International arbitration as a dispute resolution mechanism:
The Argentine case in ICSID

By Cecilia María Minaverry

1. Introduction

In the 1990s, Argentina's government signed more than fifty bilateral investment treaties and in most cases, they were submitted under the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID).

After the 2001 crisis, when the country was in a severe economic crisis with high rates of poverty, unemployment, and institutional instability, the commitments made by the government of the nineties became an additional problem. The country had to deal with the investors that had come to Argentina during the convertibility regime and now were suing the government for the changing economic conditions.

Throughout this paper, I hope to demonstrate that the mechanisms we use for international arbitration have not been as successful as promised. I will show how the case of Argentina is an example of ICSID's failures, and how the use of Bilateral Investment Treaties (BITs) were not sufficient in resolving state/investor disagreements. Then I will outline specific critiques based on the preceding explanation of terms and the Argentine case, and in my conclusion I will make suggestions for reform of these mechanisms for international arbitration.

2. Bilateral Investment Treaties

The bilateral treaties of reciprocal promotion and protection of investments (BITs) are agreements between States whose goal is to promote investments between the subscribing countries, protecting the investors from one of the States at the moment of entering capital in the territory of the other party signing.

Therefore, this would be a treaty between sovereign States with the mere goal of protecting individuals and companies. These treaties have the application of public international law to protect their capital, so through these agreements foreign investors acquire the same legal status as the host State and can make peer-to-peer negotiations with any government.

The treaties subscribed to during the nineties were generally very similar. They weren't a product of the negotiation between the countries signing them according to their needs, there was a model BIT created by every State and offered later mostly to undeveloped countries with the promise of the increase of foreign investments flows. So in almost all of the BITs we can find the same types of protection clauses for the investors.

The most common and important ones we want to mention are:

1) *Extension of jurisdiction clause:* this clause implies that disagreements between investors and the State could be resolved through international arbitration, instead of going to local courts. The most commonly used arbitration forum has been the International Centre for Settlement of Investment Disputes (ICSID), about which I will explain later.
2) *Most-favored-nation clause*: any concession granted to a State which had signed a bilateral investment treaty is applied to all other States which had done it before. Therefore, if one particular country is granted a legal benefit in order to attract its investors, it is automatically applied to all the Nations that signed treaties before this State received an extra benefit. In the case of the most-favored-nation clause, it has been noted that it creates a multilateral regime of investment protection when offering the possibility, to other investors, of achieving the most convenient

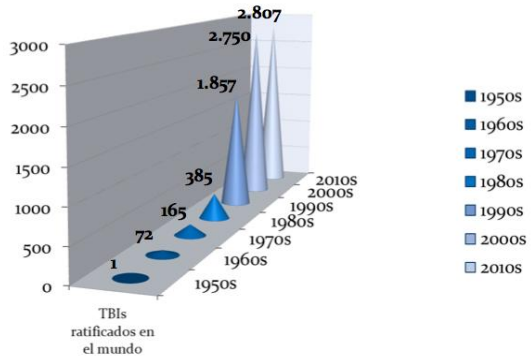
benefits offered to a third Nation[1].

3) *Fair and equitable treatment:* its inclusion in the treaties serves as an interpretation element and it is associated with the non-discriminatory principles and the duty of protecting foreign property by the host[2]. It has been used as an argument in many claims presented against Argentina.
4) *Compensation right in case of expropriatory or nationalization measures:* this clause does not prohibit expropriation, but makes sure these measures are taken only for public interest through an act, and in a non-discriminatory way[3]. It also established that the expropriated investor must be correctly, effectively and quickly compensated. This means that the amount payable should be a fair market value and, in case of delays, it should be paid with interests and in the currency type previously agreed on. On the other hand, at the event that the host government takes measures the investor considers are limiting his rights -indirect expropriation- this clause operates (for example, excess of taxes for an activity).
5) *Umbrella clauses:* these provisions are included as a way of protecting the liabilities that result from the agreements signed by the host States with the investors. The breach of contract could be the same as a failure to comply with the treaty, which will activate the defenses available for any investor that suffered this kind of non-fulfillment.

So, as we can see the purpose of these clauses is to compensate any kind of loss suffered by the investor in any situation.

The duration of BITs is usually ten years, extended automatically. However, even if there is a desire to terminate these agreements, they generally have subsisting consequences that are valid for ten additional years. In addition, under the Argentine legal system and from the constitutional amendment of 1994, these kinds of treaties signed by the State are superior to local laws.

By the year 2010 there were approximately 2,800 BITs signed in the world, most of them, as we can see, were signed during the nineties.



Number of BITs ratified in the world[4]*:*

1 PERUGINI, A. "La definición de la persona física y la cláusula de la Nación más Favorecida en los Convenios Bilaterales de Promoción y Protección de las Inversiones", en GUTIERREZ POSSE, H. (Coord). *Los Convenios para la Promoción y Protección Recíprocas de Inversiones*. Instituto de Derecho Internacional y Derecho de la Navegación. Academia Nacional de Derecho y Ciencias Sociales de Buenos Aires, 1993, p 35 y ss

