South America facing bilateral investment treaties: towards a return of the State in dispute settlement?

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1. Introduction

In their external relations, States require a regulatory framework intended to preserve their sovereignty, the legal attribute of which independent States are granted and recognized each other and to the exclusion of any other organization. Therefore, it emerges the necessity of a coordination juridical system as International Public Law. However, the regulation of certain subjects has generated changes putting into question some traditional postulates related to the system. That is the case of investor - State dispute settlement, mainly based on bilateral investment treaties (BITs) and on the Convention on the settlement of investment disputes between States and nationals of other States, signed in Washington in 1965 (CW) that creates the International Center for Settlement of Investment Disputes (ICSID).

Within this framework, the present work seeks to answer the following questions: Do the investor - State dispute solution (especially ICSID arbitration) included in the BITs

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in force in South America[3] limit the regulatory space of the States? Why of why not? Is there a return of the State in investor - State dispute settlement? Is such return a reaction of the States to the limitation in their regulatory space?

In order to answer those questions, firstly this paper studies the characteristics of BITs - ICSID system, with especial focus in the evolution in South America during the last three decades. Secondly, as it is possible to categorized BITs - ICSID system as an international regime (Krasner, 1983; Keohane, 1982 and 1988, Hurrell, 1992), this paper proposes a typology to analyze the present States position regarding BITs - ICSID system which is applied to South American States. Therefore, these States are grouped in three types: the member of the international regime (Argentina, Chile, Colombia, Guyana, Paraguay, Peru, Suriname and Uruguay), the outsiders (Brazil) and the dissidents (Bolivia, Ecuador and Venezuela).

2. Investor - State dispute settlement in bilateral investment treaties

Dispute settlement mechanisms in BITs, generally remit to the international arbitration within which external investors have *locus standi* to take legal proceedings against the states in the event of no fulfillment. Just as it is the case of *ad hoc* arbitration tribunals of the ICSID, the Permanent Court of Arbitration, the Chamber of International Commerce, the Stockholm Chamber of Commerce, the Arbitration International Court of London or others *ad hoc* arbitration instances[4]. This situation shows a change or exception to the typical diplomatic protection, according to which is the State of the particular affected nationality, not the particular[5], who makes its own the claim in front of the other State (Torreja Mateu, 2012: 317; Burgos - De la Ossa and Lozada - Pimiento, 2009: 272).

BITs also introduce another change or exception to classical system since in numerous agreements, mandatory exhaustion of domestic remedies is not a requirement to access to international arbitration, as it has been proposed by Calvo's doctrine (Herz, 2003: 13;

[3] The scope of this work not includes the investment chapters in free trade treaties or multilateral international instruments.

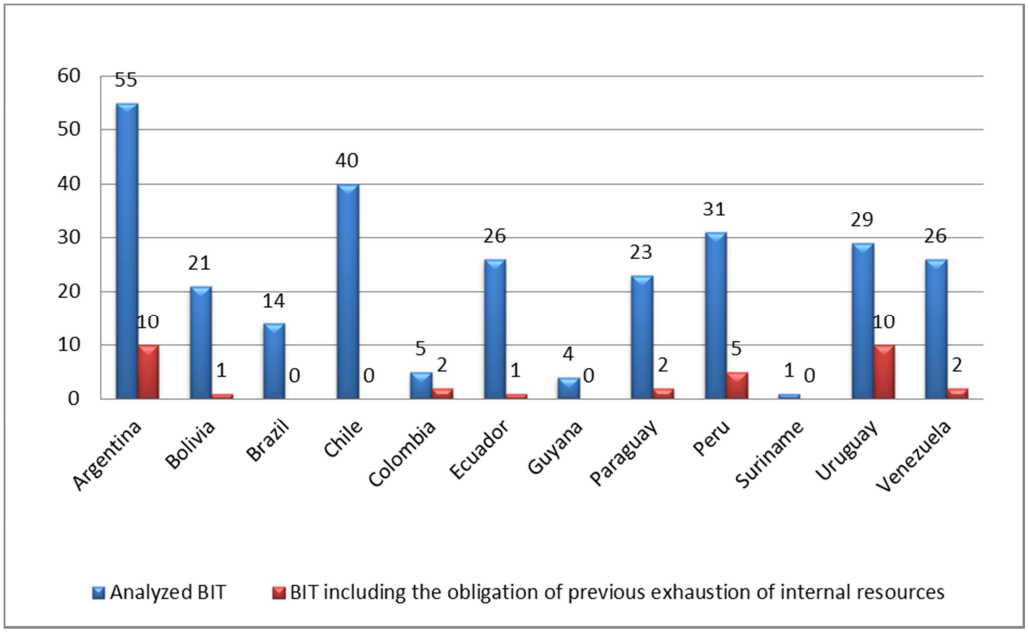
[4] For example, under United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.

[5] Diplomatic protection is a right of the State exercising jurisdiction and the rules that govern it are dispositive, hence the possibility of full or partial exemption application.

Fernández Alonso, 2013: 46) (see chart 1). This doctrine, developed in the year 1868 by the Argentinean lawyer Carlos Calvo and it is included in several Latin American constitutions, is based on the principles of sovereign equality, non - intervention and equal treatment between foreigners and national. States, as sovereigns, have the right to freely determine their internal and external policies, without foreign interference and since foreigners have equal rights to nationals, they must exhaust domestic remedies without asking for protection and / or diplomatic intervention in their State with respect to their nationality (Tamburini, 2002: 82).

