García-Bolívar and Hernando Otero (eds) *Latin American Investment Protections: Comparative Perspectives on Laws, Treaties, and Disputes for Investors, States, and Counsel*, Leiden and Boston: Martinus Nijhoff, p. 65.

pertinent illustration in this respect, having started to withdraw from a number of first generation BITs.[85] Although it is beyond the purpose of the present discourse to address the effects of BIT terminations, it should be observed that, while a treaty continues to be effective in relation to investments made prior to the date of its termination by virtue of a survival clause,[86] an investor may offer its consent to arbitration for potential future disputes.[87] The drawback for the investor is that, from the moment consent is perfected, the state will in principle also be in a position to initiate arbitration against it.[88] Finally, even termination of investment treaties does not invalidate rights and consent to arbitration given to investors in other instruments, such as contracts and national legislation.[89]

(iii) Domestic Legislation Inimical to Investment Arbitration

Adoption of domestic legislation inimical to investment protection has been another means of expressing dissatisfaction with the current system of investor-state dispute settlement. In some cases, legislative reforms have directly targeted arbitration. As an illustration, one may look at Ecuador's 2008 constitutional amendments.[90] Article 422 of that Constitution provides that:

> Treaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities in disputes involving contracts or trade between the State and natural persons or legal entities cannot be entered into.[91]

An exception to this rule in the same article establishes that 'treaties and international instruments that provide for the settlement of disputes between States and citizens in Latin America by regional arbitration entities or by jurisdictional organizations designated by the signatory countries are exempt from this prohibition'.[92] The first part of this clause appears to account for the Latin

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85 News in Brief: South Africa begins withdrawing from EU-member BITs, *Investment Treaty News*, 30 October 2012 http://www.iisd.org/itn/2012/10/30/news-in-brief-9/#_ftn1; Speech of the Minister of Trade and Industry, Dr Rob Davies, at the Discussion of UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) in Geneva, Switzerland, 25 September 2012 http://www.thedti.gov.za/editspeeches.jsp?id=2506. For a theoretical underpinning, see Government of South Africa, Department of Trade and Industry (2009), *Bilateral Investment Treaty Policy Framework Review*, Government Position Paper, Pretoria, June 2009.

86 E.g. see Article 14(3) of the terminated Netherlands-Venezuela BIT.

87 Sébastien Manciaux (2007), *supra.*

88 Catharine Titi (2014), *The Right to Regulate in International Investment Law*, *supra*, p. 110.

89 Sébastien Manciaux (2007), *supra.*

90 On the revision of Ecuador's Constitution, see R. Jijón-Letort and J. M. Marchán (2012), *supra*, p. 42-43; K. Nowrot (2010), International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism, *Beiträge zum Transnationalen Wirtschaftsrecht* 96.

91 Unsurprisingly, this provision has been invoked in the Ecuadorean decree 1823 of 2009 relating to the country's withdrawal from ICSID http://www.sigob.gov.ec/decretos/decretos.aspx?id=2007. The text of Ecuador's 2008 Constitution is available through: http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html. An English translation is available at: http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.

92 Article 422 Ecuadorean Constitution (2008).

American dispute settlement center initially proposed by Ecuador, which will be discussed below,[93] while the reference to 'jurisdictional organizations' broadens considerably the scope of the exception.

Likewise, Bolivia's 2009 Constitution, which has already been invoked to explain the country's denunciation of the ICSID Convention,[94] adopts a hostile approach to investment arbitration. Article 320 of that Constitution provides that 'foreign investment shall submit to Bolivian jurisdiction, laws and authorities'. Article 366 in its turn establishes that foreign investors operating in the hydrocarbons' production chain:

> shall submit to the sovereignty of the State, and to the laws and authority of the State. No foreign court case or foreign jurisdiction shall be recognized, and they may not invoke any exceptional situation for international arbitration, nor appeal to diplomatic claims.

This latter article appears an attempt to avert arbitration claims arising out of Bolivia's nationalization policies affecting the hydrocarbons sector.[95] It has cogently been argued that arbitral tribunals sitting in some neutral place are unlikely to give effect to such limitations when confronted with an arbitration agreement in a treaty or contract.[96] At the same time, in parallel with these constitutional stipulations, statutory laws expressly recognize the right of the parties to submit especially commercial disputes to arbitration.[97] Despite some uncertainty as to whether such provisions are, in fact, contrary to the Constitution, public procurement regulations continue to authorize contracts to give access to international arbitration when necessary for the purchase of goods or services outside Bolivia.[98]

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93 Under IV.

94 Fernando Aguirre B. (2012), *supra*, p. 64.

95 Bolivia: Supreme Decree No. 28701 of 1 May 2006, 45 ILM 1020 (2006). The Spanish version of the decree is available at http://www.asil.org/pdfs/decretobolivia060516.pdf.

96 Emmanuel Gaillard (2008), *supra* In this light, it is of interest to note the recent *Pemex* case, where the arbitral award was upheld by a US District Court despite set-aside at the seat of arbitration in Mexico. The set-aside had been based on a law that did not exist at the time the parties concluded their contract and which rendered the 'administrative rescission, early termination of the contracts and such cases as the Regulation of this Law may determine' non-arbitrable (Section 98 of the Law of Public Works and Related Services). The District Court emphasised that 'it was not until May 28, 2009, when Section 98 of the Law of Public Works and Related Services came into effect, that there was a source of law that supported the argument that the parties' dispute was not arbitrable. [. . .] Applying a law that came into effect well after the parties entered into their contract was troubling. But this unfairness was exacerbated by the fact that the Eleventh Collegiate Court's decision left COMMISA without a remedy to litigate the merits of the dispute that the arbitrators had resolved in COMMISA's favour.' US District Court Southern District of New York, Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, Opinion and Order Granting Petitioner's Motion to Confirm Arbitration Award and Denying Respondent's Motion to Dismiss Petition, 10 Civ. 206 (AKH), 27 August 2013, p. 27-29. See further Kyriaki Karadelis (2013), Pemex award upheld in US despite set-aside in Mexico, *Global Arbitration Review*, 30 August 2013.

97 E.g. see Articles 3 and 6 of Bolivia: Ley Nº 1770, Ley de arbitraje y conciliación, 10 March 1997.

98 Fernando Aguirre B. (2012), *supra*, p. 59.

III. ENFORCEMENT OF ARBITRAL AWARDS RENDERED AGAINST LATIN AMERICAN COUNTRIES

Beyond these developments that demonstrate some Latin American countries' opposition to arbitration, other recent goings-on are more difficult to appraise. Award enforcement has been one of the most crucial issues that have arisen in this respect, affecting in particular Argentina and, to a lesser extent, Ecuador. Two topics will be discussed in this context: first, Argentina's interpretation of Articles 53 and 54 ICSID Convention and, second, policy responses to purported failures to enforce arbitral awards.

(a) Compliance and Enforcement: Argentina's Combined Interpretation of Articles 53 and 54 ICSID Convention

Following the wave of arbitral claims launched against Argentina in the aftermath of its financial crisis of 2001,[99] the country sought to defend itself through various means. In the first place, Argentina made consistent efforts to reach amicable settlements[100] and, where faced with unfavorable awards, it systematically resorted to requests for annulment.[101] Both strategies have paid off: a number of disputes have been settled out of arbitration[102] and several awards delivered against Argentina have been annulled.[103] A third possible avenue of 'defence' may have been Argentina's reading of Articles 53 and 54 of the ICSID Convention, and the attendant enforcement issues that have been raised. Argentina's interpretation of these provisions has no doubt encouraged some investors to take what they could and settle amicably rather than pursue dispute resolution through formal channels

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99 *See* below, under V.

100 Enrique Fernández Masiá (2009), La estrategia de argentina de dilatar el pago de las condenas comienza a encontrar obstáculos en el CIADI, *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* II (3), p. 792; Wenhua Shan (2007), *supra*, p. 637.