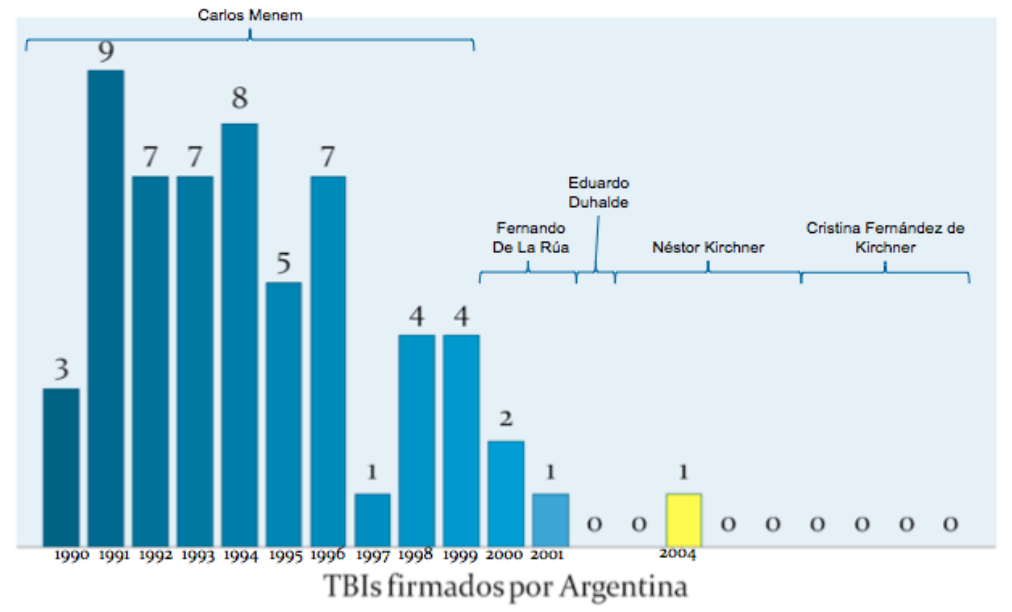
2 SCHREUER, Ch. "Fair and Equitable Treatment in Arbitral Practice", en *The Journal of World Investment & Trade*. Vol. 6, n° 3, Geneva, 2005, p. 356 y ss.

3 GONZALEZ DE COSSIO, F. "Medidas equivalentes a expropiación en arbitrajes de inversión", en RODRIGUEZ JIMENEZ, S. y WÖSS; H (Coord). *Arbitraje en Materia de Inversiones*. Instituto de Investigaciones Jurídicas, Serie 155, UNAM, México 2010, p. 21 y ss.

4 ECHAIDE, J., "CIADI: ¿Estados o corporaciones?" (ICSID: States or corporations?), Jornada preparatoria para el Congreso de Derechos y Garantías 2013, Asociación de Abogados de Buenos Aires (AABA), 2012, available at http://www.slideshare.net/jechaide/presentacin-aaba-sobre-ciadi.

The United Nations Conference on Trade and Development (UNCTAD) provides an important piece of information that should make us think about the disproportion of forces with which these treaties were negotiated. Of about 1,857 bilateral investment treaties signed in the world during the nineties, approximately 1% of them were signed between developed countries[5], which confirm that these treaties were requested to the "unreliable Nations" as a condition for the arrival of investments.

Argentina´s government signed 55 bilateral investment treaties during the nineties and in most of those treaties the country submitted to the jurisdiction of the International Center for Settlement of Investment Disputes
. Also many other Latin American countries signed BITs during the nineties. Bolivia signed 16 of them, Ecuador 18, Venezuela 22, Chile 48, Peru 28 and Mexico 15. Brazil also signed 15 of them but never ratified a single one.



TBIs firmados por Argentina

BITs ratified by Argentina[6]*:*

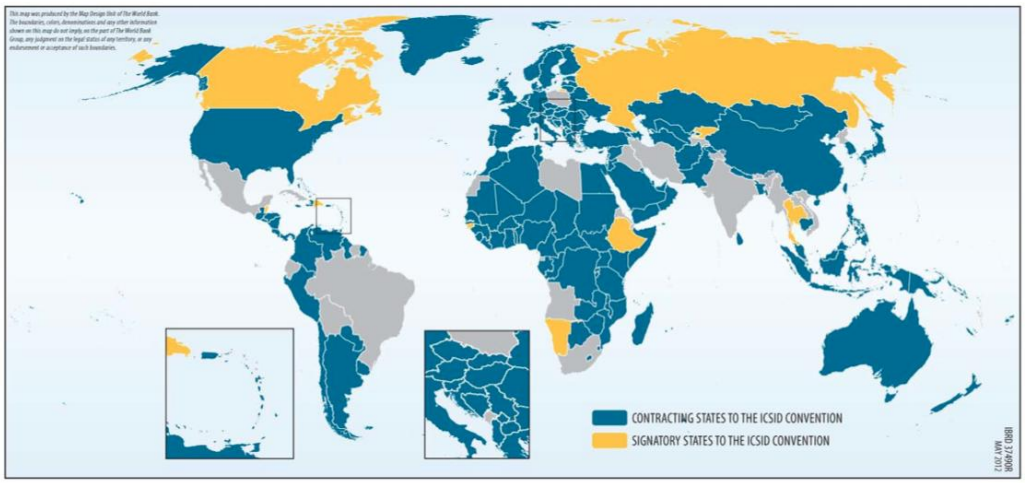
3. International Center for Investment Disputes (ICSID)

ICSID is an international legal institution based in Washington, established under the Convention on the Settlement of Investment Disputes of the World Bank (also known as the Washington Convention) on March 18, 1965. This agreement is a multilateral treaty developed by the authorities of the World Bank and currently 147 States are members of ICSID. Argentina became a member in 1994.