Based on Calvo's doctrine, in opportunity of the annual meeting of the World Bank Board of Governors, held in Tokyo in September 1964, a number of Latin American States[6] together with Iraq and the Philippines, voted against the preliminary draft of the CW whose final text is finally approved in 1965 and becomes into force in 1966. This event is known as the "Tokyo no" (Schreuer, 2009: 2 – 3; Fach Gómez, 2010: 2; Boeglin, 2012). Years later the "Tokyo no" was reversed.

Chart 1: BITs in South America which mandatory exhaustion of domestic remedies. Comparison by State.



Source: Own elaboration base on the text of treaties. Updated to December 31, 2015.

[6] These are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela (Boeglin, 2012).

In spite of those BITs that include mandatory exhaustion of domestic remedies, seeing through the most favored nation clause contained in almost all BITs in the world, this obligation could be eluded[7]. This practice is based on the access to a better treatment that a State decides to provide investors within the framework of another agreement, in this case, direct passage to international arbitration jurisdiction. According to Banifatemi, "*a State is undeniably at the liberty not to offer better treatment to other investors or not to enter into a most favoured nation clause. However, once it has freely embarked on both paths, it must abide by its obligations.*" (Banifatemi, 2009: 273).

The first time that an arbitral tribunal applies the most favored nation clause to dispute settlement mechanisms is in the case Emilio Agustin Maffezini versus Spain (ICSID, case number ARB/97/7). In the opposite side, with a restricted application of the clause are the case Plama Consortium versus Bulgary (ICSID case number ARB/03/24) and Telenor Mobile Communications AS versus Hungry (ICSID case number ARB/04/15).

3. Evolution of bilateral investment treaties in South America

3.1. The nineties: favorable climate for bilateral investment treaties and Convention of Washington.

In South America the nineties represents the expansion of signature and ratification of BITs and adhesion to the CW[8], even in States that traditionally followed Calvo's doctrine (Costa, 2008:127). A number of factors generated a favorable climate, starting with the structural reforms promoted by international economic organizations within the framework of the so called Washington Consensus, which promoted market deregulation, commercial opening through tariff reduction and the elimination of non - tariff barriers, privatization of public services and the liberalization of barriers to foreign direct investment (Fernández Alonso, 2013: 48 – 50; Bohoslavsky, 2010: 18; Gianelli, 2012: 20). Also, the failure to the concretion of Multilateral Agreement on Investment

[7] This method is denominated treaty shopping or cherry picking.

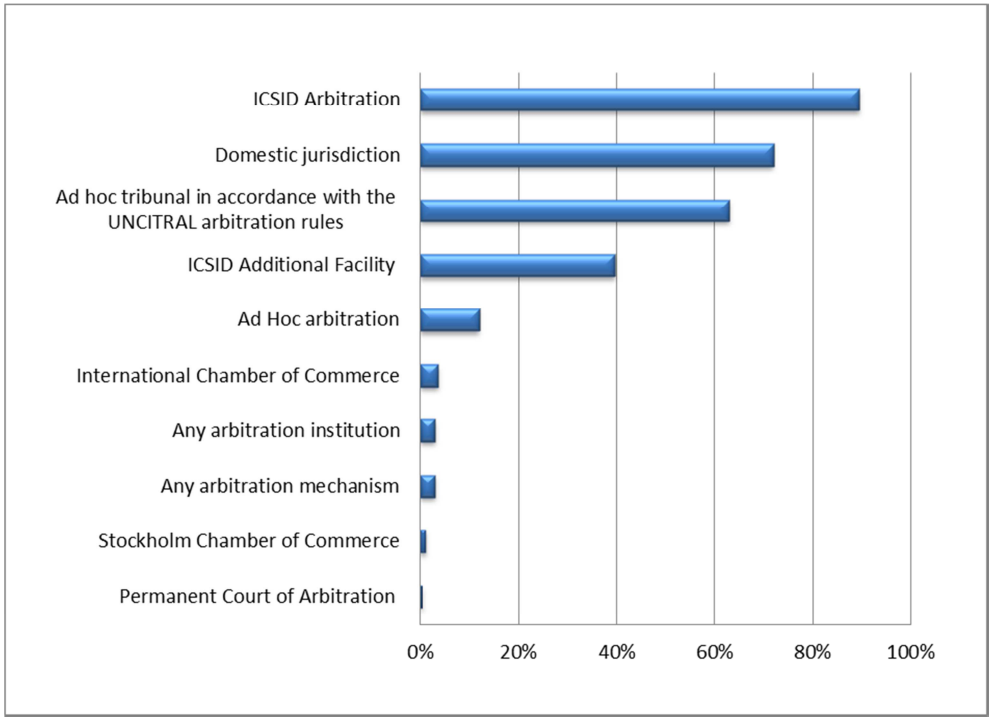
[8] Up to January 31,2015, the following South American States have ratified the CW: Argentina (November 18, 1994), Chile (October 24, 1993), Colombia (August 14, 1997), Guyana (August 10, 1963), Paraguay (February 6, 1983), Peru (September 8, 1993) and Uruguay (September 8, 2000). The agreement was denounced by Bolivia, Ecuador and Venezuela (see point 4.4). Finally, Brazil and Suriname have never adhered to the mentioned agreement.

promoted by the Organization for Cooperation and Development in 1995 tends towards an increased proliferation of BITs. From the 275 agreements under analysis, 226 correspond to the nineties[9].

