

Should We All Get Accustomed to It? The Ecuadorian Experience and Position Concerning Foreign Investment Protection Under International Law¹

Daniel Gallegos Herrera
Melbourne Law School

Abstract

The article takes on the issue of how the mainstream legal discourse on investment protection can highlight certain elements of reality and obscure others. Specifically, the article puts into question the hegemonic assertion that customary international law has emerged from a general state practice, consistent on the signature and ratification of international investment agreements. Unlike those who hold that the said practice is the result of *opinio juris*, or a strategic economic choice, the author uses the Ecuadorian example to attempt a third explanation: Such practice responds to economic necessity, not always related to the perceived direct benefits of the particular agreements. Furthermore, the article holds that there are signs that show a recent shift in the general state practice.

Resumen

El artículo se refiere a cómo el discurso mayoritario relacionado con la protección de inversiones puede resaltar ciertos elementos de la realidad y opacar otros. En específico, el artículo cuestiona que se convenga en la formación de derecho internacional consuetudinario a partir de una práctica generalizada, consistente en la suscripción y ratificación de acuerdos internacionales de protección de inversiones. A diferencia de quienes sostienen que la mencionada práctica responde a un *opinio iuris*, o que se basa en una decisión económica estratégica, el autor usa el ejemplo de Ecuador para presentar una tercera explicación: la práctica se debe a la necesidad económica, no necesariamente ligada a los posibles beneficios de este tipo de acuerdos. El artículo avanza en señalar que existen indicios de un reciente giro en la actual práctica estatal.

Keywords

Ecuador / International Customary Law / Foreign Investment / Foreign Debt / Bretton Woods Institutions / Dependency.

¹ Artículo recibido el 16 de febrero y aceptado el 11 de junio de 2016.

Palabras clave: Ecuador / Costumbre internacional / Inversión extranjera / Deuda externa / Organismos multilaterales de crédito / Dependencia.

Sumario 1. Introduction 2. Degrees of protection to foreign investment under international law / session of sovereignty from the host state 2.1. Foreign Investment Protection as a Matter of Domestic Law 2.2. First Attempts to Internationalize Foreign Investment Protection 2.3. The “Hull Formula” 2.4. The Resolutions on Permanent Sovereignty over Natural Resources (PSNR) and the New International Economic Order (NIEO) 2.5. International Protection Under IIAs 3. Voices for and against protection of foreign investment as customary international law 3.1. Customary International Law 3.2. Customary International Law and Investment Protection 3.2.1. Those Defending the Formation of Customary International Law 3.2.2. Critiques to the Position 3.2.3. Those Challenging the Formation of Customary International Law 3.2.4. Critique to the position 3.2.5. A Third Position 4. The Ecuadorian position 4.1. The First Ecuadorian BITs 4.2. Oil, Debt and Crisis 4.3. Ecuador “Changes Its View” Towards Foreign Investment 4.4. The Ecuadorian BIT Rush 4.5. The Last Shift: Repudiation of IIAs 5. Conclusion

1. Introduction²

In a document called “Transatlantic Trade and Investment Partnership [TTIP] –The Economic Analysis Explained”– the European Commission responds the question “[w]hy do other countries gain from an agreement between the EU and the US?”:³

[T]he model [...] accounts for the possibility of an indirect spill-over effect of TTIP on other countries. That is because the large economic size of the EU and the US means that partner countries will themselves have an incentive to move towards any new transatlantic standards that the TTIP creates.⁴

Later on, when asked if the Centre overestimated or underestimated the gains from the TTIP, the Commission answered:

We can safely say that these are not overestimates. On the contrary, they are closer to a low bound estimation of the true benefits of the agreement. [...] [T]he CGE models [...] underestimate the potential gains from the liberalization of services. [...] Services business that depends on foreign direct investment [...] is largely outside the scope of the CGE analysis presented in this study.⁵

² All translations from Spanish to English are by the author, except where otherwise indicated.

³ European Commission, “Transatlantic Trade and Investment Partnership – The Economic Analysis Explained”, September 2013, http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf#world, (accessed: 13-06-2016), pp. 10-11.

⁴ *Ibidem*

⁵ *Ibidem*, p. 14.

Like the optimistic picture that the European Commission presents, the mainstream versions of the history that led the international community to the present state of the law rarely take into account other perspectives than the one that investment-protection legal discourse provides.⁶ The rationale behind the discourse presents a relationship of disadvantage between the foreign investor and the host state, given the risks' for the former, and the possible abuses of the latter.⁷ The relationship is conceived in abstract terms, always presenting a powerful state, forcing no-so-powerful investors to pay for the development of its nationals through their policies.⁸ It is also premised on the complete identification between the interests of home states and those of the firms based on their territories.⁹

The present document seeks to present a particular discussion within the broader topic of foreign investment protection; that is, the debate about the formation of customary international law governing the topic, due to the spread of bilateral investment treaties (BITs), and Free Trade Agreements with investment protection chapters (FTAs), both known as "international investment agreements" (IIAs). I have identified two mainstream positions concerning this phenomenon. The first one holds that the trend shows that host (developing, capital-importing) countries now recognize the existence of an obligation under Customary international law, which would be applicable to states regardless of whether they have signed a treaty or not.¹⁰ The second position argues that the main reason for such trend is the result of the host state's economic choice or "strategy" in a competitive setting, and not a sense of legal obligation that would constitute *opinio juris*.¹¹

6 See: Lowenfeld, Andreas, *International Economic Law*, Oxford University Press, 2nd ed, New York, 2008, pp. 467-494; See: also Woods, Ngairé, "Bretton Woods Institutions" in Thomas Weiss and Sam Daws (eds), *The Oxford Handbook of the United Nations*, Oxford University Press, Oxford, 2007, pp. 233-253; See: also Guzman, Andrew T., "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) *Virginia Journal of International Law* N.º 38, Charlottesville, pp. 639-688; See: also Koskenniemi, Martti, "The Politics of International Law—20 Years Later" in *The Politics of International Law*, Hart Publishing, Oxford, 2011 63, 65. explains this in terms of the structure of the international legal discourse: "[A]lthough all the official justifications of decision-making are such that they may support contrary positions or outcomes, in practice nothing is ever that random. [...] The world of legal practice is being sliced up in institutional projects that cater for special audiences with special interests and special ethos. The point of creating such specialized institutions is precisely to affect the outcomes that are being produced in the international world. [...] This is why much about the search for political direction today takes the form of jurisdictional conflict, struggle between expert vocabularies, each equipped with a specific bias.

7 See: Guzman, "Why LDCs", pp. 661-663.

8 *Ibidem*

9 See: generally: Eicher, Theo et. Al., *International Economics*, Routledge, 7th ed, London, 2009, p. 14. The chapter on international trade begins with this phrase: "Nations (more accurately, individuals and firms in different nations) trade with each other because they benefit from it".

10 See: Mann, F. A. "British Treaties for the Promotion and Protection of Investment", *British Yearbook of International Law*, No. 52, 1981, p 249.

11 See: Guzman, Andrew, "Why LDCs", pp. 684-687; See: also Elkins, Zachary et. al. "Competing for Capital: The Diffusion of Bilateral Investment Treaties 1960-2000", *International Organization* No. 60, 2006, pp. 811-846.

This paper pretends to use the Ecuadorian experience with international norms dealing with the protection of foreign investment to advance a third explanation, which challenges the first position, and partially questions the reasons to hold the second. I will argue that those accounts find their footing in a formalist and ahistorical conception of the international order. This conception unduly regards states as totally unconstrained and free to take any course of action, regardless of their domestic economic situation and their political leverage in the global setting. According to the argument this document defends, developing countries entered into investment protection treaties, not because they felt legally bound to do so, neither only as a matter of strategic economic choice; but also due to economic necessity, not always related to the perceived direct benefits of the particular agreements. Furthermore, there are examples that demonstrate that the practice –already inconsistent and difficult to determine– has started to shift in recent years.

In order to advance such argument, this document will go through the following structure. In section II I will present the different degrees of protection provided by international law to foreign investment, in order to have a fair image of the burden they represent. In section III, I will present and criticise the different positions relating to the formation of customary international law, due to the diffusion of IIAs. In section IV, I will illustrate the argument with the Ecuadorian case, starting from the signature of its first IIA until the present time. Finally, I will advance a conclusion.

2. Degrees of protection to foreign investment under international law / session of sovereignty from the host state

The protection to foreign investments and investors allegedly provided by international law has been one of the most debated topics during the twentieth century, and it is still quite controversial today.¹² In the present subsection, I will make a description of the different degrees of protection, following a chronological order of their appearance, and highlighting their respective place in a spectrum, from the less to the more protective ones.