Map of ICISID contracting States[7]*:*

5 Bilateral Investment Treaties 1959-1999, UNCTAD, 2000, available at http://unctad.org/en/Docs/poiteiiad2.en.pdf
6 ECHAIDE, J., Op. Cit.
7 The ICSID Caseload-Statistics, Issue 2012-2, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=Spanish32

1. **Map of the ICSID Contracting States and Other Signatories to the ICSID Convention as of June 30, 2012**

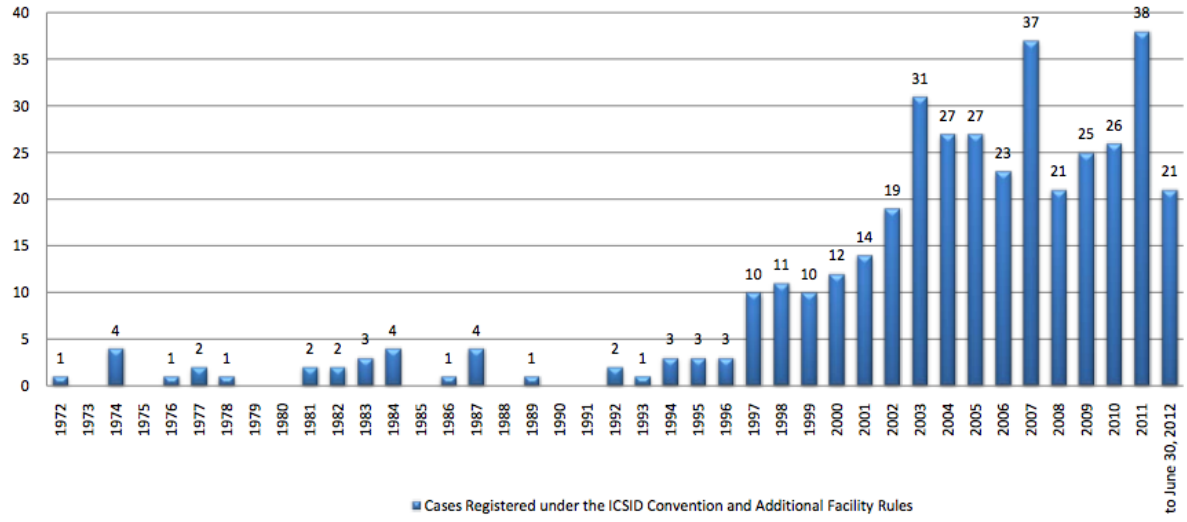


The countries we see in blue are members of ICSID, the ones in yellow have signed the convention but never ratified it, and the ones in gray never signed the convention or have already left the organization.

The Center was created during the 1960s, however it began to gain importance during the 1980s, when, in accordance with the Washington Consensus guidelines, the free market and the liberalization of the economy were promoted as a way to solve the problems of the developing countries. And it was also the time when most of the BITs were signed, giving jurisdiction in case of disputes to ICSID. From the legal point of view, multilateral organizations like the World Bank highlighted the need to establish stable property rights guaranteed by arbitration forums like this, in order to attract capital to undeveloped countries such as Argentina.

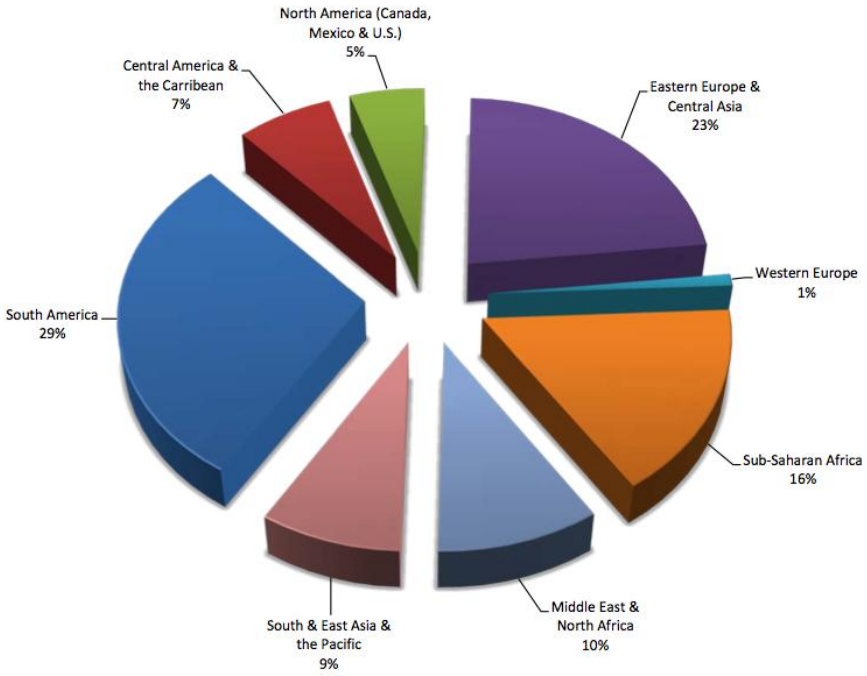
Number of ICSID Cases Registered by year and geographic distribution by State party involved[8]*:*

Chart 1: Total Number of ICSID Cases Registered by Calendar Year:



8 The ICSID Caseload-Statistics, Issue 2012-2, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=Spanish32

Chart 6: Geographic Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules by State Party Involved*:



Above, we can see how many cases were submitted per year and then we see the geographic distribution of all cases registered under ICSID. South America has 29%, being the biggest proportion.

The Center promotes itself as an impartial forum that facilitates the settlement of legal disputes between the parties, through conciliation or arbitration and as a way to get rid of political issues when solving conflicts, which in their view can be generated in local court litigations between multinational companies and host States[9]

According to the Washington Convention, *"when the parties have given their consent, no party may withdraw its consent unilaterally"* (Article 25). The investor does not need the authorization from his country to sue a State under the benefits given by the BIT signed between his country and the host State. It should be noted that before signing these BITs, the only international instance where private citizens could sue the States was before the Courts of Human Rights.