BITs follow general standards, containing provisions that rule various areas that could be grouped into: 1) general standards to investment treatment: scope and definition of investment, national treatment, most favored nation clause, fair and equitable treatment; 2) investment protection: guarantees and compensation for expropriation, guarantees of free transfer of funds and transfer of capital and abroad profits, prohibition or limits with respect to performance requirements; 3) exceptions, modifications and treaty conclusion; 4) State – State and investor – State dispute settlement mechanisms (Carrau and Valdomir, 2012: 49; Salacuse: 2010: 127- 128). Regarding the last point, the BITs of South American States present as more usual dispute settlement mechanisms, ICSID arbitration (89%), domestic jurisdiction (71%), *ad hoc* tribunal in accordance with the UNCITRAL arbitration rules (63%), ICSID Additional facility (39%) and *ad hoc* arbitration (12%) (See chart 2).

[9] Both numbers include duplication of agreements. Excluding duplication it would be 207 from 255 agreements.

Chart 2: Dispute settlement mechanisms include in South American States' BITs



Source: Own elaboration based on the text of the agreements. Updated to December 31, 2015.

It must be emphasized that ICSID is not a permanent international tribunal but an organization that manages a list of arbitrators and, for each specific case, it is established a tribunal with the choice of an arbitrator for each party and one for the Center. In order to admit an investor – State dispute in ICSID, it is necessary that the dispute has a legal nature, has a direct relation with an investment between a State Party and a national of other State Party, and that the State has signed an extension clause of jurisdiction (article 25 of CW).[10] Therefore, *"bilateral investment treaties were the suitable instruments in order that this consent remains expressed while most of them include arbitration before ICSID as solution to controversies mechanisms."* (Costante, 2012: 77).

However the nineties was not a focus of a large number of claims against neither South

[10] The Rules of Procedure of ICSID Additional facility provides the possibility that the Center administers proceedings outside the scope of the CW. That is: 1) conciliation or arbitration to resolve legal disputes arising directly from an investment between a State and a national of States that are not part of the CW; 2) conciliation and arbitration that is not directly related to an investment, provided that the State or the national be part of the CW; 3) fact finding procedures (article 2).

American States nor any State in general[11]. Taking into account ICSID jurisdiction, there are registered nine claims, the first one in June 26, 1996 by the company Fedax NV versus Venezuela (ICSID, case number ARB/96/3). The second claim is presented in February 17, 1997, Compañía de Aguas de Aconquija S.A. and Vivendi Universal SA versus Argentina (ICSID, case number ARB/97/3). In chart 3 it can be appreciated the number of arbitration requests annually registered by ICSID Secretary General, since 1996 when the first arbitration request against a South American State was registered[12]. Chart 4 shows the number of concluded and pending ICSID cases organized by State.

Chart 3: Arbitration requests against South American States annually registered by ICSID.

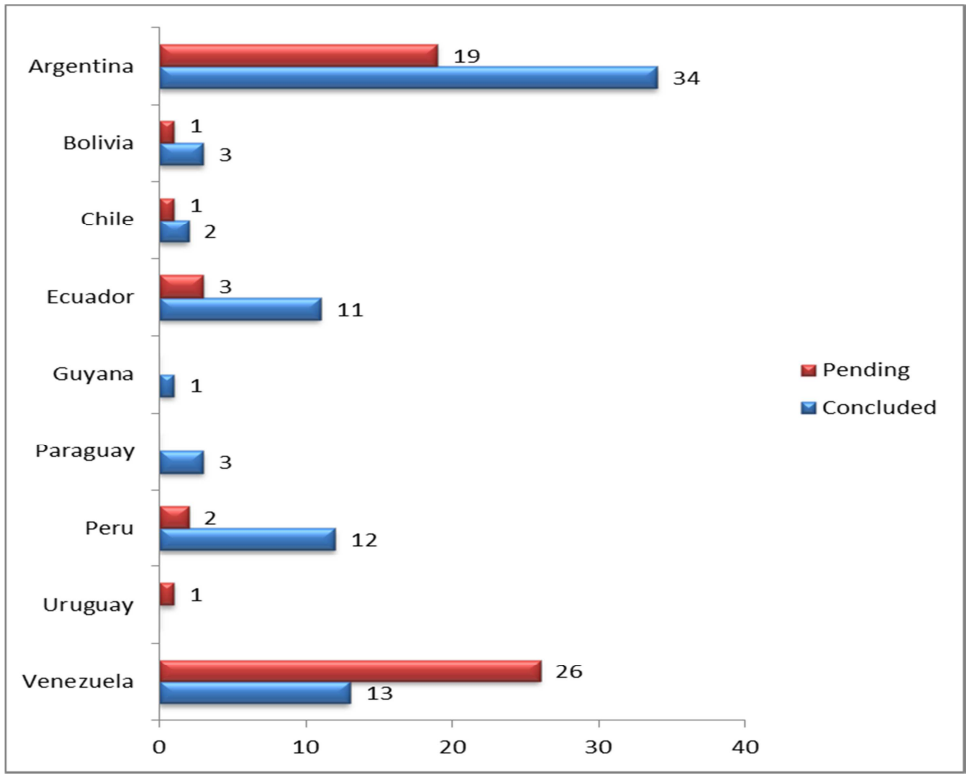
Year	Argentina	Bolivia	Chile	Ecuador	Guyana	Paraguay	Peru	Uruguay	Venezuela	South America (Total)
1996	0	0	0	0	0	0	0	0	1	**1**
1997	2	0	0	0	0	0	0	0	0	**2**
1998	1	0	1	0	0	1	1	0	0	**4**
1999	2	0	0	0	0	0	0	0	0	**2**
2000	0	0	0	0	0	0	0	0	2	**2**
2001	3	0	1	1	1	0	0	0	0	**6**
2002	4	1	0	1	0	0	0	0	0	**6**
2003	17	0	0	1	0	0	2	0	0	**20**
2004	8	0	1	1	0	0	0	0	1	**11**
2005	4	0	0	2	0	0	0	0	1	**7**
2006	0	1	0	3	0	0	1	0	1	**6**
2007	5	1	0	0	0	2	1	0	3	**12**
2008	2	0	0	4	0	0	0	0	2	**8**
2009	1	0	0	1	0	0	0	0	2	**4**
2010	0	1	0	0	0	0	2	1	4	**8**
2011	0	0	0	0	0	0	4	0	10	**14**
2012	1	0	0	0	0	0	2	0	9	**12**
2013	0	0	0	0	0	0	0	0	1	**1**
2014	1	0	0	0	0	0	1	0	2	**4**
2015	2	0	0	0	0	0	0	0	0	**2**
Total	**53**	**4**	**3**	**14**	**1**	**3**	**14**	**1**	**39**	**132**

Source: Own elaboration based on ICSID's data. Updated to December 31, 2015.