101 E.g. CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007 (hereinafter CMS Decision on Annulment); Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3, Decision on the Application for Annulment, 30 July 2010 (hereinafter Enron Decision on Annulment); Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010 (hereinafter Sempra Decision on Annulment); Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9, Annulment Proceeding, 16 September 2011. See also Argentina v. BG Group PLC., Petition to Vacate or Modify Arbitration Award, 20 March 2008, United States District Court for the District of Columbia**,** Case No. 08-0485 RBW.

102 For the registered ICSID cases settlement was reached, see the list of concluded cases on the ICSID website https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded.

103 E.g. Enron Decision on Annulment, *supra*, and Sempra Decision on Annulment, *supra* By July 2011, of the 42 ICSID cases initiated against Argentina, half had been won by the respondent, settled, suspended or annulled, 18 cases were pending and only three final awards had been rendered against Argentina. See Letter from Alfredo V. Chiaradia, Argentinean Ambassador to the US, to Timothy Geithner, US Treasury Secretary, 5 July 2011 http://embassyofargentina.us/embassyofargentina.us/files/letterambchia radiatotimothyf.pdf. See also Luke E. Peterson (2012), U.S. Court tears up $185+ million award due to failure of arbitrators to respect treaty's call for 18 months of local litigation in Argentina, *IA Reporter* 5 (2), 31 January 2012.

that, even when finding in their favour, may have failed to result in prompt compensation.[104]

The key question is whether Articles 53 and 54 of the ICSID Convention are independent of one another, the former regarding compliance and the latter enforcement of an award that has not been complied with, or whether the two provisions are to be read in conjunction. According to the dominant view, the two articles need to be interpreted separately; according to Argentina, they need to be read together.[105] It is this argument that will be examined here.

Article 53 ICSID Convention provides in its first paragraph that:

> 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.

And Article 54(1) ICSID Convention states, *inter alia*, that:

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

Article 53 ICSID Convention describes the binding character of the award on the *parties* to the dispute, while Article 54 ICSID Convention refers to the recognition and enforcement of the award in the territory of *each* contracting state.[106] That much is clear but it does not necessarily prejudge whether the two articles are to be read together. According to Aron Broches, former General Counsel of the World Bank and 'principal architect' of the ICSID Convention,[107] Article 53 affirms the binding character of the award at the international law level, while Article 54 confirms its finality vis-à-vis domestic courts.[108] This view is also not very helpful in terms of determining the relationship *between* the two articles, although in one case it has been cited in order to support the view that Articles 53 and 54 ICSID Convention are to be interpreted together as two sides of one and the same coin.[109]

According to the mainstream approach, the parties' obligation to comply with the award, as enshrined in Article 53 ICSID Convention, is 'independent of any enforcement proceedings' under Article 54 ICSID Convention.[110] Article 53 ICSID Convention is understood to impose an obligation under international law

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104 *Cf.* UNCTAD (2013), *supra*, p. 24.

105 *See* below.

106 Gabriel Bottini (2009), Recognition and enforcement of ICSID awards, *Transnational Dispute Management* 6 (1).

107 Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (2009), *supra*, p. 2.

108 Aron Broches (1972), The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *Recueil des cours de l'Academie de la Haye* 136, p. 400.

109 Gabriel Bottini (2009), *supra*.

110 Christoph Schreuer *et al.* (2009), *supra*, p. 1106. See further OECD (2012), *Investor-State Dispute Settlement Public Consultation: 16 May – 9 July 2012*, Paris: OECD, p. 29, ft 68; OECD (2010), *13th Roundtable on Freedom of Investment: Summary of Roundtable discussions by the OECD Secretariat*, Paris: OECD, p. 2 *et seq*.

'to abide by and comply with the terms of the Award, without the need for action on the part of the Claimants pursuant to the enforcement machinery' referred to in Article 54 of the ICSID Convention.[111] In other words, 'an award debtor may not insist on the initiation of enforcement proceedings to delay compliance. The need for enforcement measures under Art. 54 implies default and hence a breach of Art. 53'.[112] This statement appears to indirectly address Argentina's reading of Articles 53 and 54 ICSID Convention. However, according to a different remark, the obligations under Articles 53 and 54 'arise as soon as the award is rendered'.[113] It is also submitted that the impossibility of enforcing an award under the ICSID Convention as a consequence of the law governing the execution of domestic judgments does not affect the obligation of the party to the arbitration to comply with the award by virtue of Article 53.[114] If one abides by this first view, then Argentina could be in breach of Article 53 ICSID Convention but not Article 54 ICSID Convention. In other words, Argentina has not *stricto sensu* been responsible for failing to *enforce* an award, only for failing to *comply* with it.

In line with the second view – this is the view endorsed by Argentina[115] – Articles 53 and 54 ICSID Convention complement each other.[116] Article 54 ICSID Convention is applicable from the moment the award is rendered and not only once the state has failed to pay in accordance with Article 53 ICSID Convention.[117] As a corollary, the obligation to equate ICSID awards to final judgments of local courts in Article 54 ICSID Convention for purposes of recognition and enforcement is immediately effective and it is interpreted not to 'negate or condition in any way the binding and final nature of ICSID awards'.[118]

The determination of whether Argentina failed to comply with the awards depends on which of the two interpretations is adopted. If a combined interpretation of Articles 53 and 54 ICSID Convention is accepted, then some further considerations become pertinent. Article 54 ICSID Convention makes clear that a state may not rely on defences such as those of the New York

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111 Enron Corporation Ponderosa Assets, L. P. v. Argentina, ICSID Case No. ARB/01/3, Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 October 2008, para. 69.

112 Christoph Schreuer *et al.* (2009), *supra*, p. 1106.

113 Christoph Schreuer *et al.* (2009), *supra*, p. 1145.

114 Christoph Schreuer *et al.* (2009), *supra*, p. 1149-1150.

115 E.g. see Enron Corporation Ponderosa Assets, L. P. v. Argentina, ICSID Case No. ARB/01/3, Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 October 2008, para. 15(q); OECD (2010), *12th Roundtable on Freedom of Investment*: *Summary of Roundtable discussions by the OECD Secretariat*, Paris: OECD, p. 3-4; Letter from Alfredo V. Chiaradia to Timothy Geithner, 25 August 2011 http://www.embassyofargentina.us/embassyofargentina.us/files/110825culbersonusargentinabit.pdf; Hearings of the International Monetary Policy and Trade Subcommittee of the House Financial Services Committee, attached to Letter from Alfredo V. Chiaradia of 29 July 2011 http://embassyofargentina.us/embassyofargentina.us/files/110729tohousefinancialservicesandforeignaffairscommittees.pdf. See also Ricardo Beltramino's comment, US Suspends Argentina from Trade Preference Scheme, *International Center for Trade and Sustainable Development* http://ictsd.org/i/news/bridgesweekly/129975/;

116 Gabriel Bottini (2009), *supra*.

117 Gabriel Bottini (2009), *supra*.

118 Gabriel Bottini (2009), *supra*.

Convention to deny enforcement.[119] However, on the basis of the same article, the state is entitled to subject enforcement of the award to the procedures applicable to enforcement of a final judgment of its local courts.[120] This is understood to introduce treatment not less favourable than the one applicable to final judgments of domestic courts.[121] Accordingly, the contracting states are not required to 'undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed'.[122] It has also been suggested that the obligation 'to equate awards to final judgments of local courts for purposes of recognition and enforcement cannot be construed in a way that accepts some of its consequences, such as the impermissibility [of invoking] certain defences to deny execution, and discard other consequences, such as equal treatment between ICSID awards and final local judgments'.[123]

The state parties to the ICSID Convention have an 'obligation to give effect to Article 54 of the Convention in their internal law. Exactly how this is done depends on the constitutional arrangements of the State Party concerned'.[124] Like other countries, for the purposes of Article 54 ICSID Convention, Argentina has designated a court.[125] The relevant procedure to be followed in order to obtain enforcement is often described in laws enacted to implement the ICSID Convention; for instance, in the United Kingdom the procedure is laid out in the Arbitration (International Investment Disputes) Act of 1966.[126] Similar provisions have been adopted by Australia, New Zealand and the United States.[127] In Argentina, which has a monist legal system and therefore no implementing act was required,[128] the relevant law is contained in the Federal Code of Civil and Commercial Procedure.[129] Since the provisions of the Code were not set in place

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119 Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), adopted on 10 June 1958, entered into force on 7 June 1959.