Once the case is accepted by the Center, the arbitration process of ICSID begins with the selection of the arbitrators, assigned by each party. If the parties fail to agree about the composition of the Tribunal, the Chairman of the Administrative Council will appoint three arbitrators from the list made by the States that are members of the organization[10].

After the award is rendered the parties may seek only interpretation, revision, or annulment. This is established by the Convention in Article 53 where it states: *"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"*. There are only five causes to ask for annulment and they are: 1) that the Tribunal was not properly

9 TONDINI, B. y ROQUÉ, M, "CIADI, Inversiones y el "Factor Confianza" en la República Argentina" (ICSID, investments and the "reliability issue" in the Argentine Republic), Centro Argentino de Estudios Internacionales, available at: http://www.caei.com.ar/es/programas/di/38.pdf

10 ÁLVAREZ ÁVILA, G., "Las características del arbitraje del CIADI" (Characteristics of ICSID arbitration), *Anuario Mexicano de Derecho Internacional*, Vol. II, 2002, available at http://www.revistas.unam.mx/index.php/amdi/article/view/16417, p. 222.

constituted; 2) that the Tribunal has manifestly exceeded its powers; 3) that there was corruption on the part of a member of the Tribunal; 4) that there has been a serious departure from a fundamental rule of procedure; and 5) that the award has failed to state the reasons on which it is based.

In order to make a decision about the annulment, an ad hoc Committee will be appointed, which will be composed of three people chosen by the Chairman of the Administrative Council among the list of arbitrators in ICSID. The award may be annulled, totally or partially, and a new Tribunal may settle the dispute, since the committee that annulled the award cannot render a new one.

Since there is no appeal process available that may review the awards, they are directly enforced. Article 54 of ICSID's convention states that each Contracting State shall recognize an award rendered as binding and enforce the pecuniary obligations imposed by that award within its territories as if it was a final judgment of a court in that State.

However, it is necessary to carry out award authenticity verification and to follow the procedure established by each State in order to execute the award. The local Judiciary power can only rule on legal procedures but never on the merits, since they are reserved for the international environment. This is established in the first part of Article 26 of the Convention where it says: *"Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy"*.

It is understood that the States must comply with the awards and pay[11]. However, if there is a failure to do so, the award may be executed in any of the States members of ICSID. Failure to execute the award may lead to the application of Articles 27 and 64 from the Washington Convention, with gives the opportunity to activate diplomatic protection or to turn to the Court of International Justice[12].

From the story of Argentina, we will see that ICSID and BITs have not functioned as promised. They did not work for the government, and were equally unsuccessful for investors.

4. Argentina as a main respondent in ICSID

The relationship with ICSID started for Argentina during the 1990s. Carlos Menem was in the government and his economic plan was extremely neoliberal. His policies followed the guidelines of the Washington Consensus, which involved the political and economic transformation of many Latin American countries, characterized by the liberalization of the economy, government reform, deregulation and privatization of State enterprises. Following the advice of international organizations like the International Monetary Fund and the World Bank, foreign investment became synonymous with economic growth and development and to attract it governments resorted to unilateral and bilateral solutions, either by amending national legislation, or subscribing BITs.

As a part of this economic plan Menem introduced the convertibility regime, which established a fixed exchange rate between the argentine peso and the US dollar, as a way of attracting foreign investors[13].

This model was financed by the privatization of public utilities, like communications, oil, gas, electricity, water, and transportation. And also during his government most of the investment treaties we have today were signed.

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11 ALEXANDROV, S. "Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention", *Transnational Dispute Management*, available at: http://www.transnational-dispute-management.com/article.asp?key=1345

12 LOWENFELD, A. F., *International Economic Law*, Oxford University press, New York, 2003, chapter 13 (The Responsibility of host State to Foreign Investors: Customary International Law), pp. 392 y ss.

13 FERNÁNDEZ MAYO, M., "La crisis del orden neoliberal en Argentina y la respuesta antiglobalización contra el ALCA" (The crisis of the neoliberal order in Argentina and the antiglobalization response against the FTAA), *Revista Historia Actual Online*, Vol. Nº 13, 2007, p.113.

Because of the convertibility regime the productive structure of the country changed radically. The Argentine exports became very expensive to compete in the world, and the country was suddenly filled with imported products, which led to the subsequent bankruptcy of several industries.

The economic model collapsed in 2001. Argentina declared itself in default with a foreign debt that exceeded the amount of 130 billion dollars and was made up - in part - of bonds under the legislation of eight different jurisdictions.

During the crisis, the Argentine Congress sanctioned the law of public emergency and the amendment of the foreign currency exchange regime. This law meant the beginning of two important changes. It first ended the convertibility regime and also imposed a restructuring of the contracts - both private and public - in foreign currency under the Argentine law. It also stipulated that the rates resulting from contracts for public utilities would be fixed in Argentine pesos. During convertibility, the exchange rate was one Argentine peso to one US dollar. When convertibility was over, you needed three pesos to buy one dollar. Also the rates paid by local Argentines for their public services during the convertibility period were adjusted according to the wholesale price index of the United States and with this emergency law this was also forbidden.

This emergency legislation pushed many foreign companies that had invested in the country to settle disputes with Argentina through ICSID. That is why the country accumulated almost fifty cases with requests of awards for a total of 48 billion dollars. They requested the government to maintain the national regulation of the nineties and they used many of their BITs protection clauses to build the argument of their claims[14].