But first, we shall make a cautionary comment on the term “investment protection”. The term can be misleading, since in practical terms, it refers to “protection” in the international sphere. Thus a decreased level of protection under international law does not necessarily mean a reduction in the domestic standard of protection to private investment. In other words, what we call the “degree of protection under inter-

¹² For an account of the history of investment protection from the perspective of International Economic Law, See: Lowenfeld, Andreas, *International*, 467-494; and for the perspective of international law and development, See: Pahuja, Sundhya, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality*, Cambridge University Press, Cambridge, 2011, pp. 95-171.

national” is equivalent to the degree of invasion in the realm of sovereignty of host states.¹³ In other words, each degree of protection entails “sovereignty costs”, ranging from political costs, renouncement to certain policies, and delegation of adjudicative authority.¹⁴ Having that in mind, we may start with the description.

2.1. Foreign Investment Protection as a Matter of Domestic Law

On one extreme of the spectrum, there are the positions that do not recognize protection of investors as a matter of international law. That was the state of the law before 1917, since the prevailing custom was use the domestic legislation of the host state to solve those problems.¹⁵ According to Lowenfeld, that situation was viable due to a general recognition of the equality of treatment, the right to private property, and the duty to compensate.¹⁶ This was –and to some extent it still is– the prevalent situation amongst what we now call “developed” states during times of peace. Yet, there is another side of the story when it came to non-European countries, which could indicate, not the existence of customary law, but the use of diplomacy and warfare – often called “gunboat diplomacy”– to protect investments.¹⁷ There were also bilateral treaties of “Friendship, Commerce and Navigation” that the United States celebrated up until the 1980s, but they were isolated and were not considered a part of a general practice.¹⁸

After the Great War, a series of events challenged the “universality” of the recognition of private propriety. The events were the Russian and the Mexican revolutions, in 1917.¹⁹ In the case of Russia, the government abolished private propriety altogether, without compensation.²⁰ Mexico, instead, recognized in its constitution the original national ownership of lands and materials within its boundaries; the right of the state to transmit ownership, thus creating private property; and the possibility to expropriate for public utility, with compensation, as an expression of the social function of

13 Pahuja, describes the strategy of the Third World in constructing the concept of “Permanent Sovereignty over Natural Resources”, and the trade-off that the West made by extracting the rule to compensate in cases of expropriation from the national realm under the label of “existing obligations arising under international law”. *Ibidem*, pp. 135-159.

14 See: Elkins, Zachary et. al. “Competing for capital”, p. 825.

15 See: Lowenfeld, Andreas, *International*, pp. 469-470.

16 *Ibidem*

17 See: Kishoiyan, Bernard, “The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law”, *Northwestern Journal of International Law & Business*, No. 14, vol. 2, Chicago, 1994, p. 329. See: also Meltzer, Joshua, “Investment” in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis*, Cambridge University Press, Cambridge, 2009, p. 216.

18 See: Meltzer, Joshua, “Investment”, p. 216; See: also Elkins, et. Al, “Competing for Capital”, pp. 814, 5.

19 See: Lowenfeld, Andreas, *International*, pp. 470-473.

20 *Ibidem*, pp. 470-471.

propriety.²¹ The rest of Latin America adopted the Mexican vision during the years to follow.²² The “Calvo doctrine”, or “Calvo clause” (i.e., “[...] foreign investors were only entitled to the level of protection afforded to nationals [...] the obligations regarding expropriation were to be determined by reference to the host States’ domestic laws [...] [and] a foreign investor [...] could litigate a claim against the host State using the domestic court system”),²³ and the theory of “unequal treaties” (i.e., “[...] any treaty negotiated under duress [...] were void ab initio”) informed this position.²⁴

Although both the schemes are totally different, they coincide in considering the matters relating to the property of aliens as issues to be dealt with in the domestic setting. In fact, one could safely say that the reason why developed states pushed for internationalization of the matter was precisely because under this scheme, a host state could hold any of those positions as a matter of sovereign decision.

1.2. First Attempts to Internationalize Foreign Investment Protection

The West reacted in first instance by way of awards and judgments, recognizing “international responsibility”,²⁵ to provide “just compensation”,²⁶ which entails a “[...] reparation [that] must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.²⁷ Those awards represented a first introduction of the matter in the realm of international law.

Particularly the Chorzów Factory case introduced a high standard of protection; but the scope was relatively narrow if compared with the next examples, since it only extracted the issue of the amount of compensation in cases of expropriation from the sovereign sphere of the host state’s jurisdiction.

21 See: *Constitución Política de los Estados Unidos Mexicanos que Reforma la de 5 de Febrero del 1857* [Political Constitution of the United Mexican States, Amending the One of February 5, 1857], Mexico, 5 February 1917, Official Diary 30, art 27; See: also Lowenfeld, Andreas, *International*, pp. 471-473.

22 See: Lowenfeld, Andreas, *International*, pp. 471-473; See: also Pahuja, Sundhya, *Decolonizing International Law* pp. 106.

23 Meltzer, Joshua, “Investment”, p. 216; See: also Lowenfeld, Andreas, *International*, pp. 471-473; See: also Pahuja, Sundhya, *Decolonizing International Law*, p. 106.

24 See: Pahuja, Sundhya, *Decolonizing International Law*, p. 106.

25 *DeSabra Claim (United States v Panama)*, 1933, *Annual Digest and Reports of Public International Law Cases* 1933-4, p. 243, quoted in Lowenfeld, Andreas, *International*, p. 474.

26 *Norwegian Shipowners’ Claims (Norway v United States)*, 1922, Reports of International Arbitral Awards No. 1, p. 337; See: also Lowenfeld, Andreas, *International*, p. 474.

27 *Factory at Chorzów (Germany v Poland) (Claim for Indemnity) (Merits)*, PCIJ Series A No 17, [124]; See: also Lowenfeld, Andreas, *International*, pp. 474-475.

2.3. The “Hull Formula”

Going further in history, we encounter Cordell Hull’s statement, later known as the “Hull doctrine”, or the “Hull formula”. Mr. Hull presented the doctrine as the North American position in a diplomatic exchange concerning some large expropriations that the Mexican government made following its revolution.²⁸ The following paragraph summarizes Hull’s opinion:

The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private propriety, for whatever purpose, without provision for prompt, adequate, and effective payment thereof. In addition, clauses appearing in the constitutions of almost all nations today, and in particular of the constitution of the American republics, embody the principle of just compensation. These, in themselves, are declaratory in the like principle of the law of nations.²⁹

The preceding text is important, not only because it encapsulates the persistent position of the United States in matters related to compensation following expropriation until the present day.³⁰ It also reflects the high standard of protection the United States demand, not only in terms of amount, but also of time and manner of the compensation. Moreover, it shows the intention of the United States to build the foundations to sustain its claim as a “self-evident fact”. Furthermore, it expresses Hull’s intent to equate the meaning of the term “just compensation”, present in domestic constitutions and in international awards such as the one in Norwegian Shipowners, to his “prompt, adequate and effective” standard.³¹ However, in the same sense as the judgments cited above, the doctrine was constrained to compensation following expropriation, thus being relatively narrow in scope.

²⁸ See: 4, Andreas, *International* pp. 475-81; See: also Guzman, Andrew T., “Why LDCs Sign”, p. 645.

²⁹ Letter from US Secretary of State to Mexican Ambassador, 22 August 1938, in Green H. Hackworth, *Digest of International Law*, United States Department of State, vol. 3, Washington DC, 1942, pp. 655-661, quoted in Lowenfeld, Andreas, *International*, p. 478.

³⁰ See: Lowenfeld, Andreas, *International*, p. 476; See: also, Pahuja, Sundhya, *Decolonizing International Law*, p. 107-108.

³¹ Cfr, Guzman, Andrew, “Why LDCs sign”. p. 644. The author states that “[e]arly in [the twentieth] century, the world’s principal nations shared the view that investors were entitled to have their propriety protected by international law and the taking of alien’s propriety by a host nation required compensation that was ‘prompt and adequate’”. However, the judgment in the *Chorzow Factory* case do not expressly mention that standard.

2.4 The Resolutions on Permanent Sovereignty over Natural Resources (PSNR) and the New International Economic Order (NIEO)

The North American position collided directly with Latin America's Calvo doctrine, and the Soviet conception of propriety.³² The disagreement continued during the next years, preventing a multilateral agreement on the topic, and producing ambiguous texts, both in the Habana Charter, and the UN General Assembly resolutions on PSNR.³³ However, as Lowenfeld notes, resolution 1803, approved in 1962, sought to constitute evidence of customary international law, and established consensus about four principles; namely, that compensation must follow expropriation of alien propriety; that compensation is a matter of international law; that investment agreements between states and investors are binding; and, that arbitration agreements between states and investors are binding too.³⁴

The situation shifted after the wave of decolonization, when the number of developing states increased dramatically, levelling the scales in the UN General Assembly in favour of the Southern thesis.³⁵ The new majority pushed for three new resolutions (2158, adopted on 1966; 3171, adopted in 1973; and 3201, adopted in 1974).³⁶ In all of them, the main purpose was to push the evidence of customary international law back to the position where the regulation of alien propriety was a matter of domestic law.³⁷

The final blow in that direction was the Charter of Economic Rights and Duties of States (CERDS), where the Calvo doctrine was essentially restated.³⁸ The states of the North either voted against or abstained to vote.³⁹ Their position was to refuse the idea of a shift in customary international law.⁴⁰

1.5. International Protection Under IIAs

Finally, we have the degree of protection provided by the IIAs. Those treaties started as a German initiative at the time of reconstruction after World War II.⁴¹ After a few

32 See: Guzman, Andrew, "Why LDCs sign". p. 647.

33 See: Lowenfeld, Andreas, *International*, pp. 481-489; See: also Pahuja, Sundhya, *Decolonizing International Law*, pp. 107-108; See: also Guzman, Andrew, "Why LDCs sign". pp. 647; See: also Gerard Loibl, "International Economic Law" in Michael Evans (ed), *International Law*, Oxford University Press, 2nd ed., Oxford, 2006, p. 709.