120 Gabriel Bottini (2009), *supra*.

121 Gabriel Bottini (2009), *supra*, p. 5.

122 ICSID, Report of the Executive Directors of the Convention, under VI (*Proceedings under the Convention*).

123 Gabriel Bottini (2009), *supra*, p. 6.

124 CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, Annulment proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 1 September 2006, para. 41. Similarly, in MTD Equity Sdn Bhd. Chile, ICSID Case No. ARB/01/7, Annulment Proceeding, Decision on the Respondent's Request for a Continued Stay of Execution (Rule 54 of the ICSID Arbitration Rules), 1 June 2005, para. 32.

125 The proceeding needs to be initiated before the Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal, see ICSID, Contracting States and Measures Taken by Them for the Purpose of the Convention, ICSID/8, May 2013 https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&Measures=True&language=English. See also Christoph Schreuer *et al.* (2009), *supra*, p. 1147-1148.

126 Arbitration (international Investment Disputes) Act of 13 December 1966.

127 Australia, ICSID Implementation Act 1990, No. 107 of 1990; New Zealand, Arbitration (International Investment Disputes) Act, No. 39 of 1979 and Arbitration (International Investment Disputes) Amendment Act, No. 52 of 2000; United States, Convention on the Settlement of Investment Disputes Act of 1966, Pub.L. 89-532; 80 Stat. 344; 22 U.S.C. sec. 1650-1650a of 11 August 1966.

128 David Weissbrodt and Connie de la Vega (2007), *International Human Rights Law: An Introduction*, Philadelphia, PA: University of Pennsylvania Press, p. 344.

129 Título I, *Ejecución de sentencias*, Libro Tercero, Código Procesal Civil y Comercial de la Nación, available at http://www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/16547/texact.htm#10.

to address ICSID arbitration in particular, they encompass rules that may be inapplicable *in casu*. For instance, the Code provides grounds on which the state may deny enforcement, such as reasons of public policy.[130] In this respect, it must be noted that, in the Argentine legal system, international treaties are above national statutes;[131] in other words, should there be a conflict between the ICSID Convention and the procedure required by the Code, it will be the former that prevails.

Argentina's interpretation of Articles 53 and 54 ICSID Convention, translated into a discussion around compliance and enforcement, has met with criticism in the literature,[132] and it appears to raise systemic issues,[133] notably since it affects one of the ICSID Convention's distinctive features, which is award enforcement.[134] If the combined reading of Articles 53 and 54 of the ICSID Convention is not accepted and, therefore, Argentina should have spontaneously paid the awards, the question is asked whether there was bad faith on its part in not complying with them. In other words, is the fact that it was in Argentina's interests to delay payment of the awards a sufficient determinant of bad faith? Bad faith or its absence would have been relatively easy to determine if the beneficiaries of the non-paid awards had attempted to observe the procedure suggested by Argentina. If payment had not then been obtained, bad faith would have been established. However, Argentina's entire 'defence' has been buttressed on an understanding that it was in compliance with its obligations assumed under the ICSID Convention and that, if the awards had not been paid, this is because their owners had not complied with the 'local administrative procedures'.[135] In this light, there is good reason to assume that, were these procedures respected, Argentina would have paid. No such step was taken by the award beneficiaries.[136] Assistance was sought instead through 'diplomatic' or political channels, and this is the topic that will be considered in the ensuing section.

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130 Article 519*bis* in conjunction with Article 517(4) Código Procesal Civil y Comercial de la Nación.

131 Article 75(22) Constitution of Argentina ('*Los tratados y concordatos tienen jerarquía superior a las leyes*.').

132 E.g. Enrique Fernández Masiá (2009), La estrategia de argentina de dilatar el pago de las condenas comienza a encontrar obstáculos en el CIADI, *supra*, p. 793; Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 19. See further the aforecited Christoph Schreuer *et al.* (2009), *supra*, p. 1106.

133 Charles B. Rosenberg (2013), The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards, *Georgetown Journal of International Law* 44, p. 510.

134 Christoph Schreuer *et al.* (2009), *supra*, p. 1117.

135 Letter from Alfredo V. Chiaradia to Timothy Geithner, US Treasury Secretary, 5 July 2011, *supra*; see also Letter from Alfredo V. Chiaradia to Timothy Geithner, 25 August 2011, *supra* and Hearings of the International Monetary Policy and Trade Subcommittee of the House Financial Services Committee, *supra*.

136 Hearings of the International Monetary Policy and Trade Subcommittee of the House Financial Services Committee, *supra* On the contrary, investors have had resort to US courts in an attempt to enforce or confirm the awards. See, for example, US District Court Southern District of New York, CMS Gas Transmission Company v. Argentina, Petition to Enforce Foreign Arbitral Award, 27 March 2008, and the recent US Court of Appeals for the Second Circuit, Blue Ridge Investments, LLC v. Argentina, Docket No. 12-4139-cv, 19 August 2013.

(b) Policy Responses to Purported Failures to Enforce Arbitral Awards

In accordance with Articles 27(1) and 64 ICSID Convention,[137] where a state fails to comply with an arbitral award the possibility opens up for a politicization of the dispute through diplomatic protection or through the institution of 'an international claim'. A traditional form of diplomatic protection is, of course, recourse to the International Court of Justice[138] and Argentina, which contended that it was not in violation of the ICSID Convention, had indicated that it was 'prepared to submit the issue' to the ICJ.[139] Milder forms of 'diplomatic protection' may be exercised through the World Trade Organization (WTO); this has been recently witnessed in contexts unrelated to award enforcement, namely, in Repsol's nationalization[140] and the adoption of Australia's tobacco plain packaging legislation.[141]

The beneficiaries of non-paid awards may also put pressure on their governments to use leverage at international financial institutions, notably at the World Bank and the International Monetary Fund.[142] This is a step that has been employed in the Argentine cases. In 2011, political figures in the United States wrote to US Treasure Secretary Timothy Geithner in relation to Argentina's purported non-compliance with arbitral awards, in one case expressing 'concern about United States taxpayer dollars providing funding for World Bank loans to Argentina and . . . request[ing] a suspension of loans to sovereigns not in

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137 *See* also Enrique Fernández Masiá (2009), La estrategia de argentina de dilatar el pago de las condenas comienza a encontrar obstáculos en el CIADI, *supra*, p. 795.

138 *See* Article 36(1) Statute of the International Court of Justice in conjunction with Article 64 ICSID Convention.

139 Letter from Alfredo V. Chiaradia to Timothy Geithner, 25 August 2011, *supra*; Hearings of the International Monetary Policy and Trade Subcommittee of the House Financial Services Committee, *supra*.

140 *See* EU RAPID Press Release, Q&As: EU's challenge to Argentina's import restrictions at the WTO, MEMO/12/376, Brussels, 25 May 2012; Jennifer Freedman, European Union Challenges Argentina's Import Curbs at WTO, *Bloomberg*, 25 May 2012 http://www.bloomberg.com/news/2012-05-25/european-union-challenges-argentina-s-import-curbs-at-wto.html; European Parliament (2012), Resolution on the legal security of European investments outside the European Union (2012/2619(RSP)), P7_TA(2012)0143, Strasbourg, 20 April 2012, para. 6. See further WTO, Argentina – Measures Affecting the Importation of Goods (EU), Dispute DS438, request for consultations of 30 May 2012 and WTO, European Union and a Member State – Certain Measures Concerning the Importation of Biodiesels, Dispute DS443, request for consultations of 23 August 2012.