With all these claims, the Argentine government created an Arbitration Defense Assistance Unit (UNADAR) within the Procuración Nacional del Tesoro (Office of the Attorney for the National Treasury) in order to organize the law suits and also defend the provinces, since the State is the guarantor of their obligations.

The origin of the claims is the same, so the arguments of the defense are generally very similar. They are saying that during the crisis of 2001, emergency measures had to be taken and the government was forced into inevitable decisions. These emergency measures affected both nationals and foreigners, and while many transnational companies experienced a high loss in their profits, other Argentine firms went bankrupt.

The crisis was so severe that it represented a unique situation in the history of Argentina. That´s why in the cases that involved US companies, the Argentine lawyers invoked Article 11 of the USA-Argentina BIT. This Article says: "*This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests"*. These are the non-precluded measures provisions that were designed to limit investors' protections in situations of particular importance. They predicted the possibility of excluding the illegality of the agreement if the government sanctioned rules to protect national security and the public order. Its effect is similar to the so-called "state of necessity" recognized in customary international law and most national laws[15].

14 PEROTTI, J., "Consideraciones del caso argentino ante la jurisdicción del CIADI" (Considerations of the argentine case before the jurisdiction of ICSID), *Centro Argentino de Estudios Internacionales*, 2008, available at http://www.caei.com.ar/sites/default/files/08_2.pdf, p. 4.

15 ZABALO, P., "América Latina ante las demandas Inversor-Estado" (Latin America Facing Investor-State Claims), Universidad del País Vasco, *Revista de Economía Mundial 31*, 2012, available at http://biblioteca.hegoa.ehu.es/system/ebooks/19133/original/America_Latina_ante_demandas_Inversor-Estado.pdf?1356609058, p. 283.

Several ICSID Tribunals acknowledged that vital interest of Argentina and its people were at stake at the time of the adoption of the measures and, consequently, that the situation required prompt and urgent action from the Argentine authorities. So the defense's argument was successful in some cases.

Another strategy of Argentina was to negotiate directly with the investors. They managed to make several of them withdraw their claims before ICSID by obtaining some kind of compensation.

Finally, Argentina lost 5 disputes in ICSID, receiving awards against it for a value of $400 million dollars[16].

Argentina's government has informed that from the original 48 billion dollars that were claimed, the country has avoided paying 33 billion of this, by winning certain cases and settling others[17].

As we will see in Annex 1, Argentina has 9 closed cases with final awards rendered, and 16 cases closed with settlement agreements. Also it has 8 pending cases suspended waiting for the parties to agree and finally 17 pending cases waiting for an award or an annulment decision.

Although there are other kinds of claims against Argentina in ICSID - as the recent case of Repsol - the damage caused after the end of convertibility is still being discussed in most of them.

From the case of Argentina, we conclude with critiques of this international arbitration system, and have suggestions for reform of these mechanisms.

5. Critiques

Contradictory rulings:

There have been many inconsistent decisions in cases in which the Argentine crisis of 2001 was discussed. Several ICSID Tribunals concluded that the security of the country was severely affected and that the economic conditions of the nineties were impossible to maintain by the government[18]. For example, in LG&E, Article 11 of the Argentina-United States BIT was successfully invoked by the defense. The Tribunal said: *"The essential interests of the Argentine State were threatened in December 2001. It faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace. There is no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity. In this circumstance, an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed. It cannot be said that any other State's rights were seriously impaired by the measures taken by Argentina during the crisis. Finally, as addressed above, Article XI of the Treaty exempts Argentina of responsibility for measures enacted during the state of necessity[19]".* In Continental the Tribunal said: *"actions properly necessary by the central government to preserve or to restore civil peace and the normal life of society (especially of a democratic society such that of Argentina), to prevent and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten the legal order, even when due to significant economic and social difficulties, and therefore to cope with and aim at removing these difficulties, do fall within the*

16 Infobae, 27-11-2012, available at http://www.infobae.com/notas/683551-Argentina-afronta-demandas-ante-el-CIADI-por-65000-millones-de-dolares.html
17 El Argentino, 4-7-2010, available at http://www.infonews.com/nota.php?id=97372&bienvenido=1
18 KASENETZ, E., "Desperate Times Call for Desperate Measures: The Aftermath of Argentina`s State of Necessity and the Current Fight in the ICSID", *Geo. Wash. Int'l L. Rev.*, 2009 HeinOnline, available at http://docs.law.gwu.edu/stdg/gwilr/PDFs/41-3/41-3-Kasenetz.pdf , p. 722.
19 LG&E v. Argentina, Decision on Liability, 3 October 2006.

application under Art. XI"[20]. But in Sempra[21], Enron[22] and other cases this defense was rejected. For example in El Paso[23] the arbitrators rejected the defense of necessity found in Article XI of the Argentina-United States BIT. The tribunal ruled that the state of necessity under this Article cannot be invoked by a party having itself created such necessity or having substantially contributed to it. They said *"Argentina's failure to control several internal factors, in particular the fiscal deficit debt accumulation and labor market rigidity, substantially contributed to the crisis. The progressive worsening of internal factors diminished Argentina's ability to respond adequately to external shocks, unlike what happened in other South American countries".* The minority arbitrator disagreed in the El Paso case and said *"it should not be assumed that a State is responsible for an economic collapse in a liberal market economy, where the invisible hand of the market is more powerful than the hand of the State"*.