34 See: Lowenfeld, Andreas, *International*, p. 489; See: also Pahuja, Sundhya, *Decolonizing International Law*, pp. 107-108.

35 See: Pahuja, Sundhya, *Decolonizing International Law*, pp. 108-9; See: also Guzman, Andrew, "Why LDCs sign". pp. 646-648.

36 See: Lowenfeld, Andreas, *International*, pp. 481-492; See: also Guzman, Andrew, "Why LDCs sign". pp. 648-650.

37 *Ibidem*

38 See: Lowenfeld, Andreas, *International*, pp. 491-492; See: also Guzman, Andrew, "Why LDCs sign". pp. 648-650.

39 *Ibidem*

40 *Ibidem*

41 See: Lowenfeld, Andreas, *International*, p. 554; See: also Meltzer, Joshua, "Investment", p. 218.

years, most Western European Countries entered into BITs with developing states.⁴² On the other hand, the United States (US) did not start its BIT program up until 1981, mainly because their representation maintained that customary international law already provided for protection in the form of the Hull formula.⁴³ Even after initiating the program, the North American position was always that IIAs did nothing but codify the existing customary international law.⁴⁴

According to the United Nations Conference on Trade and Development (UNCTAD), “[b]y April 2015, the [international investment agreement] IIA regime had grown almost to 3,300 treaties”.⁴⁵ Although the trend has changed slightly in recent times, the generality of parties entering into this kind of agreement have been, on the one hand, a developed, capital-exporting country; and on the other, a developing country.⁴⁶ In the end of the 1990s, developing states started to enter into BITs among them, Coordinated by the UNCTAD, and assisted by a capital-exporting country.⁴⁷ We should also consider the growing trend of FTA ratification, following the stalemate in the WTO Doha round.⁴⁸ FTAs –most saliently, NAFTA– have permitted a more frequent application of foreign investment protection provisions to developed countries as host states.⁴⁹

The content of those treaties varies, mostly depending on the time when they were negotiated, and the model a capital-exporting country prefers.⁵⁰ However, most of them have similar provisions, and differ mostly in the degrees of protection provided in each of those categories. The most common provisions in those treaties are the ones related to the definition of an investment and an investor, the admission of the investment to the country, the standards of national treatment (i.e., the obligation to treat foreign investors at least equally to nationals); most-favoured-nation treatment (i.e. the obligation to treat investors of the party at least equally to other foreign investors); fair and equitable treatment (i.e., a minimum degree of access to judicial and administrative organs, without discrimination); full protection and security (i.e., phy-

42 *Ibidem*

43 See: Elkins, Zachary, et. Al, “Competing for Capital”, pp. 814-815.

44 See: Committee on Foreign Relations, US, *Treaty With the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments*, 1993, p. 2.

45 United Nations Conference on Trade and Development, “Reforming International Investment Regime: An Action Menu” in *World Investment Report*, 2015, p. 124.

46 Elkins, Zachary et. Al., “Competing for Capital”, pp. 814-818.

47 *Ibidem*

48 Meltzer, Joshua, “Investment”, p. 220.

49 *Ibidem*

50 Elkins, Zachary et. Al., p. 817. According to the authors, “[b]y the late 1980s, most analysts would agree that governments in countries home to large multinational corporations (MNCs) had nearly converged in a single treaty model. Developing countries could, opt to take it or leave it”.

sical protection of investors' private propriety from threats or attacks); protection against unlawful expropriation (i.e., not for the public purpose, discriminatory, without due process, and/or without compensation); compensation following expropriation; and those related to dispute settlement, normally entrusted to an international arbitral tribunal with power to call for compensation and damages.⁵¹

While the degree of protection that IIAs provide differs between treaties, it is certainly greater than every one of the prior schemes in many respects. First, the mere existence of an international treaty dismisses all doubt concerning the international character and the content of obligations.⁵² Moreover, the protection goes well beyond the particular issue of lawful expropriation, and compensation following it. Likewise, the commitments seriously limit the state capability to design and implement its policies effectively in the public interest. Also, the host state renounces –sometimes partially, sometimes totally– to the possibility to adjudicate in case of disputes with an investor.⁵³ This is even more taxing if we consider that under the IIA regime, investors are the only ones who can bring claims to the arbitral tribunals; and they can do it directly, without the need to be sponsored by their home state.⁵⁴ Besides, the agreement does not guarantee the investment; and, since investors are not the ones entering into the agreement, they do not acquire any obligation towards the home state.⁵⁵

Arguably the function of the arbitral system of dispute settlement has worked also in favour of expanding the content of IIAs provisions, sometimes in detriment of the regulatory capacity of the state to achieve legitimate purposes. A relevant example of the prior assertion is the standard of fair and equitable treatment. According to Katia Yannaca-Small,

[the standard] has been increasingly used as an alternative and more flexible way to provide protection for investors in cases where the test for indirect expropriation is too difficult to achieve, since the threshold is quite high. It has therefore become a preferred way for tribunals to provide a remedy.⁵⁶

51 See: Meltzer, Joshua, "Investment", p. 220-71; See: also Lowenfeld, Andreas, *International*, pp. 555-577; See: also United Nations Conference on Trade and Development, *Latest Developments in Investor-State Dispute Settlement*, IIA Monitor No. 1, 2009, p. 4-10. The definitions shown above are merely referential, because they highly depend on the wording of the treaty, and the opinion of any given tribunal adjudicating a dispute.

52 Elkins, Zachary et. Al., "Competing for capital", p. 824.

53 *Ibidem*

54 *Ibidem*

55 UNCTAD, "Reforming International", p. 130.

56 Katya Yannaca-Small, "Fair and Equitable Treatment Standard" in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, Oxford, 2010, p. 385.

Arbitral tribunals have provided several interpretations of the standard, linked in some treaties to “international law”, and in some others to “customary international law”.⁵⁷ This has bolstered a sense of uncertainty in the interpretation of the treaties. UNCTAD states the problem in the following terms:

There is a great deal of uncertainty concerning the precise meaning of the concept of [fair and equitable treatment] FET, because the notions of “fairness” and “equity” do not connote a clear set of legal prescriptions and are open to subjective interpretations. Moreover, the relationship between FET and principles of customary law [...] has raised significant issues of interpretation, especially where the IIA text contains no express link between FET and customary international law. As a result, the task of determining the meaning of the FET standard has been effectively left to ad hoc arbitral tribunals.⁵⁸

Now, we can witness other elements that put the scales in favor of foreign investors, if we go beyond the veil of reciprocity and sovereign equality that covers the mainstream discourse about investment protection. For example, although in recent years investors have brought up more claims against developed states,⁵⁹ the numbers still reflect an asymmetry in terms of litigation. From 608 known cases solved by dispute-settlement mechanisms under IIAs, in 80% of the cases the claimant was an investor based in a developed country, and 60% of the respondents were developing states.⁶⁰ A crucial element to consider is that investment disputes tend to rise in numbers whenever a country faces an economic crisis. The most known example is Argentina, holding the record of 56 claims raised against it.⁶¹ Most of the claims against Argentina were issued as a result of the measures taken during the massive economic crisis in the late 1990s and early 2000s.⁶² Another example, currently provoking much attention from the countries in the global North is Spain.⁶³ In 2013, five claims were raised against Spain; and six in 2012.⁶⁴ They relate to a seven percent tax on revenues, and a reduction of subsidies in the renewable energy sector; measures taken to cope the budget deficit in 2012.⁶⁵

⁵⁷ *Ibidem*, pp. 386-93.

⁵⁸ See: UNCTAD, “Reforming International”, p. 137.

⁵⁹ See: United Nations Conference on Trade and Development, *Investor-State Dispute Settlement: Review of Developments in 2014*, IIA Issues, Note No 2, May 2015, p. 1.

⁶⁰ See: UNCTAD, “Reforming International”, p. 146.

⁶¹ See: UNCTAD, “Investor-State”, p. 3; See: generally, Joseph Stiglitz, “Dealing with Debt: How to Reform the Global Financial System” *Harvard International Review* No. 25, Cambridge, 2003, p. 54.

⁶² See: Dough Jones, “Investor-State Arbitration in Times of Crisis”, *National Law School of India Review* No. 25, vol. 1, Bangalore, 2013, p. 30.