[11] The defendant States were Argentina (five claims), Chile (one claim), Paraguay, (one claim), Peru (one claim) and Venezuela (one claim).

[12] Until 2014, 488 claims were registered by ICSID against any country in the world, approximately 80% of the total of 608 investor – State dispute settlement cases known (UNCTAD, 2015: 7).

Chart 4: South American States as respondents (ICSID): concluded and pending cases.



Source: Own elaboration based on ICSID's data. Updated to December 31, 2015.

3.2. 2000s from now on: the questions

In recent years, the great number of claims registered against the States of the region[13], especially those based on new domestic legislation concerning economic sensitive sectors such as oil/petroleum, gas and mining industry, electric energy and other sources of energy, waters and sanitation services, finance, debt instruments, among others, claiming substantial compensation [14], the questioning about dispute settlement

[13] Taking only into consideration the ICSID, the South American states were sued in 82 of the 236 cases reported during the period 2000 - 2009. Argentina leads with 44 cases during this period, of which 37 arise from economic measures adopted in view of the economic and social crisis initiated in December, 2001.

[14] For example, in the ICSID case Occidental Petroleum Corporation and Occidental Exploration and Production Company versus Ecuador (ICSID), case number ARB/06/11), the arbitration tribunal does rise to the request for compensation of nearly 1.800 million dollars. In the Argentinean case, the individual amount of claims does not reach previous amount, for example, concerning the case CMS Gas Transmission Company (ICSID), case number ARB/01/8), directly related to the economic and social

mechanisms itself, as well as the lack of proof concerning direct relation between foreign direct investment attraction and the validity of BITs [15], have generated movements around the positions of the States as regards the nineties.

The present situation of South American States will be analyzed in the following part of this paper, based in a typology of States created to explain their position in BITs - ICSID system.

4. South America and BITs – ICSID system: present situation

4.1. BITs - ICSID system: typology of States

To study the present situation of South American States, this works introduces a typology of States constructed regarding the State position in relation to BITs-ICSID system, understanding that it can be categorized as an international regime. In this way, Krasner defines international regimes as *"an implicit or explicit set of principles, standards, rules and procedures for decision making around which converge the expectations of different actors in the field of a determined area of international relations"* (Krasner, 1983: 2).

States as international actors, take part in an international regime by self-choice and because they perceive reciprocal interests or a win - win relation. Therefore, the benefits that a State receives once it enters into the regime must be more or at least the same, than those that were received before. As a matter of facts, it is possible that the members would withdraw the regime if they perceive that the costs of taking part in it are higher than the external alternatives. However, the withdrawal of the regime is always a possible option, no matter the external alternatives or internal costs (Keohane, 1988: 137, Keohane, 1982: 331).

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crisis of the year 2001, it is ordered to pay 133,2 million dollars plus interests of 262 million dollars required. However, the cumulative claims present other characteristics. For example, in October 2013 Argentina settled and agreement with five companies, one of them the mentioned CMS, with respect to the payment of investment arbitration awards of 677 million dollars, with a release from the debt of 25% and taking out a subscription of Argentinean bonds of at least 10% (transactional agreement approved by Resolution 598/2013 of the Ministry of Economy and Public Finance of Argentina, dated October 8, 2013). The companies at issue namely are: Azurix (ICSID case number ARB/01/12), CMS (ICSID case number ARB/01/08). Continental Casualty (ICSID case number ARB/03/9), Vivendi (ICSID case number ARB/97/3), and National Grid (UNCITRAL arbitration).

[15] With regard to this subject, see Baker (2012).

Among the benefits for weak actors it can be emphasized: the perception of a higher level of protection against strong actors' possible arbitrariness because of the existence of rules and institutions, agreement facilitation as a result of the spillover effect, certainty regarding rules of the game observance, or the actions against noncompliance. For strong States, the benefits are focused in the maintenance of a beneficial *status quo* and the possibility to have political influence in the decision making process of other actors (Hurrell, 1992: 655). In general, regimes maximize the profit of the members and develop systems of reciprocity by introducing the idea that if in a certain situation a member collaborates or avoids damaging the others, the latter will have the same behavior in the future (Keohane, 1982: 335, 342; Bizzozero, 2011: 151 - 153).

Considering the above and taking into account that not all the actors are interested in taking part of a regime, this research proposes a typology of States based in their position regarding BITs - ICSID system: the members, the outsiders and the dissidents. In the first case, the members' expectations converge in investment protection, which implies the existence of investor - State dispute settlement mechanisms, usually *ad hoc* arbitration. To be part of the regime, States must sign or adhere the CW and BITs with other members.

Secondly, the outsiders are those States that believe that the benefits received once being a member are not higher or equal to those that were perceived before and they choose to be outside. Consequently, they do not sign, adhere and or ratify the CW and / or BITs. Finally, the States in the third type, the dissidents, were members of BITs – ICSID system that decided to withdraw it, following the dispositions of CW article 71 and the termination clauses included in BITs in force. The withdrawal process is motivated by the perception that the costs of being part of the regime are higher than the ones of being outside.