141 *See* WTO, Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Ukraine), Dispute DS434, request for consultations of 13 March 2012; WTO, Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Honduras), Dispute DS435, request for consultations of 4 April 2012; WTO, Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Dominican Republic), Dispute DS441, request for consultations of 18 July 2012; WTO, Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Cuba), Dispute DS458, request for consultations of 3 May 2013; WTO, Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Indonesia), Dispute DS467, request for consultations of 20 September 2013.

142 Charles B. Rosenberg (2013), *supra*, p. 517-518, ft. 75.

compliance with . . . ICSID . . . rulings'.[143] It has also been suggested that the United States oppose Argentina's request to restructure its outstanding Paris Club debt,[144] which currently stands at USD 6.5 billion.[145] Sometime later, the United States voted against the extension of some World Bank and Inter-American Development Bank (IDB) loans to Argentina,[146] a move emulated at the time by Germany and Spain, and, in 2013, also endorsed by the United Kingdom, although on grounds only remotely, if at all, related to award enforcement.[147] The long-term potential of such negative votes is uncertain at the time of writing.[148]

Blocking the disbursement of loans would probably be the most effective method of stepping up pressure; but it is another much less drastic measure, withholding trade benefits, that has attracted attention in relation to the Argentine crisis disputes.[149] In March 2012, the United States suspended Argentina's designation as a beneficiary country of the US Generalized System of Preferences (GSP).[150] Generalized Systems of Preferences find their legal basis in the WTO's Enabling Clause (officially 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries')[151] and they are offered by a number of developed economies, including Australia, Canada, the European Union, Japan, Switzerland, and, as mentioned, the United States.[152] The purpose of these programs is to allow developing countries to benefit from non-reciprocal preferential (zero or low) tariff rates without an

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143 Letter from Mark Kirk, US Senator, to Timothy Geithner, 21 June 2011 http://embassyofargentina.us/embassyofargentina.us/files/letterambchiaradiatotimothyf.pdf.

144 Charles B. Rosenberg (2013), *supra*, p. 517.

145 This amount, excluding late interest, was correct as of 31 December 2012. See Paris Club Press Release, The Paris Club Releases Comprehensive Data on Its Claims as of 31 December 2012 www.clubdeparis.org/sections/donnees-chiffrees/encours-du-club-paris_1/downloadFile/attachedFile_4_f0/2012a.pdf?nocache=1369818219.53.

146 Charles B. Rosenberg (2013), *supra*, p. 517.

147 *See* Argentina surprised by Germany, which voted against granting a loan at the IDB, *MercoPress*, 31 August 2012 en.mercopress.com/2012/08/31/argentina-surprised-by-germany-which-voted-against-granting-a-loan-at-the-idb; UK will block IADB and World bank loans to Argentina because of financial 'misconduct', *MercoPress*, 14 February 2013 http://en.mercopress.com/2013/02/14/uk-will-block-iadb-and-world-bank-loans-to-argentina-because-of-financial-misconduct and UK confirms policy of no support for World Bank and IADB loans to Argentina, *MercoPress*, 13 July 2013 http://en.mercopress.com/2013/07/13/uk-confirms-policy-of-no-support-for-world-bank-and-iadb-loans-to-argentina. See also HM Government E-petition, Stop British taxpayers' money supporting World Bank loans to Argentina epetitions.direct.gov.uk/petitions/34551.

148 *See* Argentina unhurt in 2012 by U.S. loan hurdles-source, *Reuters* 28 September 2011 http://www.reuters.com/article/2011/09/29/argentina-debt-us-idUSS1E78R20U20110929 and US about turn: now it supports loans to Argentina in multilateral credit organizations, *MercoPress* 8 December 2011 http://en.mercopress.com/2011/12/08/us-about-turn-now-it-supports-loans-to-argentina-in-multilateral-credit-organizations.

149 E.g. see Charles B. Rosenberg (2013), *supra* and Roger P. Alford (2013), The Convergence of International Trade and Investment Arbitration, *Santa Clara Journal of International Law* 12.

150 Proclamation 8788 of 26 March 2012, Federal Register Vol. 77 No. 61, p. 18899, March 29, 2012. See also Marc Bungenberg and Catharine Titi (2014), Developments in International Investment Law. In Herrmann, C., Krajewski, M. and Terchechte, J. P. (eds) *European Yearbook of International Economic Law 2014*. Berlin Heidelberg: Springer.

151 Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, GATT Document L/4903, 28 November 1979, BISD 26S/203.

152 Charles B. Rosenberg (2013), *supra*, p. 520; Roger P. Alford (2013), *supra*, p. 50.

obligation to extend the same privileges to developed economies.[153] The United States' Generalized System of Preferences, in particular, is designed to encourage economic growth in developing economies by granting preferential duty-free treatment for up to 5,000 products exported to the United States from the beneficiary countries.[154] Given the discretionary nature of GSP schemes, granting of benefits is generally subject to performance obligations,[155] one of which in the US Generalized System of Preferences program is that beneficiary states must 'act in good faith in recognizing as binding or in enforcing arbitral awards'.[156]

The suspension of Argentina's benefits under the US Generalized System of Preferences program came as a result of petitions in relation to Argentina's alleged failure to comply with the *Azurix* and *CMS* Awards.[157] The petitions were submitted by Azurix Corporation and Blue Ridge Investments (the latter having purchased the *CMS* Award).[158] The US Government determined that Argentina had 'not acted in good faith in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association that is 50 percent or more beneficially owned by United States citizens',[159] which occasioned the first ever suspension of the application of the US GSP program for non-payment of an arbitral award.[160] It is of interest to note that the terminology employed in the above statement, as in the underlying law,[161] jars with the earlier assumption that, in accordance with the dominant interpretation, Argentina has failed to *comply* with the awards but it has not failed to *enforce* them.[162] This serves to stress the fluidity of the two concepts and the possible absence of a clear demarcating line between them. Suspension of its GSP benefits aside, a petition has been deposited against

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153 *See* Enabling Clause for developing countries (goods) at http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm; also Roger P. Alford (2013), *supra*, pp. 50-51. Detailed documentation and updates on GSP programs are available through UNCTAD's website at http://unctad.org/en/Pages/DITC/GSP/Generalized-System-of-Preferences.aspx.

154 *See* webpage of the Office of the United States Trade Representative http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp. See also Office of the United States Trade Representative (2012), *U.S. Generalised System of Preferences (GSP) Guidebook*, December 2012, Washington D.C.

155 Roger P. Alford (2013), *supra*, p. 51.

156 19 USC § 2462(b)(2)(E).

157 *See* List of Country Practice Petitions Accepted in the 2009 GSP Annual Review, *GSP: 2009 Annual Review* www.ustr.gov/webfm_send/2147; Notice Regarding the Announcement of Petitions Accepted for the 2009 Annual GSP Country Practices Review, Acceptance of Pre-Hearing Comments and Requests To Testify for the 2009 Annual GSP Country Practices Review Hearing, and the Initiation of the 2010 Annual GSP Country Practices Review, Federal Register Vol. 75, No. 154, 11 August 2010, p. 48737; Results of the 2010 GSP Annual Review, *GSP: 2010 Annual Review* www.ustr.gov/webfm_send/3218; GSP 2011 Annual Review: Country Practice Petitions under Review http://www.ustr.gov/sites/default/files/GSP%202011%20Annual%20Review_0.pdf.