⁶³ See: UNCTAD, “Investor-State”, 2.

⁶⁴ *Ibidem*

⁶⁵ *Ibidem*

Another illustration of the constraints that the IIA protection impose to host countries is the amount of damages. The average amount of damages claimed for in a single case is US\$1.1 billion,⁶⁶ and the amount awarded is US\$575 million –interests not included–.⁶⁷ While this may not seem so taxing for a developed country; that amount has the capability to seriously stall the economic capacity of a developing country.⁶⁸ Ecuador is a good example of this assertion. Nowadays Ecuador is the sixth state with most known claims issued as of 2014 (22).⁶⁹ However, this number may not be completely accurate, since UNCTAD only reports known cases (i.e., those not protected by a confidentiality clause). According to the Ecuadorian Government, there were 34 cases raised up to mid-2013, most having an oil company as the claimant.⁷⁰ The most known case in which Ecuador was a respondent is *Occidental v Ecuador*.⁷¹ *Occidental* is the case with the second highest amount ever awarded, recently displaced by *Yukos v Russia*.⁷² The tribunal awarded a total amount of damages of US\$1 769 625 000 plus interests.⁷³ That amount represent 2.02% of the Ecuadorian GDP,⁷⁴ 42.74% of the total projected expenditure in education, 99.65% of expenditure in health, or 151.25% of the expenditure in social welfare at the year the tribunal issued the award.⁷⁵

3. Voices for and against protection of foreign investment as customary international law

If taken as a historical account, the description made in the previous section of this document has a missing piece. It is not clear why states from the global South made

⁶⁶ *Ibidem*

⁶⁷ *Ibidem*

⁶⁸ See: “Ecuador Mantiene 34 Casos Pendientes Relacionados al Arbitraje Internacional, Confirma Subsecretario de Planificación y Desarrollo (AUDIO)” [Ecuador Has 34 Pending Cases Related to International Arbitration, Confirms Sub-Secretary of Planning and Development (AUDIO)] *Ecuador Inmediato* (online) 30 August 2015 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=203967&umt=ecuador_mantiene_34_casos_pendientes_relacionados_al_arbitraje_internacional_confirma_subsecretario_planificacion_y_desarrollo_audio> (accessed: 13-06-2016).

⁶⁹ See: UNCTAD, “Investor-State”, p. 3.

⁷⁰ See: “Ecuador Mantiene 34 Casos Pendientes Relacionados al Arbitraje Internacional, Confirma Subsecretario de Planificación y Desarrollo (AUDIO)”.

⁷¹ See: ICSID Arbitral Tribunal, *Occidental Petroleum Corporation v The Republic of Ecuador (Award)*, case No ARB/06/11, 5 October 2012; See: also, Procuraduría General del Estado, *Oxy Case: The Defense of a Sovereign and Legal Decision of the Ecuadorian State*, Procuraduría General del Estado, 2014, available at <http://104.130.171.14/images/stories/boletines/librocasooxy_20141021/oxy_case_book/libro_oxy_translation_low.pdf> (accessed: 13-06-2016).

⁷² PCA Arbitral Tribunal, *Yukos Universal Ltd v The Russian Federation (Award)*, Case No AA 227, 18 July 2014.

⁷³ *Occidental v Ecuador*, [2015].

⁷⁴ The World Bank, GDP (*Current US\$*) The World Bank, 2015 <<http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>> (accessed: 13-06-2016).

⁷⁵ See: Ministerio de Finanzas del Ecuador [Finance Ministry of Ecuador], *Presupuesto General del Estado Consolidado por Sectorial Gastos (US Dólares)* [State General Budget Consolidated by Sectorial Expenditure (US Dollars)] Ministerio de Finanzas del Ecuador. 2012 <<http://www.finanzas.gob.ec/wp-content/uploads/downloads/2014/06/10.SECTORIAL.pdf>> (accessed: 13-06-2016).

such a drastic turn from a multilateral rejection to a unilateral eagerness to accept international protection of foreign investment. During the period between early 1990s and 2007, the world experienced this major shift.⁷⁶ A growing number of states started to enter into BITs, “[...] so that by the mid-2000s hardly any country did not have at least a few BITs”.⁷⁷ Although the “IIA rush” started to slow down, partly because of the global economic crisis; IIAs are undoubtedly the biggest international legal net nowadays.⁷⁸ Even before it had reached its peak, this phenomenon prompted scholars to discuss whether the shift in state practice could amount to the formation of legal rules and principles, binding to states regardless of the existence of a treaty.⁷⁹

In this section, I will discuss the main positions concerning the particular matter. First, though, it is necessary to spend a few lines in the conception of that source of law in particular.

3.1 Customary International Law

Article 38(b) of the Statute of the International Court of Justice recognizes “international custom, as evidence of a general practice accepted as law”.⁸⁰ The International Court of Justice pointed out that to consider certain practice as customary international law, there must be an objective element – “[...] settled [state] practice” –, and a subjective one – “[...] evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it”.⁸¹

In order to determine the existence of customary international law, there is first the need to give evidence of state practice, to then evaluate whether there is *opinio juris*.⁸² The evidence may have several manifestations, such as “government statements in the domestic framework [...] or in an international framework”.⁸³ Other evidences

⁷⁶ See: UNCTAD, “Reforming International”, pp. 123-4.

⁷⁷ *Ibidem*, p. 123.

⁷⁸ *Ibidem*, p. 124.

⁷⁹ See: Lowenfeld, Andreas, *International*, pp. 584-586; See: also Guzman, Andrew T., “Why LDCs Sign; See: also Kishoiyian, Bernard, “The Utility of Bilateral”; See: also Katya Yannaca-Small, “Foreword”, in Yannaca-Small, Katya (ed) “Fair and Equitable”, p. v.

⁸⁰ *Statute of the International Court of Justice* art. 38(b).

⁸¹ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Merits)* ICJ Rep 6, 1969, pp. 44-5 [77].

⁸² See: Tulio Treves, “Customary International Law” in Oxford Public International Law, *Max Planck Encyclopaedia of Public International Law* (November 2006) <<http://opil.ouplaw.com.ezp.lib.unimelb.edu.au/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?rskey=I6BPfc&result=1&prd=EPIL>> [7]-[11] (accessed: 13-06-2016); See: also Koskenniemi, Martti, “Between Apology and Utopia”, pp. 55-8. Although this twofold structure of the concept “customary international law” does not go without challenge, we will accept it for the moment, in order to advance the argument in the same playfield as the two mainstream positions.

⁸³ *Ibidem*, p. 26.

may be “material behaviours such as [...] economic measures [...]”.⁸⁴ As we can witness, those categories are very broad, encompassing a big list of possible elements to take into consideration. Also, the conclusion will depend on the weight that the decision maker gives to each one of them in a given case. Another relevant consideration for our purposes is the “generality” of the practice. According to Tulio Treves, “[t]he practice relevant for establishing the existence of a customary international rule must neither necessarily include all States nor must it be completely uniform”.⁸⁵ The criterion set by the ICJ is that the practice “[...] of States whose interests are specially affected, should [be] both extensive and virtually uniform”.⁸⁶

Treves makes a particular mention regarding foreign investment protection:

[R]ules on economic relations, such as those on foreign investment, require practice of the main investor States as well as that of the main States in which investment is made. The mention of the “specially affected” States is often seen as alluding also to the most important States.⁸⁷

Now, Treves’s description also recognizes that the “most important state” criterion is contested. He argues: “Whether the practice of the most important States may alone, notwithstanding opposition, be sufficient to justify the formation of a customary rule is highly controversial”.⁸⁸

3.2. Customary International Law and Investment Protection

Scholars adopt two mainstream positions when discussing about the alleged establishment of customary law governing the matter. On the one hand, there are the ones who believe the spread of IIAs is an indication that states had recognized their legal obligations, thus creating customary international law. On the other hand, there are the ones who challenge the first position, because in their opinion, the trend can be explained as a matter of economic choice or strategy. In this section, I will present and criticise both positions, as well as articulate a third explanation.

3.2.1. Those Defending the Formation of Customary International Law

In 1981, several years before the big global diffusion of BITs, F. A. Mann defended the idea that the apparently contradictory behaviour of developing states –fiercely op-

⁸⁴ *Ibidem*, p. 27.

⁸⁵ *Ibidem*, p. 35.

⁸⁶ *North Sea Continental Shelf Cases*, pp. 43-4, [74].

⁸⁷ Treves, Tulio, “Customary International Law”, p. 81.