In the following part of this paper, it is analyzed the particular case of South American States applying the proposed typology of States. A table summary containing the main characteristics is presented in Annex II.

4.2. The members: Argentina, Chile, Colombia, Guyana, Paraguay, Peru, Suriname and Uruguay

The third position is composed of the rest of South American states, a heterogeneous group but generally follows the trend towards the signature and the entry into force of

the BITs and subscription to the CW. At January 31, 2015, Argentina has 55 BITs in force, Chile 40, Colombia 5, Guyana 4, Paraguay 23, Peru 31, Suriname 1 and Uruguay 29.

The most outstanding case is Argentina since it is the South American country with the highest number of BITs in force[16]. From the 55 agreements, concluded between 1990 and 2000, 53 correspond to Carlos Menem's presidency (1989 – 1999). Their celebration is motivated by the privatization process, especially in the field of public services, the ideological conviction in the benefits of an increased opening to the economy, the international trend to the signature of BITs encouraged by the Washington Consensus and the need to take into account on legal instruments providing a greater juridical security to foreign investors (Beltramino, 2010: 21). Related to this last point, most of BITs requiring Argentina to include clauses conferring jurisdiction extension in favor of international arbitration, without asking for mandatory exhaustion of domestic remedies, underlining a withdrawal from Calvo´s doctrine[17].

However, they are mainly concessionary enterprises of public services[18], privatized in the nineties, which initiated arbitration actions against Argentina on the basis of BITs concluded in the same decade[19], because of being affected by the measures taken from December 2001 in order to palliate the economic and social crisis. It is appropriate to underline the Law on Public Emergency and Exchange System Reform (Law No. 25.561 issued in January 6, 2002), standard that revokes adjustment clauses with respect to US dollars or other foreign currencies and the clauses based on international parameters, as the prices indexes of other States and converts prices and taxes included in public contracts into Argentinean currency (Fernández Alonso, 2013: 58)[20].

[16] Due to the recent begging of President Mauricio Macri Government, December 10, 2015, this work analyzes the characteristics of Argentina until the end of 2015.

[17] There are 43 BITs without mandatory exhaustion of domestic remedies, 41 signed during Menem's presidency.

[18] The main economic sectors involved are: oil/petroleum and gas, electric energy, waters and sanitation, information and communications (particularly telephony).

[19] Particularly in the case of United States – Argentina BIT, in which 17 of the 37 ICSID cases directly related to the economic and social crisis of 2001 were based. Twenty of the fifty claims against Argentina were based on this treaty. .

[20] In general, the claims are focused on the absence of fair and equitable treatment, treatment less favorable than that accorded to national investors and indirect expropriation, in terms of the sanction of the aforementioned internal rules.

Regarding controversies settled in the ICSID, by the end of 2015 Argentina accumulates 53 claims, from which 37 were directly related to the economic and social crisis of 2001[21]. In general, those claims are based in the absence of fair and equitable treatment, less favorable treatment than national investors and indirect expropriation, related to domestic regulations. The following cases are examples of this situation: Azurix Corp. (ICSID case number ARB/01/12, subject of the dispute: water and sewer services concession agreement, award against Argentina for 165,2 million dollars plus interests), CMS Gas Transmission Company (ICSID case number ARB/01/8, subject of the dispute: gas transmission enterprise, award against Argentina for 133,2 million dollars plus interests), Daimler Financial Services AG (ICSID case number ARB/05/1, subject of the dispute: leasing and financial services, award favorable for Argentina).

In this context, in the year 2003 a structural change occurs in the country and one of its premises is the neglect of the policy on negotiation and ratification of BITs. It is only modified the treaty with Panama in 2004 and it enters into force the treaty with Senegal in the year 2010 that was pending the ratification of the African nation[22]. According to Carlos Bianco[23], Secretary of International Economic Relations of the Ministry of Foreign Affairs of Argentina during the period 2013 – 2015, the change of model is originated by a different ideological position, based on the industrial development and social inclusion. Even though the actual government of Cristina Fernández de Kirchner (2007 – 2015) was very critic of results emerged from the BITs and it was internally discussed the possibility of withdrawal, but no progress in this direction was made. Therefore, the BITs in force were automatically renewed and Argentina still remained being an ICSID member.

Following the theory of international systems, Argentina still remains within the regime but with some restrictions. However, several projects has been submitted to the Chamber of Deputies wherein is proposed the neglect of the system, whether the withdrawal of the CW or the BITs in force or the declaration of absolute nullity of abovementioned standards[24]. In the first case, is based on two aspects: 1) the

[21] 2003 is the year wherein have been registered the highest record of cases against Argentina: 17 of 20 registered against South American states and from 30 registered in total.

[22] The agreement is signed in 1993 and ratified by Argentina in 1994.

[23] Personal interview held in October 22, 2014 at Buenos Aires. The interviewee consented to be cited in this work.

[24] In the first group are, for example, those projects with the number 8 of parliamentary proceedings,

particularity of clauses generally included within the BITs, especially the most favored nation clause, stability clause and umbrella clause[25], and 2) the sovereignty renunciation regarding jurisdiction of local courts, in favor of ICSID or other arbitration international courts[26]. In the second case, according to Costante (2012) this situation is explained that due to the constitutional provision stating the supra - legal position but infra - constitutional with respect to treaties[27], the BITs are absolutely null because they collide against constitutional provisions that provide for the jurisdiction of local courts in all matters according to the Argentinean Constitution (1994), such as to engage loans upon the credit of the Nation and arrange the payment of national and external debt of the Nation (articles 75 paragraphs 4 and 7, 116 and 117).