We should mention that one of the arbitrators - Albert Jan Van Den Berg - was a member of the panel in LG&E and Enron and the cases were resolved in very different ways. So in the ICSID system we have seen that one case does not set legal precedent over another. And in the case of Argentina the country may be affected by many different rulings and maybe even contradictory rulings, when the origin of the dispute is the same (the end of convertibility and the alteration of the terms of the contracts). Of course in each case a specific law will apply, but consistency is needed in the application of general rules and principles.

Conflict of interest:

There had been many cases in which a conflict of interest among the arbitrators was discovered by the countries and there is no way to recuse those arbitrators because the ICSID Conventions does not provide clear rules about this. In Aguas del Aconquija and Vivendi[24], one of the arbitrators, Gabrielle Kaufmann-Kohler, was a director of UBS, a bank which owned shares of Vivendi. Argentina argued that the tribunal had not been properly constituted but the annulment committee decided that this issue was not relevant. This is perhaps why lawyers cannot sit one day as judges in an ICSID panel, and the next day be the ones advising companies in their law firms about the same proceeding. Also, it is dangerous to have the same people writing awards that in the future could benefit their clients in similar cases[25].

ICSID´s lack of independence:

The Administrative Council is chaired by the World Bank president and his role in appointing arbitrators has been criticized for its lack of independence. On the other hand, ICSID is part of the World Bank financially and structurally and this also constitutes a conflict of interest as the World Bank takes a position in subjects like investors-State relationships. One of the purposes of the World Bank is to stimulate private international investment, as a way to promote development. ICSID responds to these goals, and it has been demonstrated that, generally, arbitrators rule in favor of the private companies and investors[26].

Length and cost of the process:

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20 Continental Casualty Company v. Argentine Republic, Award, 5 September 2008.
21Sempra Energy v. Argentine Republic, Award, 28 September 2007.
22Enron Corp. Ponderosa Asset, L.P. v. Argentine Republic, Award, 22 May 2007
23El Paso v. Argentina, Award, 31 October 2011.
24 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, Second Annulment Proceeding, 10 August 2010.
25 MANN, H., COSBEY, A., PETERSEN, L and von MOLTKE, K., "Comments on ICSID Discussion Paper, Possible Improvements of the Framework for ICSID Arbitration", IISD`s International Investment and Sustainable Development Team, 2004, available at http://www.iisd.org/pdf/2004/investment_icsid_response.pdf, p. 11.
26 GARCÍA-BOLIVAR, O., "Defining an ICSID Investment: Why Economic Development Should be the Core Element" on Investment Treaty News from the International Institute for Sustainable Development, 2012, available at http://www.iisd.org/itn/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/.

Many countries have complained about the length and cost of the process of arbitration through ICSID. This isn't helpful for low-income countries, or for small companies, as they cannot afford the expertise and cost of the process. There are different studies that show that the cost of litigation can be between 1 million and 2 million US dollars[27]. Moreover, the process is long, which questions the efficiency of arbitration and the choice of this type of proceedings instead of traditional court trials. Finally, in many cases, low-income countries are involved in disputes with firms that have many more resources and access to better lawyers for their defense.

Lack of transparency:

Article 48 of the Washington Convention says: *"the Centre shall not publish the award without the consent of the parties"*. The entire process is confidential and public information about the cases is very limited. In these kinds of proceedings, where national governments are involved, this is a serious problem as every citizen should be able to know what their country is doing. One of the basic principles of good governance is transparency, especially when billions of dollars are involved and the stability of the economy of a country could be at stake.

The definition of "investment":

Article 25 of the Convention says that *"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre"*. But the convention does not say exactly what an investment is. About this topic the Executive Directors of the World Bank have said: *"No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre*[28]*"*. This has led to the use of contradictory definitions of the term "investment" and to the extension of ICSID´s jurisdiction in some cases. In Abaclat and others[29], a collective case of Italian bondholders, the majority of the arbitrators decided to accept the case because they considered that as Article 25 does not stipulate what must be understood as an investment, the panel has the power to make their own interpretation. In a dissenting opinion, Professor Georges Abi-Saab said that following the guidelines of the Salini case[30]: a bond could not be included in the definition of investment. The arbitrators in that case considered the criteria outlined by the commentators of the Washington Convention and stated that an investment should have certain characteristics such as: a) the existence of a financial contribution, b) certain duration, and c) risk sharing. So Professor Georges Abi-Saab indicated that the lack of an explicit definition of investment in the Convention does not mean that the term is open to any definition that the countries provide in their treaties[31]. This shows that there should be a more clear definition in the convention of what falls under the jurisdiction of the Center.

Lack of appeal:

There isn't an appeal process for final arbitration decisions, so the parties are using the annulment proceeding as a way to review the cases. But there are only five reasons to ask for an annulment stipulated in the Washington Convention and their only purpose is to annul an award for the reasons given, without

27 Zabalo, P, Op. Cit., p. 270
28 Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID, paragraph 27.
29 Abaclat and others v. Argentine Republic, Decision on Jurisdiction, 4 August 2011.
30 Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan, ICISD Case No. ARB/02/13, Decision on Jurisdiction, Nov. 29, 2004.
31 Abaclat and others v. República Argentina (Case Nº ARB/07/5), Dissenting Opinion, George Abi-Saab, October 28 2011.

analyzing the arguments or substantive grounds used by the original Tribunal[32]. In the annulment procedure of Continental the arbitrators noted the limited function of an annulment committee that can only asses the legitimacy of the award rather than its correctness. They also mentioned: *"Although there is no doctrine of binding precedent in the ICSID arbitration system, the Committee considers that in the longer term the emergence of a jurispudence constante in relation to annulment proceedings may be a desirable goal*[33]*"*. And even when the parties get the annulment of the award, the committee cannot render a new one, so the process starts all over again.