⁸⁸ *Ibidem*

posing in the 1960s and 1970s, and entering into bilateral agreements later— was an indication of a “change of view” about their international obligations.⁸⁹ In his most famous quote, he stated: Is it possible for a state to reject the rule according to which alien propriety may be expropriated only on certain terms long believed to be required by customary international law, yet to accept it for the purpose of these treaties?⁹⁰

Mann’s position rested on a construction of the duty of states to act in good faith, and the role of BITs in help investors present a stronger case when states deny the existence of “a duty which customary law imposes or is widely believed to impose”.⁹¹ In other words, Mann stated that the role of BITs is to codify customary international rules, to prevent host states from denying its existence in the event of a conflict with the investor.⁹²

As we have seen before in this document, this has been the North American position since Cornell Hull’s statement.⁹³ For example, the US Senate Committee on Foreign Relations submitted a report prior the ratification of the BIT between the US and Ecuador. In the report, the Committee described the general objective of the BIT as “[...] to [...] codify rules on investment and dispute settlement, which the [US] views as well established international law and precedent”.⁹⁴

Lowenfeld defends the position in more moderate terms. He recognizes that “[a]t minimum, the [CERDS] was a concerted effort by the developing countries to repudiate a system of law in whose creation they had played little or no part”;⁹⁵ However, he also argues that there is a distinction between “common principles”, and “particular provisions” of a given BIT.⁹⁶ Thus, he articulates what he believes is the minimum content of customary international law governing the matter —which we can identify with the content of resolution 1803—:

[...] the understanding that international law is applicable to the relation between host states and foreign investors, that expropriation must be for public purpose and must be accompanied by just compensation, and the disputes between foreign investors and host states should be subjected to

⁸⁹ See: F. A. Mann, cited in Lowenfeld Andreas, *International*, pp. 584-585; See: also Guzman, Andrew, “Why LDCs sign”. p. 685.

⁹⁰ *Ibidem*

⁹¹ Mann, quoted in Kishoiyan, Bernard, “The Utility of Bilateral” n16, p. 328.

⁹² *Ibidem*

⁹³ *Ibidem*, p. 29.

⁹⁴ *Ibidem*, pp. 1, 2.

⁹⁵ Lowenfeld, Andreas, *International*, p. 492.

⁹⁶ *Ibidem*, p. 586

impartial adjudication or arbitration are general principles, and do not depend on the wording or indeed on the existence of any given treaty.⁹⁷

3.2.2. Critiques to the Position

Treves's reference to the "main", or "most important" states, when bringing up the "generality" criterion to determine the existence of a customary international rule,⁹⁸ may be attributed to those arguing that the BIT practice has hardened into customary international law. From the text alone, it does not become clear what does Treves mean by "main" or "most important" states. What is clear is that the practice of some "main", or "most important" states may be taken to be more relevant than the one of the "secondary" or "less important" states.

While it may seem an isolated statement, it does explain various assumptions that the authors holding that position make. For example, to answer why "[...] the [CERDS] seems less significant than it appeared at the time", and only as an "essentially political" challenge, Lowenfeld's cardinal argument is that the Western states refused to vote in favour of the Charter, and to recognize its legal value.⁹⁹ Similarly, while Yannaca-Small acknowledges that "[the] cascade of international litigation [in international arbitration tribunals, under IIA provisions] has spawned a multiplicity of problems, procedural, jurisdictional, and substantive";¹⁰⁰ she qualifies the negative attitude of developing countries towards the regime in the recent years as "[...] uninformed, nationalistic and autarchic [...]".¹⁰¹

The authors that defend this particular position describe the actions of developing states during the 1960s and 1970s –and of some of them in the recent years– as the one of a "prodigal son", strayed from the righteous path for a time, but later repented and back in his father's house. They argue that customary international law has not changed only because some –or the majority– of states had rejected the existence of an obligation in a "political challenge".

Their argument implies, that the global North's rejection to that challenge was the "non-political" –or more precisely, the "legal"– thing to do.¹⁰² In other words, under the argument we now criticise, a change in customary international law could have

⁹⁷ *Ibidem*

⁹⁸ *Ibidem*, p. 81.

⁹⁹ Lowenfeld, Andreas, *International*, p. 492.

¹⁰⁰ See: Yannaca-Small, Katia, "Fair and Equitable", p. v.

¹⁰¹ *Ibidem*

¹⁰² For a more profound account about the argumentative structure of the legal discourse, as a rejection of the "apologetic"/"utopian" nature of politics, See: Koskeniemi, Martti, "Between Apology

not taken place without the consent of the “most important states”. Instead, the law remained untouched all those years, waiting to be recognized again, once the Third World adventure had finished.

Additionally, those who defend the formation of customary international law derived from the signature and ratification of IIAs –except Lowenfeld, to some extent– do not consider the differences in the content of those agreements over time, and the uncertainty that the arbitral system of dispute resolution has brought to the law. With that great hurdle to overcome, it is not easy to argue the existence of a consistent state practice.

Even more disquieting –and more important for the purposes of the present work–, the assertion that some of the norms governing the protection of foreign investment amount to universally accepted principles, which states should follow even though they have not agreed to them, entails a risk in itself. The question to ask is what would be the situation of the few “uninformed”, “nationalistic” and “autarchic” states that decided not to sign those treaties, or even to denounce them.¹⁰³

Evidently, those states are not following the “general state practice”. Probably, they would not be considered the “main” or “most important” states. Would the provisions of IIAs as interpreted by arbitral tribunals in the context of cases of which they did not take part apply to them anyway? In which terms? Who would judge whether they have complied with the “general principles” governing the protection of foreign investments? Would their attitude justify the international community to call them to comply with those principles? The ones defending this position leave all those questions unanswered.

3.2.3. Those Challenging the Formation of Customary International Law

Mann’s criterion has not gone without criticism. Andrew T. Guzman, for example, rejects the idea that developing countries “had simply changed their view”.¹⁰⁴ The author begins by noting that the consensus on the “Hull formula” before World War II was only possible because the majority of countries that later opposed were colonies.¹⁰⁵ He holds that Third World states obtained a “victory” by way of passing the resolutions culminating on the CERDS, because they represented the demise of the “Hull for-

¹⁰³ See: generally UNCTAD, “Reforming International”, 124. According to UNCTAD, “[some] countries, by far a smaller group, have announced a moratorium on future IIA negotiations, while still others have chosen a more radical approach by starting to terminate existing IIAs. A few countries have also renounced to their membership to ICSID”.

¹⁰⁴ Guzman, Andrew, “Why LDCs sign”. p. 666.

¹⁰⁵ *Ibidem*, p. 646.

mula” as a customary rule.¹⁰⁶ On the other hand, he contends that, while developing states “... have willingly and, indeed, enthusiastically, signed BITs with developed countries”;¹⁰⁷ they did not do so just because they realized that they would be better off if they signed those treaties, nor because they felt they needed to clarify the rules applying, neither because BITs entailed any special benefit to them.¹⁰⁸

To back his assertion, he highlights the fact that some states entered into treaties at the same period as the General Assembly resolutions on PSNR and the NIEO were adopted.¹⁰⁹ Furthermore, he argues that if they really had changed their mind, they would have expressed so in the United Nations forum, instead of doing it by taking bilateral compromises with developed countries.¹¹⁰ Finally, he considers that the enhanced protection provided to investors by BITs challenges any explanation related to their supposed beneficial effect if compared with not signing them.¹¹¹

Instead, Guzman presents an explanation based on the hypothesis that developing states agreed to those treaties as a result of a “strategic choice”.¹¹² In his view, “... developing countries have different interests when they behave as a group than they do when they behave individually”.¹¹³ In the former situation, they act in a competitive way.¹¹⁴ Because of that, they want to retain the ability to make commitments that would give them a competitive edge if compared with other states offering the same investment opportunities.¹¹⁵ Therefore, they have an incentive to enter into BITs, despite the fact that they make renunciations in order to achieve that competitive edge, and those renunciations may eventually reduce any benefit to zero.¹¹⁶

Elkins, Guzman and Simmons hold the same position.¹¹⁷ They note that “BITs do not simply reflect the acceptance of dominant international property rights norms”.¹¹⁸ On the other hand, they oppose “power-based theories”, according to which “[...] dominant capital-exporting countries such as Germany or the [US] control the agenda and

106 *Ibidem*, pp. 646-51.

107 *Ibidem* p. 666.

108 *Ibidem*, p. 667-9.

109 *Ibidem*, pp. 667-8.

110 *Ibidem*, p. 668.

111 *Ibidem*, pp. 668-9.

112 *Ibidem*, pp. 669-75.

113 *Ibidem*, pp. 669.

114 *Ibidem*, pp. 669-70.