Another case of particular interest is Uruguay because since 2010 faces its one and only claim of a foreign investor, the tobacco company Philip Morris (Philip Morris Brand Sàrl, Phil Morris Products SA and Abal Hermanos SA versus Uruguay, CIADI case

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March 14, 2011; number 37 of April 25, 2006; number 3 March 3, 2006; number 52 of May 13, 2000, while in the second group is included, for example, the project with the number 182 of the parliamentary proceedings, of December 14, 2012. These projects are signed by the deputies of following political parties: Movimiento Proyecto Sur, Socialist Party, Soberanía Popular, Emancipación y Justicia, Sí a la Unidad Popular, Concertación Entrerriana, GEN and / or ARI.

[25] It is of especial interest the case of the most favored nation clause in Panama – Argentina BIT. The treaty establishes that *"no Party may expropriate or nationalize directly or indirectly or take any equivalent measure"* (article 3). As an effect of the most favored nation clause, this disposition may be applied to any BIT that is in force in Argentina.

[26] In the 55 BITs dispute settlement mechanisms include are: ICSID arbitration (51 BITs) *ad hoc* tribunal in accordance with the UNCITRAL arbitration rules (49), domestic jurisdiction (45), ICSID Additional facility (42), others (5).

[27] According to article 74 paragraph 22 of the Argentinean Constitution (1994), treaties have supra – legal but infra – constitutional position, with exception of those that expressly receive constitutional hierarchy. These treaties are: American Declaration of the Rights and Duties of Man; Universal Declaration of Human Rights; American Convention on Human Rights; International Covenant on Economic Social and Cultural Rights; International Covenant on Civil and Political Rights and its Optional Protocol; Convention on the Prevention and Punishment of the Crime of Genocide; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Inter - American Convention on Forced Disappearance of Persons; Convention on the Non - Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

number ARB/10/7)[28]. The company opposed to the tobacco control policy that Uruguay has followed since President Tabaré Vázquez's first Government (2005 – 2010). These regulations establish that: 1) companies must sell only one variation of cigarettes per brand, therefore twelve brads had to be withdrawn from the market; and 2) an increase in the size of health warnings on cigarette packaging from 50% of the total pack size to 80%, in both the front and back of the packaging.

According to the claimant, those regulations constrict its right to use the brands, a protected investment according to Uruguay - Switzerland BIT. Even though this BIT has a large definition of investment, it is possible to question of the subject of the dispute is directly related to a protected investment if it is a sovereign act of Uruguay regarding the protection or the human right to health in accordance to the minimum standards of the World Health Organization (WHO) Tobacco Control Framework Convention, that Uruguay has to accomplish as Part of it.

4.3. The outsiders: Brazil

Brazil's case is the most significant in South America. In 1994, having adhered to the constitutive Agreement of the Multilateral Investment Guarantee Agency (Seoul, 1985), begins the practice of concluding BITs, with the signature of 14 between 1994 and 1999. Although six of these agreements are submitted to the Brazilian Congress[29], but there were opposition to pass them. Finally in March 2002, in the last year of President Fernando Henrique Cardoso's Government (1995 – 2002), an Inter - Ministerial Working Group was created which determines *"the convenience of withdrawing these agreements from the Congress, fact accomplished in December 2002"* (Actis, 2014: 23). De Azevedo (2001: 9) emphasizes that the disadvantages for the approval of BITs on the part of the Congress, are based on the fact that the State is obliged to engage for very long periods, granting a privilege to foreign investor to the detriment of national, there are constitutional problems, for example, as regards dispute settlement within the scope of arbitration international instances[30], and the free transfer of capital may present risks in the balance of payments.

[28]The award is expected to be issued during the second semester of 2016, according the experts that were interviewed.

[29] Draft legislative decrees were presented to Congress in 1996: BITs with Switzerland, Portugal and Chile and United Kingdom; and in 2000: BITs with France and Germany (De Azevedo, 2001: 6).

[30] In particular, article 1 paragraph 1 and article 5, paragraph 34.

Therefore, following the international regime theory, Brazil represents the case of an actor who understands that the benefits received once integrated into the regime, are not greater or equal to those perceived before its incorporation, so, its choice is to stay outside.

However, this clear position to be outside of BITs – ICSID system, is argued by the fact that the flow of investments in Brazil is no longer the only unidirectional way but bidirectional since Brazilian companies have begun to invest outside borders, turning the country into foreign direct investment's recipient / issuer[31]. In this context, under the Foreign Trade Secretary of the Development, Industry and Trade Ministry, it is elaborated a new model of agreement, the Cooperation and Facilitation Investment Agreement (CFIA), as an instrument to support Brazilian investments offshore[32]. In this context, in October 2013, Brazil submits proposals related to BITs to Angola, Nigeria, Mozambique and South Africa (Actis, 2014: 27). The Brazilian expert on International Investment Law, José Augusto Fontoura Costa[33], explains that the proposed agreements are due to sectorial interests of Brazil in these countries and to the perception of fragility of the existing legal framework within them[34].

The new model of bilateral treaty has no reference to investor - State dispute settlement, and only a State - State dispute prevention mechanism is proposed. This mechanism is based in. 1) the existence of National Focal Points or Ombudsmen in each State in order to prevent disputes and facilitate their resolution; 2) the conformation of a Joint Committee, integrated by governmental representatives of both States, that makes consultation and negotiation to evaluate the dispute, as a previous requirement to begin

[31] According to the FDC Ranking of Brazilian multinational corporations 2013 to 2015, the corporations with higher transnationality index in those years are: JBS, Gerdau, Stefanini, Magnesita Refratários, Marfrig, Meltalfrío, Ibope, Odebrecht, Sabó, Minerva Foords, InterCement, Artecola, Fitesa, and CZM. Retrieved from: http://www.fdc.org.br

[32]For a further analysis of the context and process of elaboration of the CFIA model, see Morosini and Ratton Sanchez Badin (2015: 3).