158 Blue Ridge Investments, LLC v. Argentina, United States District Court, Southern District of New York, Case 1:10 Civ. 153 PGG, Memorandum, Opinion & Order, 30 September 2012.

159 Proclamation 8788 of 26 March 2012, Federal Register Vol. 77 No. 61, 29 March 2012, p. 18899.

160 Charles B. Rosenberg (2013), *supra*, p. 505; UNCTAD (2012), *World Investment Report 2012: Towards a New Generation of Investment Policies*. New York and Geneva: UN, p. 87.

161 19 USC § 2462(b)(2)(E).

162 *Cf.* above, under III (a).

Argentina for trade remedies under section 301 of the US Trade Act of 1974.[163] The latter broadly concerns cases where foreign trade practices violate trade agreements or unjustifiably impede US commerce, but the United States has appeared unwilling to take any related action.[164]

It is unclear whether suspension of its trade benefits was an attempt to convince Argentina to pay the awards in order to be reinstated in the GSP program[165] or whether it was primarily meant as retaliation or a sanction.[166] It must be noted that for Argentina the resulting costs from the suspension of the GSP program in its regard were only a fraction of the amount the country owed in international arbitration.[167] Instead of altering its position in the matter, Argentina has endeavoured to reach post-award settlements with the award beneficiaries, and details of reported deals have recently been reported in the press.[168] These settlements do not compromise Argentina's reading of Articles 53 and 54 ICSID Convention, and they achieve satisfaction at the international level. For the same reasons, politically this may also prove a more convenient approach to adopt.

The suspension of Argentina's trade benefits could also be intended as a warning to third countries that may be considering non-compliance with arbitral awards, given the assumption that other Latin American states could seek to avoid paying arbitral awards in the future.[169] The statement by late Venezuelan President Hugo Chavez in 2012, two weeks before Venezuela's denunciation of the ICSID Convention, that the country would not comply with any ICSID awards[170] and Ecuador's stance in the *Chevron* dispute (see *infra*) appear to have triggered such considerations.[171] It is remarkable, however, that the US has not suspended GSP benefits of other countries that have previously failed to respect arbitral awards.[172]

Following in the steps of Azurix Corporation and Blue Ridge Investments, more recently Chevron has been lobbying the US Trade Representative to suspend

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163 19 USC § 2411.

164 Roger P. Alford (2013), *supra*, p. 53.

165 Press Release, U.S. Trade Representative Ron Kirk Comments on Presidential Actions Related to the Generalized System of Preferences, March 2012 http://www.ustr.gov/about-us/press-office/press-releases/2012/march/us-trade-representative-ron-kirk-comments-presidenti; Charles B. Rosenberg (2013), *supra*, p. 527-528.

166 *See* post by Ricardo Beltramino on Questions about Suspending GSP Benefits to Argentina http://worldtradelaw.typepad.com/ielpblog/2012/04/questions-about-suspending-gsp-benefits-to-argentina.html.

167 Roger P. Alford (2013), *supra*, pp. 52-53.

168 *See* Gobierno oficializó acuerdos en CIADI por u$s 677 M, *Ámbito Financiero*, 18 October 2013, http://www.ambito.com/noticia.asp?id=712044&seccion=Econom%EDa&fecha=18/10/2013. See also Ministerio de Economia y Finanzas Publicas Resolución Nº 598/2013, Buenos Aires 8 October 2013, published in the Boletin Oficial, http://www.boletinoficial.gov.ar/Inicio/Index.castle. Kyriaki Karadelis (2013), Argentina 'close' to settling treaty awards, *Global Arbitration Review*, 20 September 2013. *Cf.* Roger P. Alford (2013), *supra*, p. 53.

169 Charles B. Rosenberg (2013), *supra*, p. 508-509.

170 *See* Chavez says he won't respect World Bank panel's decision, *CNN*, 9 January 2009 http://edition.cnn.com/2012/01/09/business/venezuela-exxon.

171 E.g. see Charles B. Rosenberg (2013), *supra*, p. 509.

172 Charles B. Rosenberg (2013), *supra*, p. 520. See, for example, AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Kazakhstan, ICSID Case No. ARB/01/6, Award, 7 October 2003. The case was adjudicated on the basis of the US-Kazakhstan BIT. Kazakhstan is a beneficiary of the US GSP program, see http://www.ustr.gov/sites/default/files/GSP%20by%20the%20numbers_0.pdf.

Ecuador's beneficiary status under the Andean Trade Preference Act (ATPA), in view of the country's conduct in relation to the *Chevron* case.[173] The Andean Trade Preference Act was enacted in the early 1990s in order to offer reduced-duty or duty-free access to the US market to exports from Bolivia, Colombia, Ecuador, and Peru.[174] Pursuant to Title 19 of the United States Code, ATPA benefits too may be suspended if a beneficiary country 'fails to act in good faith in recognizing as binding or in enforcing arbitral awards'.[175] Chevron requested the US Government to allow Ecuador's ATPA benefits to expire, because of the country's 'failure to enforce or recognize arbitral awards under the BIT', unless appropriate steps were taken for their recognition and enforcement.[176] In the two most recent annual reports on the operation of the ATPA, the Office of the US Trade Representative stressed that BIT terminations, withdrawal from the ICSID Convention and Ecuador's conduct in the *Chevron* dispute raise concerns about the Government's 'long-term commitment to international arbitration for the settlement of investor disputes'.[177] As a consequence, the US 'is monitoring developments in connection with these matters' under the relevant eligibility criteria.[178]

The opinion has been expressed that Ecuador is likely to see its trade benefits suspended anyway,[179] given that it figures currently as the program's sole eligible beneficiary.[180] Another issue of consequence is that both the US GSP and ATPA programs have at the time of writing expired and it is unclear whether they will be renewed.[181] The ramifications of a belated renewal are also uncertain. In the past, a lapse in GSP authorization was redressed by retroactively extending the benefits to eligible products that had been imported in the United States between the program's expiration date and that of the entry-into-force of its renewal.[182]

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173 Office of the United States Trade Representative, Sixth Report to the Congress on the Operation of the Andean Trade Preference Act, *supra*, p. 36; Office of the United States Trade Representative, Seventh Report to the Congress on the Operation of the Andean Trade Preference Act as Amended, 20 June 2013 http://www.ustr.gov/sites/default/files/USTR%202013%20ATPA%20Report.pdf, p. 31.

174 Office of the United States Trade Representative, Seventh Report to the Congress on the Operation of the Andean Trade Preference Act, *supra*, p. 3.

175 *See* 19 USC § 3202(c)(3) - Beneficiary country.

176 Office of the United States Trade Representative, Sixth Report to the Congress on the Operation of the Andean Trade Preference Act, *supra*, p. 36; Office of the United States Trade Representative, Seventh Report to the Congress on the Operation of the Andean Trade Preference Act, *supra*, p. 31.

177 Office of the United States Trade Representative, Sixth Report to the Congress on the Operation of the Andean Trade Preference Act, *supra*, p. 25; Office of the United States Trade Representative, Seventh Report to the Congress on the Operation of the Andean Trade Preference Act, *supra*, p. 16-17.

178 Office of the United States Trade Representative, Seventh Report to the Congress on the Operation of the Andean Trade Preference Act, *supra*, p. 17.

179 Roger P. Alford (2013), *supra*, p. 53.

180 Office of the United States Trade Representative, Seventh Report to the Congress on the Operation of the Andean Trade Preference Act, *supra*, p. 4.

181 The schemes had been authorised until 31 July 2013. See http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp; Office of the United States Trade Representative, Seventh Report to the Congress on the Operation of the Andean Trade Preference Act, *supra*, p. 3.

182 Vivian C. Jones (2013), Generalized System of Preferences: Background and Renewal Debate, *Congressional Research Service*, 9 January 2013.