115 *Ibidem*

116 *Ibidem*

117 Elkins, Zachary et. Al., “Competing for capital”.

118 *Ibidem*, p. 812.

begin BIT negotiations according to their schedule and needs".¹¹⁹ The authors defend Guzman's "competitive theory of BIT diffusion" with quantitative evidence to support it.¹²⁰ They finally conclude that "[b]oth theoretically and empirically, the competition model seems most apt in this case".¹²¹

The authors also provide another possible explanation. When studying the variables supporting their competitive theory, and comparing them with other possible explanations, they tested the variable "coercion" (i.e., the "host state use of IMF credits").¹²² While they recognized that there is no explicit stipulation of a commitment to negotiate and enter into BITs in the IMF conditionalities, they argued that "there may be more subtle pressures on a state in balance-of-payments difficulties to use these treaties to attract foreign capital".¹²³ The variable accounted for a "positive effect on the odds of a BIT" during a given period of time.¹²⁴ In fact, the "hazard ratio" in that variable was higher than the competitive-theory variables in one of the three proposed models; and it was the second highest in the other two.¹²⁵

The possible explanations are, according to the authors, that "states seeking assistance from the IMF are encouraged to enter into BITs"; or "that the conditionality of IMF loans overlaps with the obligations of the BIT, reducing the costs of the latter".¹²⁶ In their conclusions, the authors also mentioned that "[t]he strong positive effect of IMF borrowing and alliance relationships on the propensity to sign a BIT also reminds us that a certain degree of coercion may be at play in some cases".¹²⁷ Now, although the authors recognize that "[...] multiple motives exist for the spread of this [BIT] form of protection [...]", they still consider the competitive theory as the strongest one.¹²⁸

3.2.4. Critique to the position

While the position held by Elkins, Guzman and Simmons appears reasonable, it also seems to unnecessarily diminish the importance of the "coercion" variable, at least in the period following the debt crises in the 1970s to 2000s.¹²⁹ Be as it may, both

¹¹⁹ *Ibidem*, p. 819.

¹²⁰ *Ibidem*, p. 822-44. They hold the theory has at least four implications: "... BITs should diffuse among host country competitors"; "BITs should spread most readily to countries where the competition for capital is the most intense"; "BITs should spread as the pool of available capital grows"; and, "BITs should diffuse more readily among host governments that lack credibility".

¹²¹ *Ibidem*, p. 841.

¹²² *Ibidem*, p. 837.

¹²³ *Ibidem*, p. 833.

¹²⁴ *Ibidem*, pp. 836-7.

¹²⁵ *Ibidem*, pp. 837.

¹²⁶ *Ibidem*, pp. 840.

¹²⁷ *Ibidem*, pp. 842.

¹²⁸ *Ibidem*

¹²⁹ See: generally Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO*, Zed Books, London, 2009, pp. 78-99.

the competitive and the coercion explanations can coincide in a situation without excluding each other; and instead, they may be connected in a deeper level than the one presented in the study. To rest importance to the influence that the IMF –and the World Bank– had over indebted countries would not be wise if we want to describe the situation in the most fair and complete manner. We shall now discuss in the next subsection elements that will permit us conclude that the Bretton Woods institution exercised more than “a certain degree of coercion ... in some cases”.

3.2.5. A Third Position

Another explanation that connects both the “competitive” and the “coercion” hypotheses is that the Bretton Woods institutions prompted many of the highly indebted countries from the global South to enter into the competitive behaviour described by Elkins, Guzman and Simmons. This is the argument Pahuja makes when she describes the situation as a “resolution through conditionality”.¹³⁰

As Pahuja notes, by the late 1970s the World Bank gradually expanded the scope and intensity of its intervention on domestic economies through the device called “structural adjustment”.¹³¹ Similarly, the IMF started to impose conditions to its loans.¹³² The event that broke the overall controversy “[...] not only of the claim to PSNR but of the broader claims to global redistribution and redress which had taken form on the demands for a [NIEO]” was the 1980s debt crisis.¹³³ Latin American countries found themselves in an extremely difficult situation, and the IMF and the World Bank took the opportunity to impose their conditions to them, through what has been called the “Washington Consensus”.¹³⁴ Among the many conditions imposed by the Bretton Wood institutions, it was the requirement “[...] to encourage foreign investment [...]”.¹³⁵ As envisaged in 1985 by the US government in the “Baker Plan” the conditionality concerning foreign investment “[...] specifically negated the demands made in the PSNR debate”.¹³⁶

Taking into account the events described above, the argument that the third position holds is that one of the main reasons –if not the main reason– for South countries

¹³⁰ See: Pahuja, Sundhya, *Decolonizing International Law*, pp. 160-9; See: also Ronn Pineo, *Ecuador and the United States: Useful Strangers*, University of Georgia Press, Athens, 2007, pp. 189-91, 95-6.

¹³¹ See: Pahuja, Sundhya, *Decolonizing International Law*, p. 166; See: also Woods, Ngairé, “Bretton Woods Institutions”, p. 236-8; See: also Peet, Richard, *Unholy Trinity*, p. 84-91.

¹³² *Ibidem*

¹³³ *Ibidem*

¹³⁴ *Ibidem*

¹³⁵ Woods, Ngairé, “Bretton Woods Institutions”, p. 237-8; See: also, Richard, *Unholy Trinity*, pp. 84-5.

¹³⁶ Pahuja, Sundhya, *Decolonizing International Law*, p. 168.

to enter into IIAs during their heyday period was the economic necessity prompted, not by the benefits of foreign direct investment itself, but by the “take-it-or-leave-it” offer they faced when asking for help. In other words, The Bretton Woods Institutions played a crucial role in the shaping of the choices developing countries made during that period, leaving a narrow margin of manoeuvre for them. This “coercive” pattern cannot be considered enough to create a sense of legal obligation. Therefore, the circumstances do not evidence the presence of the subjective element of customary international law.

It is necessary to differentiate the argument presented above from the “power-based theories” Elkins, Guzman and Simmons reject. Indeed, there are enough reasons to suspect that there is more than a coincidence in the fact that the introduction of protection of foreign investment in the Washington Consensus –as proposed in the “Baker Plan”– took place no more than three years after the US started its BIT program. However, the present argument does not hold that the IIA signing responded to the specific agenda of one or many capital-exporting countries, beyond the effective influence that such countries effectively exercised on the Bretton Woods institutions at the time. Instead, the relevant factor that determined the timing in each case was the situation of the indebted country itself, and the decision to invoke the help of the Bank and/or the IMF.

In the same sense, this position does not discard the “competition theory”, but it does qualify it. As we have witnessed above, there is empirical evidence that permit us conclude that developing countries entered into a competitive logic when they started to sign BITs.¹³⁷ However, the IMF and the World Bank were the institutions that justified, and later imposed, the competitive logic in the technical and institutional discourse. For example, it is unconvincing to hold that the World Bank was not interested in how states decided to solve their disputes with investors; when the ICSID Convention was its proposal, and the Institute forms part of the organization. Consequently, either consciously or not, the Bretton Woods institutions had a lot to do with the demise of the non-competitive NIEO initiative.

4. The Ecuadorian position

In the previous sections of this document we have presented the different opinions regarding the formation of customary international law due to the signing and ratification of IIAs by states around the world. In this section, we will go through certain

¹³⁷ Moreover, as we will examine in the Ecuadorian example set in the next section of this document, the ideological proximity between the domestic executives of the indebted countries and the international financial institutions also had a lot to do with the decision to negotiate and ratify a BIT.

episodes of the Ecuadorian history, starting from the moment when it entered into its first BIT, until the present day, in order to witness the state behaviour and perceive the reasons behind it, from a domestic perspective.

4.1. The First Ecuadorian BITs

Ecuador entered into its first BITs with Germany in June 28 1965,¹³⁸ and with Switzerland, on May 2, 1968.¹³⁹ Although the country had experimented a steady growth during the past decades, by the 1960s, it was still an agricultural economy, based mainly on banana, coffee and cacao exports.¹⁴⁰ Only a few years before, the country had discovered the oil reserves in the Amazon, but the production had not started yet.¹⁴¹

During that period, the President of the Republic was Otto Arosemena Gómez.¹⁴² Besides the link of President Arosemena with the exporting sector,¹⁴³ it is not clear why he decided to negotiate this treaty. In any case, it may be considered an isolated case, since the country did not enter into another IIA for 24 years.

4.2. Oil, Debt and Crisis

A few years after the discovery of oil under the Amazon jungle in 1967, Ecuador began an accelerated expansion of its economy, ending the agricultural prevalence, but generating high dependence on oil prices.¹⁴⁴ It was also the moment when foreign investment started to play a relevant role in Ecuadorian economy, led by US-based Texaco-Gulf.¹⁴⁵ The heyday of the oil era coincided with the rule of the “Gobierno Nacionalista y Revolucionario” [Nationalist and Revolutionary Government], a progressist military

138 See: United Nations Conference on Trade and Development “Ecuador” *Investment Policy Hub* <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/61>> (accessed: 13-06-2016).

139 See: UNCTAD, “Ecuador”; See: also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Tratado entre la República del Ecuador y la Confederación Suíza sobre Protección y Fomento de las Inversiones* [Dictum on the Constitutionality of the Treaty Between the Republic of Ecuador and the Swiss Confederation on the Protection and Promotion of Investments] Dictum No. 040-10-DTI-CC, case No 0012-10-TI, 11 November 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

140 See: Dennis M. Hanratty (ed), *Ecuador: A Country Study*, Federal Research Division, Library of Congress, 3rd ed, Washington D.C., 1989, p. 105.

141 *Ibidem*

142 See: Enrique Ayala Mora, *Resumen de la Historia del Ecuador* [Summary of the History of Ecuador]. Corporación Editora Nacional, 3rd ed, Quito, 2008, p. 52.