[33] Interview held through e-mail, in November 25, 2014. The interviewee consented to be cited in this work.

[34]In the survey on foreign policy impact on internationalization of Brazilian multinational corporations, published by the Fundação Dom Cabral for the FDC Ranking of Brazilian multinational corporations 2013, the corporations emphasized that one of the main elements that collaborate to internationalization is the conclusion of bilateral agreements on cooperation and trade with Africa, Latin America and (Fundação Dom Cabral, 2013: 14).

international arbitration[35]. Therefore, CFIAs resolve part of the traditional BIT problems, for instance, they mitigate the risks and eventual disputes with the presence of the Ombudsmen; and they eliminate the draconian clauses that give more benefits to foreign investors than to national investors (Actis, 2015: 29), and they do not include any reference to investor - State dispute settlement.

By the end of 2015, Brazil has signed six CFIAs with African and Latin American countries, that is: Mozambique (March 30, 2015); Angola (April 1, 2015); Mexico (May 26, 2015); Malawi (June 25, 2015); Colombia (October 9, 2015); Chile (November 23, 2015). Agreements with Algeria, Morocco, Nigeria, Peru, South Africa and Tunisia are still under negotiation (Dietrich, 2015).

4.4. The dissidents: Bolivia, Ecuador and Venezuela

Bolivia[36], Ecuador[37] and Venezuela[38] are the first States in South America to withdraw CW on May 1, 2007, July 2, 2009 and January 24, 2012 respectively[39], and beginning the process of non - renewal or withdrawal of BITs in force in the case of Bolivia and Ecuador. This process can be framed within the neglect of an international regime, BITs - ICSID system, as the costs for remaining within it are higher with respect to external alternatives.

The case of Ecuador constitutes of particular interest due to the institutional changes generated. The neglect process from the international system begins in January, 2008 with the withdrawal of nine BIT, taking as a basis those ones wherein reciprocal investments had not been registered (Guerra, 2012: 43).[40] With respect to the remaining agreements, only is reached the last stage in the BIT Ecuador - Finland[41]. However, it

[35]The CFIAs with Mexico and Colombia have dispositions regarding the possible conformation of an *ad hoc* arbitration tribunal (articles 19 and 22).

[36] Bolivia is the State most advanced in the process of BIT termination. Eight of them are not renewed and in May 2013 the remaining 21 treaties are jointly withdrew (Orellana López, 2014).

[37] At the beginning of the termination process, Ecuador has 26 BITs in force.

[38] Venezuela has 27 BITs of which has reported only one.

[39] According to CW article 71, the withdrawals are effective six months after notification.

[40] BITs with Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Rumania and Uruguay.

[41] The procedure involves the following steps: 1) Official note of the Presidency to the Constitutional

should be noted that in most cases, there are survival clauses determining that the provisions of BITs are in force for five, ten or fifteen years more, for those investments carried out before notice of termination.

In May 2013, Ecuador moves forward by establishing the Commission for the Civic Integral Treaties on Reciprocal Protection of Investments and International Arbitration System in the field of Investments (CAITISA, abbreviation in Spanish) (Executive Order No. 1506, May 6, 2013). The CAITISA is composed of four experts or researchers in the matter of investments and International Law, arising from the civil society with their respective alternates and four State delegates: the Planning and Development National Secretary, National Secretariat Management Policy, the Legal Secretary General of the Presidency of the Republic and the Minister of Foreign Affairs (Article 6). Their functions are to analyze the BITs and other international instruments related to investments requiring the State, the standards of international arbitration and actions brought against Ecuador (Article 3).

The specialist in International Public Law and CAITISA's member, Javier Echaide[42], states that the arguments used by Ecuador intended to report the BITs and the CW are based on: 1) the incompatibility with provisions of the Constitution of 2008, mainly as regards the establishment of a jurisdiction different from the domestic one in the matter of controversies with foreign investors (Article 422); 2) the need to take steps with regard to the protection of nature's rights, with constitutional devotion for the first time in the history of Ecuador (Article 71 to 74); 3) aspects in the context of the situation, especially, the controversies with the companies Occidental Petroleum Corporation and Occidental Exploration and Production Company (ICSID case number ARB/06/11) and Chevron Corporation and Texaco Petroleum Company (Permanent Court of Arbitration case number 2007-2); 4) indirect affectations of cases that are settled in different jurisdictions, such as environmental problems in Lago Agrio related to the Chevron case.

Court asking to pronounce on the withdrawal; 2) Opinion of the Constitutional Court; 3) Official note to the Presidency of the National Assembly asking for the withdrawal; 4) Report of the Permanent Specialized Commission on sovereignty, integration, international relations and integral security of the National Assembly; 5) Resolution of the Plenary of the National Assembly; 6) Written notice of the withdrawal addressed to the counterpart in the BIT.

[42] Personal interview held in October 16, 2014, at Buenos Aires. The interviewee consented to be cited in this work.

5. Final reflections: realities and perspectives.

The present work intends to bring forward discussion about investor - State dispute settlement included in BITs in force or signed by South American States with relation to the regulatory space of the States. This space exists but is limited and the limitation appears by the hand of the claims or the threats of claims, by foreign investors, especially in those economic sectors that are strategic or have connections to public interest, even those that have constitutional protection.