At the same time, the United States' re-evaluation or suspension of trade benefits may open the way for other states or economies to follow a similar approach vis-à-vis 'recalcitrant' ICSID members or states that are in non-compliance with their international investment obligations. Already, with respect to the nationalization of Repsol, one month after the announcement of the suspension of Argentina's benefits under the US GSP program, the European Parliament urged the European Commission and the Council to consider and adopt measures required to prevent 'such situations' from 'arising again, including the possible partial suspension of the unilateral tariff preferences under the GSP scheme'.[183] No related action has been taken so far.

The topics of compliance and enforcement will probably continue to animate the debate on Latin American investment arbitration, at least until the beneficiaries of outstanding awards have been satisfied or a solution has been reached at the international level. The suspension of trade benefits as a means of response to purported failures to respect awards may become recurrent and lead to a partial 're-politicisation' of investment disputes.[184] It remains to be seen how these issues will evolve in the time to come.

IV. TOWARDS A NEW REGIONALISM IN INVESTMENT ARBITRATION: UNASUR NEGOTIATIONS ON A LATIN AMERICAN INVESTMENT ARBITRATION CENTER

An outcome of the dissatisfaction with the current system of international investment arbitration that has found proponents among a number of Latin American states is the proposed establishment of a regional Latin American arbitration center.[185] The creation of this center is the focus of the present section. The 'First Ministerial Conference of Latin American States Affected by Transnational Interests', convened in late April 2013 in Guayaquil, Ecuador, brought together ALBA Member States and representatives from Argentina, Guatemala, El Salvador, Honduras, and Mexico. The Conference resulted in the adoption of a declaration which acknowledged the 'deficiencies' of the international system of investment dispute settlement[186] and noted the signatory parties' agreement:

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183 European Parliament (2012), *supra*, para. 8.

184 UNCTAD (2012), *supra*, p. 87; OECD (2012), Investor - State Dispute Settlement Public Consultation: 16 May – 23 July 2012, Comments received as of 30 August 2012, OECD: Paris, http://www.oecd.org/daf/inv/investment-policy/ISDSconsultationcomments_web.pdf, Comment submitted by Andrea K. Bjorklund, p. 56; See also Marc Bungenberg and Catharine Titi (2014), *supra*.

185 Silvia Karina Fiezzoni (2012), UNASUR Arbitration Centre: The Present Situation and the Principal Characteristics of Ecuador's Proposal, *Investment Treaty News* Issue 2, Volume 2, December 2011/January 2012.

186 Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests, Guayaquil, Ecuador, 22 April 2013 http://cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_eng.pdf, p. 1. The Spanish text of the Declaration is available here: http://cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_esp.pdf.

> To support the constitution and implementation of regional organisms for settling investment disputes, to ensure fair and balanced rules when settling disputes between corporations and States. Encourage UNASUR in the approval of a regional mechanism currently under negotiation and promote the inclusion of other Latin American States in this mechanism.[187]

The above statement requires some explanation. The Union of South American Nations (UNASUR), created in 2008 and clustering together Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela,[188] currently serves as the negotiation forum for a regional dispute settlement body.[189] This body, first proposed by Ecuador as a counterweight to ICSID,[190] would place emphasis, *inter alia*, on dispute resolution through consultations or mediation and on the transparency of proceedings;[191] it would encompass an appellate mechanism[192] and, similarly to the New York Convention[193] and in contradistinction to the ICSID Convention,[194] the relevant arbitration rules would allow a host state to deny recognition or enforcement of an award, if, according to its laws, the subject-matter of the dispute is non-arbitrable[195] or it is contrary to public policy.[196]

At the outset, the arbitration center would be reserved for UNASUR countries, later it would open up to countries in Central America and the Caribbean, and, finally, it would become available to any country that wishes to use it.[197] The aim is to set in place an 'independent' and 'impartial' body, deferent to the sovereignty of UNASUR Member States, and at the same time to take into account the need to encourage investment inflows.[198] The potential and scope of this proposed investor-state arbitration system remains, as of the present time, yet to determine.[199]

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187 Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests, Guayaquil, *supra*, p. 2.

188 *See* on UNASUR's official website: http://www.unasursg.org/inicio/organizacion/historia.

189 E.g. see, on the website of Ecuador's Ministry of Foreign Affairs, Commerce and Integration, Grupo de trabajo de UNASUR analiza mecanismos de Solución de Controversias, 3 April 2013 http://cancilleria.gob.ec/grupo-de-trabajo-de-unasur-analiza-mecanismos-de-solucion-de-controversias/. See also Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 7.

190 *See* Silvia Karina Fiezzoni (2012), *supra.*

191 Silvia Karina Fiezzoni (2012), *supra.*

192 Silvia Karina Fiezzoni (2012), *supra.*

193 *See* Article V(2) New York Convention.

194 *See* Article 53 ICSID Convention, also Articles 50 *et seq.* ICSID Convention.

195 This appears to be a difference with Article V(2) New York Convention, where recognition and enforcement may be denied when the subject-matter of the dispute is not arbitrable according to the laws of the country where recognition and enforcement are sought.

196 Silvia Karina Fiezzoni (2012), *supra.*

197 Silvia Karina Fiezzoni (2012), *supra.*

198 *See*, on the website of Ecuador's Ministry of Foreign Affairs, Commerce and Integration, Grupo de trabajo de UNASUR analiza mecanismos de Solución de Controversias, 3 April 2013 http://cancilleria.gob.ec/grupo-de-trabajo-de-unasur-analiza-mecanismos-de-solucion-de-controversias/.

199 A dissonant note in this respect is struck by two statements in the recent ALBA Summit of 30 July 2013. See Declaración del ALBA desde el Pacífico, XII Summit of Heads of State and Government of the ALBA-TCP, Guayaquil, 30 July 2013, http://alainet.org/active/66091 and Cumbre de Movimientos Sociales de la ALBA, Declaración de Guayaquil, Guayaquil, 30 July 2013, http://alainet.org/active/66089%29.

V. LATIN AMERICAN INVESTMENT ARBITRATION AND THE PUBLIC INTEREST

One final aspect to take into account when evaluating the Latin American approach to arbitration is that the criticism levelled at the latter is linked to cases that involve the public interest.[200] A first example is the *Aguas del Tunari, S.A.* dispute,[201] which was born out of the privatization of water utilities in Cochabamba, Bolivia.[202] The privatization, which had been encouraged by international financial institutions,[203] resulted in costlier water sources and water treatment systems, which, in their turn, resulted in higher water prices for consumers.[204] While the World Health Organization (WHO) estimates that an individual should not be spending in excess of 3% to 5% of his or her income on water *in casu* households ended up spending more than 20% of their income on water.[205] A few months after the start of the privatization scheme, violent protests erupted, during which more than 100 people were injured and one person was killed.[206] These events marked the onset of what became known as Bolivia's Water War.[207] Following the protests, Bolivia put an end to the privatization concession.[208] The case brought by the investor was eventually settled out of arbitration. Bechtel, the owner of the concession, agreed to withdraw its claim in response to escalating criticism at the international level and in light of 'the civil unrest and the state of emergency'.[209]

But the most obvious example of Latin American arbitration involving the public interest is that of the cases that were initiated as a result of Argentina's financial crisis of 2001. The facts are well-known, so only a brief summary will be given here. Argentina's economic recession of the late 1990s significantly deepened in 2001, precipitating an economic and political crisis[210] so severe that it later resulted in violent demonstrations, deaths and a succession of five presidents within a period shorter than two weeks.[211] In an attempt to 'stabilize the economy and

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200 Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 7.

201 Aguas del Tunari, S.A. v. Bolivia, ICSID Case No. ARB/02/3.

202 *See* Bolivia: Ley Marco de Capitalización, 21 March 1994.