143 *Ibidem* The historian Enrique Ayala Mora describes Arosemena’s government as “[...] the representation of an alliance between the old right with oligarch groups of a more modern stream, linked with trade and banking activities]”. The original text says “... cuyo gobierno representó una alianza de la vieja derecha con grupos de la oligarquía de vertiente más moderna, vinculados con el comercio y la banca”.

144 See: Ayala, Enrique, “Resumen de la”, p. 53; See: also Hanratty, Dennis, “Ecuador: a Country”, pp. 103, 5-6; See: also Pineo, Ronn, “Ecuador and the United”, pp. 180-1.

145 See: Pineo, Ronn, “Ecuador and the United”, pp. 180.

dictatorship led by General Guillermo Rodríguez Lara.¹⁴⁶ The government used the unprecedented amount of revenues from oil exporting to modernize and strengthen the state and the domestic production, put without serious technical planning.¹⁴⁷ During that period, Ecuador joined the Third World countries in their PSNR proposal and became member of OPEC.¹⁴⁸

In 1974, Texaco-Gulf protested because of the nationalist measures, and pulled out in 1976¹⁴⁹ The high military ranks, counselled by the economic elites, and supported by the people that suffered the austerity following Texaco's retreat, took-over the power and replaced General Rodríguez with a "Consejo Supremo de Gobierno" [Supreme Council of Government].¹⁵⁰ The Council limited the expansive policies, but at the same time, lent high amounts of money from banks eager to lend it, to enter into a "... lavish last-minute spending spree [...]"¹⁵¹ Hanratty notes that "... the country's external debt grew from US\$324 million to about US\$4.5 billion".¹⁵²

Ecuador was the first Latin American country to return to democracy, with a new constitution and the elections held in 1979.¹⁵³ The winner, Jaime Roldós Aguilera, presented a progressist development program, based on reassertion of sovereignty over the oil industry, greater international autonomy, and human rights promotion in the region.¹⁵⁴ Yet, as the Latin American debt crisis unfolded, the Supreme Council's heavy lending started to take its toll.¹⁵⁵ By 1981, the external debt totalled US\$ 5.9 billion.¹⁵⁶ As oil prices started to go down, the country was highly indebted, and the President's legislative coalition broke-down since the beginning of the period, it was virtually impossible for the President to implement his plan.¹⁵⁷ On May 24, 1981, President Roldós died in a plane accident, and Vice-President Osvaldo Hurtado replaced him.¹⁵⁸ During Hurtado's term, the economy entered into recession, and several natu-

146 See: Ayala, Enrique, "Resumen de la", p. 53; See: also Pineo, Ronn, "Ecuador and the United", p. 179.

147 See: Ayala, Enrique, "Resumen de la", p. 53; See: also Pineo, Ronn, "Ecuador and the United", pp. 179-81.

148 See: Ayala, Enrique, "Resumen de la", p. 53.

149 See: Pineo, Ronn, "Ecuador and the United", p. 184.

150 See: Ayala, Enrique, "Resumen de la", p. 53; See: also Hanratty, Dennis, "Ecuador: a Country", pp. 103-4, 7; See: also Pineo, Ronn, "Ecuador and the United", pp. 183-5.

151 Pineo, Ronn, "Ecuador and the United", p. 186; See: also at p. 189; See: also Ayala, Enrique, "Resumen de la", p. 53; See: also Hanratty, Dennis, "Ecuador: a Country", pp. 103-4, 7.

152 Hanratty, Dennis, "Ecuador: a Country", p. 107; Pineo, Ronn, "Ecuador and the United", p. 186, gives different numbers: "Ecuador's foreign debt rose twenty times over, from \$209 million in 1970 to \$4.2 billion by 1980".

153 See: Ayala, Enrique, "Resumen de la", p. 54; See: also Pineo, Ronn, "Ecuador and the United", pp. 186-8, 93-4.

154 *Ibidem*

155 See: Ayala, Enrique, "Resumen de la", p. 54; See: also Pineo, Ronn, "Ecuador and the United", p. 189-90.

156 See: Pineo, Ronn, "Ecuador and the United", p. 194.

157 See: Ayala, Enrique, "Resumen de la", p. 54; See: also Pineo, Ronn, "Ecuador and the United", pp. 189-90, 4; See: also Hanratty, Dennis, "Ecuador: a Country", pp. 103, 7.

158 See: Ayala, Enrique, "Resumen de la", p. 53; See: also Pineo, Ronn, "Ecuador and the United", p. 194; See: also "Entregan a Fiscalía

ral disasters took place, leaving the country with little room of action to cope with its many problems.¹⁵⁹ The debt continued to grow up to US\$ 8.4 billion in 1984, and debt servicing amounted to 60% of the country's export earnings.¹⁶⁰ To face the economic problems, Hurtado introduced several austerity and stabilization measures, including devaluating the currency, rising interest rates, cutting government spending, rising exchange controls, reducing fuel subsidies, and loosening the controls for foreign oil companies to operate in the country.¹⁶¹ Although those measures were extremely unpopular, the government met the objective of rescheduling its debt with the IMF, by way of its first letter of intent.¹⁶²

4.3. Ecuador "Changes Its View" Towards Foreign Investment

After Hurtado's term of office, a right-wing coalition named "Frente de Reconstrucción Nacional" [National Reconstruction Front] led by León Febres-Cordero won the elections in 1984.¹⁶³ Febres-Cordero's government signaled his full commitment with neo-liberal ideas based on deregulation, set to benefit the international trade and banking sector.¹⁶⁴ Due to the new approach, the government avoided default, and achieved another debt renegotiation with foreign private banks and the Paris Club.¹⁶⁵ Although those policies permitted the government to reduce the amount of money dedicated to debt service to 30% of exports earnings, it only served to pay for the interests.¹⁶⁶ In 1987, the Trans-Ecuadorian Pipeline –the only way to take the oil from the eastern Amazon jungle to the Pacific coast– suffered a serious damage, due to an earthquake.¹⁶⁷ It took six months to repair the pipeline and export oil again.¹⁶⁸ To repair the damage, the government asked for loans to the World Bank and a consortium

Documentación Desclasificada en Caso "Rodós" [Office of the Prosecutor-General Receives Unclassified Information on "Roldós" Case] *Ecuador Inmediato* (online) 29 June 2015, <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=2818783881&umt=entregan_a_fiscalia_documentacion_desclasificada_en_caso_roidos> (accessed: 13-06-2016); See: also "Familia de Roldós Pide que se Abran Archivos del "Plan Cóndor en Ecuador (AUDIO)" [Roldós's Family Asks Ecuador "Plan Cóndor" Archives to be Declassified (AUDIO)] *Ecuador Inmediato* (online) 27 May 2015, <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=2818781960&umt=familia_roidos_pide_que_se_abran_archivos_del_plan_condor_en_ecuador_audio> (accessed: 13-06-2016).

159 See: Ayala, Enrique, "Resumen de la", p. 53; See: also Hanratty, Dennis, "Ecuador: a Country", p. 107; See: also Pineo, Ronn, "Ecuador and the United", p. 195.

160 See: Hanratty, Dennis, "Ecuador: a Country", p. 107.

161 See: Hanratty, Dennis, "Ecuador: a Country", p. 107; See: also Pineo, Ronn, "Ecuador and the United", p. 195.

162 *Ibidem*

163 See: Ayala, Enrique, "Resumen de la", p. 53.

164 *Ibidem* See: also Hanratty, Dennis, "Ecuador: a Country", p. 103.

165 See: Hanratty, Dennis, "Ecuador: a Country", p. 107.

166 *Ibidem*, pp. 107-8.

167 *Ibidem*, p. 110.

168 *Ibidem*

of private banks, which brought the external debt up to US\$ 9.6 billion.¹⁶⁹ During that period, the government fully opened the borders to foreign capital.¹⁷⁰ The measure did not have much success, apart for the growth in trade and financial services.¹⁷¹ Instead, financial speculation and inflation augmented.¹⁷² Most notably, after years of a consistent refusal policy based on the “Calvo doctrine”, Ecuador was one of the first Latin American countries that decided to accept the ICSID Convention, on 1986.¹⁷³ It also entered into a BIT with Uruguay.¹⁷⁴

4.4. The Ecuadorian BIT Rush

After a four year social-democrat government, the Ecuadorian Conservative Party won the 1992 elections.¹⁷⁵ President Sixto Durán-Ballén pushed for a neo-liberal plan of modernization and reduction of the state size, as well as structural adjustment policies, consistent on elimination of subsidies, and rise of fuel prices to international levels.¹⁷⁶ President Durán implemented an aggressive liberalization program in its international relations, as part of the negotiations pursuing the country membership in the WTO.¹⁷⁷ In exchange of all those policies, the government managed to renegotiate the payment of the external debt, and recover access to international credit after years of paying only the interests.¹⁷⁸ Thus, the government strategy was “[...] to demonstrate immediately that theirs were not mere good wishes, but a real intention to pay the debt. Little by little they accorded different programs to condone part of the external debt, both with international organisms, and with several European countries”.¹⁷⁹ During his term of office President Durán’s government signed treaties with Argentina,¹⁸⁰

¹⁶⁹ *Ibidem*

¹⁷⁰ See: Ayala, Enrique, “Resumen de la”, p. 53; See: also Hanratty, Dennis, “Ecuador: a Country”, p. 109-10.