Issue of enforcement:

The payment of awards is a very controversial topic, since it covers aspects of domestic law and international law. The States enjoy immunity of execution and, therefore, they can avoid, limit, or defer the execution of a judgment[34]. The Convention says that after an investor obtains an award against a State, he must initiate a formal process of enforcement, which is dependent on the domestic legislation of the country where the enforcement takes place. Article 54 of the Convention anticipates that a way of executing awards would be through the local processes considered by the State regulations that are subject to its jurisdiction. The Argentine government states that the execution of awards in favor of investors should be arranged in national courts, as it were a judgment issued by the local Judiciary power against the State[35]. Despite the opinion of many Argentine authors as Rosatti[36] and Bottini[37], who think that the award should be reviewed in local courts in order to verify its constitutionality and legitimacy before execution, the Argentine government has shown a willingness to pay, but only if the correct procedure is completed. Meanwhile investors are reluctant to present their payment request at local courts, arguing partiality and excess of costs. On this subject many authors have said that those governments who claim immunity from execution to avoid paying an award are breaching its obligations under Article 53 and 54 of the Convention[38]. However, it has long been accepted that the resignation of immunity from jurisdiction by a country, does not include the automatic resignation to the immunity of execution. This, we can conclude, is why Article 55 was included in the Washington Convention. Due to all this controversy, the award payment became a matter of State versus State, with diplomatic negotiations and sanctions. An example would be when President Obama suspended trade benefits to Argentina because of the country´s failure to pay the awards to US companies. This also includes attempts to seize the property of the Argentine government outside the country.

Sensitive topics:

There are certain issues discussed in the ICSID processes that are of vital importance to countries. The characteristics in which the system was designed (commercial or private disputes) are not the appropriate forum to discuss matters of water or energy supply or issues as public economic decisions such as negotiations of debt bonds and public welfare matters that should be decided in a more structured judicial proceeding. The interests and need of citizens to some of the most basic services such as fresh water should be placed at a higher level than the loss of profit of a particular investor.

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32 SCHREUER, Ch. "Three Generations of ICSID Annulment Proceedings", in GAILLARD, E. and BANIFATEMI, Y. *Annulment of ICSID Awards*. IAI, Series on International Arbitration, n° 1, 2004. p. 17 y ss, available at: www.univie.ac.at/intlaw/wordpress/pdf/67.pdf

33 Continental v Argentina, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011.

34 DIEZ DE VELASCO, Manuel. *Instituciones del Derecho Internacional Público*. Tecnos. Madrid. 2005. p. 314 y ss.

35 Página 12, 27-3-2012, available at http://www.pagina12.com.ar/diario/economia/2-190500-2012-03-27.html

36 ROSATTI, H. "Los Tratados bilaterales de inversión, el arbitraje internacional obligatorio y el sistema constitucional argentino". *LL 2003-E*, 1283.

37 BOTTINI, G. "El cumplimiento de los laudos del CIADI y el derecho internacional". Edit. *La Ley Suplemento Administrativo*, 01/11/2005, 1.

38 DELAUME, G. "Foreign Sovereign Immunity: Impact on Arbitration", *Arbitration. Journal*. n° 38, 1983, p. 36.

6. Suggestion for reform of ICSID and conclusions

Throughout this paper we have seen how ICSID and BITs work. The main goal of these mechanisms has been to protect private entities investing capital into developing countries, guaranteeing them rights that could be wielded in an international forum. The Argentine case has shown many aspects of this system, since the country had signed more BITs than anyone in the region and suffered the most important crisis in its history. Thus, analyzing the cases involving Argentina in ICSID we can see clearly that the system has many failures, including: lack of transparency; independence; consistency; speed; efficiency; or sufficient levels of review. It is also clear that it was ineffective for the Argentine government and the investors who are still arguing about events that took place over a decade ago.

Therefore, in response to these obvious concerns, we conclude with specific recommendations for reforming and replacing the current system of international financial judicial action. Firstly, we should mention that there has already been some action by member states to create a new arbitration forum within UNASUR, which was proposed specifically by Ecuador. It is not surprising that South American countries are the ones to be making the suggestion for a replacement of ICSID and BITs, as they have been the most severely affected by the shortcomings of these mechanisms.

Below is a list of suggestions for reform of ICSID in the response to its obvious shortcomings. Alternatively, if ICSID refuses to make changes, these suggestions could be incorporated into a new international arbitration center to replace the functioning role of ICSID. Within this a new forum, there would be vast room for improvement.

- There should be a permanent staff of arbitrators dedicated to their work. This could prevent situations of conflict of interest when arbitrators are working at the same time in companies or law firms. The arbitrators should be experts not only in investment law but also in international law. Also the list of arbitrators should be balanced geographically and in knowledge.
- Also it should be an independent organization outside from the World Bank, with direct control from its members. The appointment of the judges should be managed by all the participating States.
- The system should have an appeal process with a system of case precedent. This is intended to provide consistent jurisprudence, creating predictability for investors and states. The appeal body should give a final decision to end the controversy. The decision in one case should be relevant to decision in other cases. Predictability is fundamental for governments facing these proceedings and also for investors.
- There should be causes for recusal in the Convention to avoid situations of conflict of interest.
- Low Income Countries should have a support system to assist with appropriate legal defense, which can be costly. Also training State lawyers can help their countries arrive to settlements and defend their interests in a better way.
- Settlement should be enforced before arbitration; the parties should be encouraged to resolve any dispute by conciliation prior to arbitration, so they can settle the dispute and avoid litigation. In the Argentina cases we have seen that settlement worked in a better way for investors. The ones that chose to continue with the ICSID arbitration are still involved in annulment proceedings and even in matters of jurisdiction that have not been decided yet.
- In relation to transparency, all arbitration proceedings should be made public (this includes documents, records, evidence, hearings and awards) except for those relating to defense and security of states[39].