203 Erik B. Bluemel (2004), The Implications of Formulating a Human Right to Water, *Ecology Law Quarterly* 31, p. 965.

204 Erik B. Bluemel (2004), *supra*, p. 966.

205 Erik B. Bluemel (2004), *supra*, p. 966.

206 Mary H. Mourra (2008), *supra*, p. 60-61; Sébastien Manciaux (2007), *supra*.

207 Fernando Aguirre B. (2012), *supra*, p. 68; Damon Vis-Dunbar and Luke Eric Peterson (2006), Bolivian water dispute settled, Bechtel forgoes compensation, *Investment Treaty News*, 20 January 2006; Water war in Bolivia, *The Economist*, 10 February 2000 www.economist.com/node/280871.

208 Erik B. Bluemel (2004), *supra*, p. 966.

209 Damon Vis-Dunbar and Luke Eric Peterson (2006), *supra*; Sébastien Manciaux (2007), *supra*.

210 BG Group Plc. v. Argentina, UNCITRAL, Final Award, 24 December 2007 (hereinafter BG Award), paras 54 *et seq*.; LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (hereinafter LG&E Decision on Liability), para. 54.

211 El Paso Energy International Company v. Argentina, ICSID Case No. ARB/03/15, Award, 31 October 2011 (hereinafter El Paso Award), para. 91; BG Award, *supra*, paras 60, 72; CMS Gas Transmission Co.

restore political confidence',[212] Argentina adopted a broad range of measures. Among these were the freezing of bank accounts to prevent a run on the banks with Decree No. 1570/01,[213] known as the *Corralito*,[214] and the abandonment of the currency board system that had pegged the Argentinean peso to the US dollar with the Emergency Law of January 2002.[215] As already mentioned, these measures created a wave of disputes, the most impressive in the history of investment arbitration.[216] But apart from their sheer number and the political and financial implications for any respondent of having to defend such a large caseload,[217] a number of the awards delivered against Argentina have proved controversial and several of them have been annulled.[218] Notably, some awards were found to contain errors of law[219] and annulment committees concluded that the tribunals had entirely failed to apply the applicable law.[220]

It is beyond the purpose of the present to canvass the controversies of these cases. Another aspect needs to be emphasized here, to wit, that these awards directly involved the public interest: they pronounced on Argentina's economic policies –especially when tribunals examined whether the state had contributed to the crisis[221] – and, in doing so, manifested variable degrees of deference to the general interest at stake. An illustrative example is offered by the tribunals' appreciation of the gravity of Argentina's predicament. While some tribunals considered that the crisis was of sufficient magnitude to render necessary the

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v. Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005 (hereinafter CMS Award), para. 64; LG&E Decision on Liability, *supra*, paras 63, 235-236.

212 W. W. Burke-White and A. von Staden (2008). Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties. *Virginia Journal of International Law* 48 (2007-2008), p. 309.

213 Argentina: Decreto 1570/2001, BO 3 December 2001, No. 29787, p. 1.

214 El Paso Award, *supra*, para. 91; LG&E Decision on Liability, *supra*, para. 63; BG Award, *supra*, paras 56, 70 *et seq*.

215 Ley 25.561, Emergencia Pública y Reforma del Régimen Cambiario, BO 7 January 2002. See further BG Award, *supra*, para. 73; Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3, Award, 22 May 2007 (hereinafter Enron Award), paras 71 *et seq*.; El Paso Award, *supra*, para. 95; LG&E Decision on Liability, *supra*, paras 64 *et seq*.

216 *See* above, under I.

217 Wenhua Shan (2007), *supra*, p. 636.

218 E.g. see CMS Decision on Annulment, *supra*; Enron Decision on Annulment, *supra*; Sempra Decision on Annulment, *supra* For a critical appraisal, see generally Catharine Titi (2014), *The Right to Regulate in International Investment Law*, *supra*; W. W. Burke-White and A. von Staden (2008), *supra*, p. 498 *et seq*.; J. Kurtz (2010). Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis. *International and Comparative Law Quarterly* 59, p. 25 *et seq*.; F. Ortino (2012). Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures. *Journal of International Dispute Settlement* 3 (1), p. 41 *et seq*. – Contrast J. E. Alvarez and K. Khamsi (2009). The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime. In K. P. Sauvant ed. *Yearbook on International Investment Law & Policy 2008-2009*. New York: Oxford University Press, p. 427-44.

219 CMS Decision on Annulment, *supra*, paras 45, 130, 146, 148; Enron Decision on Annulment, *supra*, paras 395, 405.

220 Sempra Decision on Annulment, *supra*, paras 165, 208-209; Enron Decision on Annulment, *supra*, para. 393.

221 E.g. see CMS Award, *supra*; Enron Award, *supra*; Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Award, 28 September 2007 (hereinafter Sempra Award); El Paso Award, *supra Cf*. LG&E Decision on Liability, *supra*; Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9, Award, 5 September 2008.

enactment of measures for the protection of the state's essential security interests[222] and that Argentina faced 'an extremely serious threat' to 'its existence, its political and economic survival' and 'the preservation of its internal peace',[223] others required 'total economic and social collapse'[224] or a situation that 'compromised the very existence of the State and its independence',[225] and remained unconvinced that the severity of the crisis at hand crossed that threshold.[226]

It is not unusual that a tribunal rules upon public policy decisions of a quasi-constitutional nature.[227] With the Argentine crisis disputes it became clear that what effectively has been under review is Argentina's response to a major economic crisis, leading arbitral control to the heart of governmental policy.[228] This observation raises the question of where lies the dividing line 'between judging a State's policies and judging the consequences of such policies' for investors.[229] The measures Argentina adopted were based on the assumption that its essential security interests and public order were at stake,[230] an argument accepted by some tribunals but rejected by others.[231] The opinion has been expressed that it is questionable whether the subjective interests of a state that perceives its security to be at stake are susceptible of objective evaluation and whether 'any tribunal acting judicially can override the assertion of a State that a dispute affects its security or vital interests'.[232] In this light, the vehemence of Argentina's defence strategy is hardly surprising.

Beyond the initial crisis awards, more recently a new type of dispute has confronted Argentina, in the form of the *Abaclat* case, this time arising directly out of the country's sovereign debt restructuring.[233] In determining that it has the right to hear the dispute, the tribunal's Decision on Jurisdiction and Admissibility marks a controversial approach to at least two issues, namely, the question of whether security entitlements in government bonds constitute investment and, more contestably, whether mass claims are allowed under the ICSID

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222 LG&E Decision on Liability, *supra*, para. 226.

223 E.g. LG&E Decision on Liability, *supra*, para. 257. See also Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 180 ('The protection of essential security interests recognized by Art. XI does not require that "total collapse" of the country or that a "catastrophic situation" has already occurred before responsible national authorities may have recourse to its protection. The invocation of the clause does not require that the situation has already degenerated into one that calls for the suspension of constitutional guarantees and fundamental liberties. There is no point in having such protection if there is nothing left to protect.' Footnotes omitted.).

224 CMS Award, *supra*, para. 355.

225 Enron Award, *supra*, para. 306. See also Sempra Award, *supra*, para. 348.

226 CMS Award, *supra*, paras 355-356; Enron Award, *supra*, para. 306; Sempra Award, *supra*, para. 348.

227 W. W. Burke-White and A. von Staden (2008), *supra*, p. 372.

228 Catharine Titi (2014), *The Right to Regulate in International Investment Law*, *supra*, p. 204. See further Burke-Burke-White, W. W. and Staden, A. von (2008), *supra*, p. 372.

229 Stern, B. (2009). Are Some Disputes Too Political to Be Arbitrable? *ICSID Review* 24 (1), p. 80.

230 CMS Award, *supra*, paras 344 *et seq*.; Enron Award, *supra*, para. 325; Sempra Award, *supra*, para. 367; El Paso Award, *supra*, para. 91; BG Award, *supra*, para. 50.