The possible effect of this situation may have as effect a *"regulatory chill" or even a "regulatory freeze", stopping States from adopting regulations"* in public issues such as environment or public health (United Nations, 2015: 5). This point is of especial relevance in those issues where States have the obligation to protect their people because of international commitments, for instance treaties related to human rights protection[43].

In this way, multinational corporations press States in order to obtain laws that contain dispositions closer to their interests, becoming pseudo lawmakers. This practice puts into question the foundations of the State, because, as Arato (2015: 238) explains, *"the rise of corporations as lawmakers threatens local and global public values, as diverse as economic development, human rights, and the protection of public health and the environment"*.

Nowadays, a possible reform of investor - State dispute settlement is under discussion in the UNCTAD, and this constitutes a first step towards States recover their fundamental role in the system. A second step is reached by the exclusion of strategic economic sectors or public interest issues from investor - State dispute settlement, for instance public health, security or environment protection. This could be the case of the Trans – Pacific Partnership (TPP), depending on the interpretation that judges and arbitrators would give to the dispositions.

However, it would be desirable that this discussion on possible reform appeals to the South American States to publically talk about this and other aspects concerning the BITs, as the most favored nation clause, the survival clauses, the fair and equitable

[43] For a further analysis of this point see the Fourth report of the Independent Expert on Promotion of a democratic and equitable international order, Document A/70/285 (UN, 2015).

treatment, the concept of indirect expropriation, mandatory exhaustion of domestic remedies, the concept of investment itself and its exceptions, among other topics. In this way solid basis would be included in the eventual negotiation of future agreements or the renegotiation of those in force taking into account regional interests, in particular regarding the development model to be attained.

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Annex I: List of cited arbitral cases

Respondent (State)	Claimant (Investor)	Arbitration forum	Case number
Argentina	Azurix Corp.	ICSID	ARB/01/12
Argentina	CMS Gas Transmission Company	ICSID	ARB/01/8
Argentina	Compañía de Aguas del Aconquija SA and Vivendi Universal SA	ICSID	ARB/97/3
Argentina	Continental Casualty Company	ICSID	ARB/03/9
Argentina	Daimler Financial Services AG	ICSID	ARB/05/1
Argentina	Gas Natural SDG SA	ICSID	ARB/03/10
Argentina	National Grid PLC	*Ad hoc* arbitration in accordance with UNCITRAL arbitration rules	-
Argentina	Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA	ICSID	ARB/03/17
Argentina	Suez, Sociedad General de Aguas de Barcelona SA and Vivendi SA	ICSID	ARB/03/19
Bolivia	Aguas del Tunari SA	ICSID	ARB/02/3
Ecuador	Chevron Corporation and Texaco Petroleum Company	PCA	2007-2
Ecuador	Occidental Petroleum Corporation and Occidental Exploration and Production Company	ICSID	ARB/06/11
Uruguay	Philip Morris Brand Sàrl, Philip Morris Products SA and Abal Hermanos SA	ICSID	ARB/10/7
Bulgaria	Plama Consortium	ICSID	ARB/03/24
España	Agustín Maffezini	ICSID	ARB/97/7
Hungría	Telenor Mobile Communications AS	ICSID	ARB/04/15

Source: Own elaboration.

Annex II: Table summary of South American States types concerning their position as regards BITs - ICSID system

	Members	Outsiders	Dissidents
States	Argentina; Chile; Colombia; Guyana; Paraguay; Peru; Suriname; Uruguay.	Brazil.	Bolivia (2007); Ecuador (2009); Venezuela (2012).
Number of BITs	Argentina: 55; Chile: 40; Colombia: 5; Guyana: 4; Paraguay: 23; Peru: 31; Suriname: 1; Uruguay: 29.	None. Since 2015 Brazil signs CFIAs, a new model of agreement. By the end of 2015, none of them is in force.	Bolivia: 0 (21 were terminated); Ecuador: 16 (10 were terminated); Venezuela: 25 (1 was terminated).
Washington Convention Part	Argentina (November 18, 1994); Chile (October, 24, 1993); Colombia (August 14, 1997); Guyana (August 10, 1963); Paraguay (February 6, 1983); Peru (September 8, 1993); Uruguay (September 8, 2000).	No.	Withdrew by Bolivia (May 1, 2007); Ecuador (July 2, 2009) and Venezuela (January 24, 2012); the withdrawals were effective six months later.
Number of claims (ICSID)	Argentina: 53; Chile: 3; Colombia: 0; Guyana: 1; Paraguay: 3; Peru: 14; Suriname: 0; Uruguay: 1.	None.	Bolivia: 4; Ecuador: 14; Venezuela: 39.
Position main characteristics	These States tend to sign BITs and maintain them in force. In general, these States adhered to CW.	Brazil signed 14 BITs but none of them enter into force because they were retired from Congress by the Executive Power. In 2015, it begins the practice to sign CFIA, a new model of agreement. By the end of 2015, it has signed 6 CFIA.	The three States withdrew CW, and Bolivia and Ecuador began processes of termination of the BITs in force (by withdrawal or non - renewal).
Position basis	Adherence to Washington Consensus ideas, especially the need to attract foreign direct investment.	To avoid to engage the State for very long periods and to privilege to foreign investor to the detriment of national; and constitutional problems, especially international arbitration as investor - State dispute settlement mechanism.	Context of the situation (big number of claims and their amounts) and constitutional (prohibition of extension clauses of jurisdiction, unless Latin America and the Caribbean integration processes courts, nature's rights protection or strategic sector protection that are the focus of the main part of the lawsuits).

Source: Own elaboration.