39 FIEZZONI, S. K., "UNASUR Arbitration Center: The Present Situation and the Principal Characteristics of Ecuador´s Proposal" in Investment Treaty News, International Institute for Sustainable Development, Nº 2, 2011-2012, available at http://www.iisd.org/itn/2012/01/12/unasur

We can conclude that there are obvious limitations to the current system of international arbitration. We can therefore suggest that we need mature legal institutions that can keep up with the increasing trade and investment around the world. The new system should take into account the crisis that countries will suffer eventually and the importance of the matters discussed in international arbitration. As UNASUR has demonstrated its interest in creating such a body, its members should support this proposal, as it will benefit each country, and could prevent situations like the ones experienced by Argentina after the 2001 crisis.

Annex 1

Closed cases:

Final awards rendered or annulment procedure finished:
1) Metalpar S.A. y Buen Aire S.A. v. Argentine Republic (Case No. ARB/03/5) ganamos
2) Wintershall Aktiengesellschaft v. Argentine Republic (Case No. ARB/04/14) ganamos
3) Azurix Corp v. Argentine Republic (Case No. ARB/03/30) lost!
4) Azurix Corp. v. Argentine Republic (Case No. ARB/01/12) lost!
5) Continental Casualty Company v. Argentine Republic (Case No. ARB/03/9) se perdió la anulación!
6) Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Case Number ARB/97/3) ???
7) Houston Industries Energy Inc. And others v. Argentine Republic (Case Number ARB/98/1) ???
8) TSA Spectrum de Argentina S.A. v. Argentine Republic (Case Number ARB/05/05) ganamos
9) CMS Gas Transmission Company v. Argentine Republic (Case Number ARB/01/8) lost!

Settlement agreed by the parties or at the request of the claimant:
1) Camuzzi International S.A. v. Argentine Republic (Case Number ARB/03/7)
2) Lanco International, Inc v. Argentine Republic (Case Number ARB/97/6)
3) Mobil Argentina S.A. v. Argentine Republic (Case Number ARB/99/1)
4) Empresa Nacional de Electricidad S.A. v. Argentine Republic (Case Number ARB/99/4)
5) Aguas cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic (Case Number ARB/03/18)
6) Compañía General de Electricidad S.A. and CGE Argentina S.A. v. Argentine Republic (Case Number ARB/05/2)
7) RGA Reinsurance Company v. Argentine Republic (Case Number ARB/04/20)
8) France Telecom S.A. v. Argentine Republic (Case Number ARB/04/18)
9) Telefónica S.A. v. Argentine Republic (Case Number ARB/03/20)
10) CIT Group Inc. v. Argentine Republic (Case Number ARB/04/9)
11) BP America Production Company and others v. Argentine Republic (Case Number ARB/04/8)
12) Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic (Case Number ARB/03/13)
13) Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. and Pioneer Natural

Resources Tierra del Fuego S.A. v. Argentine Republic (Case ARB/03/12)

14) Impregilo S.p.A. v. Argentine Republic (Case No. ARB/08/14)

15) Siemens A.G. v. Argentine Republic (Case Number ARB/02/8)

16) Asset Recovery Trust S.A. v. Argentine Republic (Case No. ARB/05/11)

Pending cases

Cases suspended pursuant to the parties' agreement

1) AES Corporation v. Argentine Republic (Case No. ARB/02/17)

2) Camuzzi International S.A. v. Argentine Republic (Case No. ARB/03/2)

3) Enersis S.A. and others v. Argentine Republic (Case No. ARB/03/21)

4) Unisys Corporation v. Argentine Republic (Case No. ARB/03/27)

5) Gas Natural SDG, S.A. v. Argentine Republic (Case No. ARB/03/10)

6) LG&E Energy Corp. LG&E Capital Corp. And LG&E International Inc v. Argentine Republic (Case No. ARB/02/1)

7) Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic (Case No. ARB/03/22)

8)Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic (Case No. ARB/01/3)

Pending cases still waiting for award or annulment decision:

1) El Paso Energy International Company v. Argentine Republic (Case No. ARB/03/15)

2) Total S.A. v. Argentine Republic (Case No. ARB/04/1)

3) Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic (Case No. ARB/03/17)

4) Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic (Case No. ARB/03/19)

5) Abaclat and others v. Argentine Republic (Case No. ARB/07/5)

6) Giovanni Alemanni and others v. Argentine Republic (Case No. ARB/07/8)

7) Ambiente Ufficio S.p.A. and others v. Argentine Republic (Case No. ARB/08/9)

8) Impregilo S.p.A. v. Argentine Republic (Case No. ARB/07/17)

9) EDF International S.A., S.A.UR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic (Case No. ARB/03/23)

10) Sempra Energy International v. Argentine Republic (Case No. ARB/02/16)

11) Hochtief Aktiengesellschaft v. Argentine Republic (Case No. ARB/07/31

12) Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic (Case No. ARB/04/16)

13) Saur International v. Argentine Republic (Case No. ARB/04/4) 14) Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic (Case No. ARB/07/26) 15) Daimler Financial Services AG v. Argentine Republic (Case No. ARB/05/1)
16) Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic (Case N° ARB/12/38) 16)Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic (Case No. ARB/09/1)