231 E.g. compare LG&E Decision on Liability, *supra*, and CMS Award, *supra Cf.* CMS Decision on Annulment, *supra*.

232 H. Lauterpacht (1933). *The Function of Law in the International Community*. Reprinted 1966. Hamden, Connecticut: Archon Books, p. 188.

233 *See* Abaclat and Others v. Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 (hereinafter Abaclat Decision on Jurisdiction and Admissibility).

Convention.[234] *Abaclat* and its (potential) successors[235] may contribute to further raising skepticism as to states' consent to arbitration.

By their nature arbitral awards are susceptible to bear on issues that relate to the public interest. This in itself should not be an issue. Nonetheless, taking into account the nature of arbitrations that have involved Latin American countries helps better illustrate the circumstances under which any mistrust on their part of the dispute settlement system has come about. These disputes also appear to have rekindled a rhetoric of sovereignty. As already mentioned, negotiations on the Latin American arbitration center under the auspices of UNASUR aim to create a body respectful of state sovereignty[236] and, according to one extreme public statement, bilateral investment treaties are 'null and void' because they have entailed an abandonment of Latin American countries' 'legislative and jurisdictional sovereignty'.[237] It is likely that this talk of sovereignty is only another way of expressing sensitivity to the public interest and the fact that the latter has not always been sufficiently taken into account.

VI. CONCLUSION

Developments in Latin America are only a symptom of a wider re-thinking of standards of investment protection across the globe and the new tendency towards more flexible and balanced investment agreements.[238] If the questioning of the system seems to take place more acutely in this part of the world, it may be due to the type of disputes that have been registered. However, to confine this phenomenon to Latin America fails to reflect reality. Denouncing the ICSID Convention is more a political statement than an actual rejection of investment

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234 *See* Abaclat Decision on Jurisdiction and Admissibility, *supra* See further ICSID tribunal takes jurisdiction over 60,000 bondholder claims against Argentina for sovereign debt default, Herbert Smith Freehills, 24 November 2011 http://hsf-arbitrationnotes.com/2011/11/24/icsid-tribunal-takes-jurisdiction-over-60000-bondholder-claims-against-argentina-for-sovereign-debt-default/; Jessica Beess und Chrostin (2012), Sovereign Debt Restructuring and Mass Claims Arbitration before the ICSID, The Abaclat Case, Harvard International Law Journal 53 (2)509, 512; Céline Lévesque (2012), Case Comment: Abaclat and Others v Argentine Republic: The Definition of Investment, *ICSID Review* 27 (2); Michael D. Nolan, Frédéric G. Sourgens and Hugh Carlson (2013), Leviathan on Life Support? Restructuring Sovereign Debt and International Investment Protection after *Abaclat*, in Karl P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2011-2012*, New York: Oxford University Press; Catharine Titi (2013), The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration, *Journal of World Investment & Trade* 14 (5), October 2013 (forthcoming).

235 Ambiente Ufficio S.p.A. and others v. Argentina, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013. See further Giovanni Alemanni and others v. Argentina, ICSID Case No. ARB/07/8.

236 *See* above, under IV.

237 *See* Argentina faces 65bn dollars in claims; plans to abandon international litigations court, *MercoPress* 28 November 2012 en.mercopress.com/2012/11/28/argentina-faces-65bn-dollars-in-claims-plans-to-abandon-international-litigations-court.

238 Catharine Titi (2014), *The Right to Regulate in International Investment Law*, *supra*; Catharine Titi (2013), The Arbitrator as a Lawmaker, *supra* See further Catharine Titi (2013), EU investment agreements and the search for a new balance: A paradigm shift from laissez-faire liberalism toward embedded liberalism? *Columbia FDI Perspectives* No. 86, 3 January 2013, www.vcc.columbia.edu; Wenhua Shan (2007), *supra*, p. 650 *et seq*.

arbitration. If some investors protected under Bolivian BITs are unable to bring a dispute before an ICSID tribunal, this is not different to the situation facing NAFTA investors and investors bringing claims against the European Union in the near future.[239] If Argentina decides to include an expressly self-judging essential security interests exception in its future treaties,[240] the United States adopted this approach back in the 1990s.[241] All 'options' considered in this article other than BIT terminations are more conventional and less radical than Australia's (potential) wholesale rejection of investor-state dispute settlement.

It must be stressed that the present contribution has centered on investment arbitration and that the popularity of commercial arbitration follows a different trajectory.[242] According to the ICC, which administers predominantly commercial dispute settlement, participation of Latin American parties has been on the rise,[243] with 11% of parties in 2012 case filings, viz. 224 parties, coming from Latin America.[244]

Finally, the professed skepticism of some states to investment arbitration does not translate into a single Latin American approach.[245] If some countries in the region are considering options beyond the traditional investment dispute settlement mechanisms, others remain faithful to these same mechanisms.[246] This is notably the case of Chile, Mexico, Panama and Peru,[247] which have not been

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239 In relation to the EU, if arbitration clauses in future EU investment agreements provide for ICSID arbitration, third-party investors will not be able to bring ICSID claims where the respondent is the EU, but they will be able to do so where the respondent is a Member State. See European Commission (2012), Proposal for a Regulation 'establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party', COM(2012) 335 final, 2012/0163 (COD), Brussels, 21.6.2012. On the topics discussed here, see further Marc Bungenberg (2010), Going Global? The EU Common Commercial Policy After Lisbon, in Herrmann, C. and Terchechte, J. P. eds., *European Yearbook of International Economic Law 2010*, Berlin Heidelberg: Springer, p. 149; Marc Bungenberg and Catharine Titi (2013), The Evolution and Future of EU-China Investment Relations, in Wenhua Shan (ed.), *Collected Courses on International Investment law and Arbitration* – Silk Road Collected Courses in International Economic Law, Brill (forthcoming). *Cf.* European Commission (2010), Communication 'Towards a comprehensive European international investment policy', COM(2010)343 final, Brussels, 7.7.2010, p. 10; European Parliament (2011). European Parliament Resolution of 6 April 2011 on the future European international investment policy, (2010/2203(INI)), P7_TA(2011)0141, para. 33.

240 On self-judging exceptions, see S. Schill and R. Briese (2009), "If the State Considers": Self-Judging Clauses in International Dispute Settlement. *Max Planck Yearbook of United Nations Law* 13; Catharine Titi (2014), *The Right to Regulate in International Investment Law*, *supra*, p. 190 *et seq*.; W. W. Burke-White and A. von Staden (2008), *supra*, p. 376 *et seq*.

241 LG&E Decision on Liability, *supra*, paras 211, 213; CMS Award, *supra*, paras 339, 368; Enron Award, *supra*, para. 327; Sempra Award, *supra*, para. 369.

242 E.g. see Jonathan C. Hamilton and Michael A. Roche (2009), Developments in Latin American Arbitration Law 2009, *Transnational Dispute Management* 6 (4), p. 2 *et seq*.

243 ICC (2013), 2012 Statistical Report, *ICC International Court of Arbitration Bulletin* 24 (1).

244 ICC (2013), *supra*.

245 *See* also Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 8.

246 Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 7 *et seq*.

247 Enrique Fernández Masiá (2009), El incierto futuro del arbitraje de inversiones en Latinoamérica, *supra*, p. 8. Peru has recently become the first Latin American state to bring an ICSID claim (Peru v. Caravelí Cotaruse Transmisora de Energía SAC, ICSID Case No. ARB/13/24). See Douglas Thomson (2013), Peru brings ICSID claim against power investor, *Global Arbitration Review*, 20 September 2013.

discussed in this article. And even the countries with apparent secessionist tendencies, such as Ecuador, are currently taking part in the negotiations on the creation of the Latin American arbitration center. In this respect, it will be interesting to monitor developments in the immediate and near future. At this stage, the overall Latin American approach does not amount to a rejection of investment arbitration, nor should it necessarily be perceived as particularly hostile to it.