¹⁷¹ See: Ayala, Enrique, “Resumen de la”, p. 53; See: also Hanratty, Dennis, “Ecuador: a Country”, 103, p. 10.

¹⁷² See: Ayala, Enrique, “Resumen de la”, pp. 54-5; See: also, Hanratty, Dennis, “Ecuador: a Country”, p. 103.

¹⁷³ See: Lowenfeld, Andreas, *International*, p. 540-541.

¹⁷⁴ See: UNCTAD, “Ecuador”.

¹⁷⁵ See: Ayala, Enrique, “Resumen de la”, p. 55.

¹⁷⁶ *Ibidem*

¹⁷⁷ See: AFESE, “Sixto Durán Ballén (1992-1996)” 59 *Revista AFESE*, Quito, 2006, pp. 39, 41, 50.

¹⁷⁸ See: Ayala, Enrique, “Resumen de la”, p. 55; See: AFESE, “Sixto Durán”, pp. 39, 41. In an interview about his government, President Durán described the situation as [... a moment in which we practically did not have access to international credit, and ... there was a series of unsolved issues, before the international organizations and friend governments, of credit offers or loans suspended]. The original text says: “... estábamos en un momento en que prácticamente no teníamos acceso al crédito internacional y ... había una serie de asuntos pendientes, ante los organismos internacionales y gobiernos amigos, de ofrecimiento de créditos o préstamos en marcha que estaban suspendidos”.

¹⁷⁹ *Ibidem*. The original text says “... había que demostrar de inmediato que no eran simples buenos deseos sino realmente una intención real de mi gobierno de lograrlo. Poco a poco se fueron acordando distintos programas, tanto con los organismos internacionales como con varios países europeos de condonación de parte de la deuda externa”.

¹⁸⁰ See: UNCTAD, “Ecuador”; See: also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República Argentina para la Promoción y Protección Recíproca de Inversiones*, Dictum on the Constitutionality of the Agreement between the Government of the Republic

Chile,¹⁸¹ France,¹⁸² El Salvador,¹⁸³ Paraguay,¹⁸⁴ Spain,¹⁸⁵ the United Kingdom,¹⁸⁶ the US,¹⁸⁷ Venezuela,¹⁸⁸ Bolivia,¹⁸⁹ Canada,¹⁹⁰ Cuba,¹⁹¹ Germany,¹⁹² Romania,¹⁹³ Russia,¹⁹⁴ and China.¹⁹⁵

of Ecuador and the Government of the Republic of Argentina for the Reciprocal Protection and Promotion of Investments] Dictum No. 003-13-DTI-CC, case No 0009-10-TI, 17 January 2013, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>>, (accessed: 13-06-2016).

181 See: UNCTAD, "Ecuador"; See: also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República de Chile para la Promoción y Protección Recíprocas de Inversiones* [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Chile for the Reciprocal Protection and Promotion of Investments] Dictum No. 038-10-DTI-CC, case No 0010-10-TI, 11 November 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

182 See: UNCTAD, "Ecuador"; See: also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República Francesa para la Promoción y Protección Recíprocas de Inversiones* [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the French Republic for the Reciprocal Protection and Promotion of Investments] Dictum No. 031-10-DTI-CC, case No 0007-10-TI, 16 September 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

183 See: UNCTAD, "Ecuador".

184 *Ibidem*

185 See: UNCTAD, "Ecuador"; See: also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República del Ecuador* [Dictum on the Constitutionality of the Agreement for the Reciprocal Protection and Promotion of Investments Between the Kingdom of Spain and the Republic of Ecuador] Dictum No. 010-13-DTI-CC, case No 0010-11-TI, 25 April 2013, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

186 See: UNCTAD, "Ecuador"; See: also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Convenio Suscrito entre el Gobierno del Reino Unido de Gran Bretaña e Irlanda del Norte y el Gobierno de la República del Ecuador para la Promoción y Protección de Inversiones* [Dictum on the Constitutionality of the Agreement Signed between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ecuador for the Protection and Promotion of Investments] Dictum No. 020-10-DTI-CC, case No 0008-10-TI, 24 June 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

187 See: UNCTAD, "Ecuador"; See: also *Dictamen de Constitucionalidad sobre la Denuncia del Tratado entre la República del Ecuador y los Estados Unidos de América Sobre Promoción y Protección Recíproca de Inversiones* [Dictum on the Constitutionality of the Treaty between the Republic of Ecuador and the United States of America for the Reciprocal Protection and Promotion of Investments] Constitutional Court of Ecuador, Dictum No. 043-10-DTI-CC, case No 0013-10-TI, 25 November 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

188 See: UNCTAD, "Ecuador"; See: also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República de Venezuela para la Promoción y Protección Recíprocas de Inversiones* [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Venezuela for the Reciprocal Protection and Promotion of Investments] Dictum No. 041-10-DTI-CC, case No 0011-10-TI, 25 November 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

189 See: UNCTAD, "Ecuador".

190 *Ibidem*; See: also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno del Ecuador y el Gobierno de Canadá para el Fomento y la Protección Recíproca de Inversiones* [Dictum on the Constitutionality of the Agreement between the Government of Ecuador and the Government of Canada for the Reciprocal Protection and Promotion of Investments] Dictum No. 035-10-DTI-CC, case No 0003-10-TI, 7 October 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

191 See: UNCTAD, "Ecuador".

192 See: UNCTAD, "Ecuador"; See: also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Tratado entre la República del Ecuador y la República Federal de Alemania sobre Fomento y Recíproca Protección de Inversiones de Capital* [Dictum on the Constitutionality of the Treaty between the Republic of Ecuador and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Capital Investments] Dictum No. 023-10-DTI-CC, case No 0006-10-TI, 24 June 2010, available in <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

193 See: UNCTAD, "Ecuador".

194 *Ibidem*

195 *Ibidem*; See: also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el*

After Durán's term, Ecuador went through a series of democratic crises, which lasted for a decade.¹⁹⁶ Three elected presidents were removed from office by the National Congress due to the severe civic unrest caused by their unpopular policies.¹⁹⁷ While they did not completed the four-year term of office, one of them –Jamil Mahuad Witt–, managed to negotiate and enter into BITs with Dominican Republic,¹⁹⁸ Peru,¹⁹⁹ and the Netherlands.²⁰⁰

President Mahuad, candidate for the Christian Democrats (center), won the runoff election of 1998, in an alliance with Febres-Cordero's center-right party.²⁰¹ Mahuad, a Harvard-educated economist, Finances his campaign by making compromises with powerful economic actors, including owners of private banks.²⁰²

Mahuad used his legislative coalition to push for economic reforms, continuing the path of modernization and privatization set by President Durán.²⁰³ However, due to external factors, such as another fall of oil prices, and the Asian crisis, as well as a financial breakdown due to deregulation policies, the country suffered a severe economic crisis.²⁰⁴

At the end of Mahuad's government, Ecuadorians ended up without domestic currency –since 1999 until the present day, Ecuador uses the US dollar as its legal currency–, and all their life savings taken due to a “bank holiday”.²⁰⁵ After the Congress removed Mahuad on January 21, 2000, Vice-President, Gustavo Noboa Bejarano took his place as interim President for the rest of the term.²⁰⁶ Noboa continued with Mahuad's

Gobierno de la República del Ecuador y el Gobierno de la República Popular de China para el Fomento y Protección Recíprocos de Inversiones [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Popular Republic of China for the Reciprocal Protection and Promotion of Investments] Dictum No. 027-10-DTI-CC, case No 0004-10-TI, 29 July 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

196 See: Ayala, Enrique, “Resumen de la”, 56-7.

197 *Ibidem*

198 See: UNCTAD, “Ecuador”.

199 *Ibidem*. See also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República del Perú sobre la Promoción y Protección Recíproca de Inversiones* [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Peru on the Reciprocal Protection and Promotion of Investments] Dictum No. 032-13-DTI-CC, case No 0016-13-TI, 29 November 2013, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

200 See: UNCTAD, “Ecuador”; See also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Convenio Para la Promoción y Protección Recíproca de Inversiones entre la República del Ecuador y el Reino de los Países Bajos* [Dictum on the Constitutionality of the Agreement on the Reciprocal Protection and Promotion of Investments between the Government of the Republic of Ecuador and the Government of the Kingdom of the Netherlands] Dictum No. 030-10-DTI-CC, case No 0005-10-TI, 16 September 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

201 See: Carlos de la Torre, *Populismo, Democracia, Protestas y Crisis Políticas Recurrentes en Ecuador* [Populism, Democracy, Protests and Recurring Political Crises in Ecuador], Konrad Adenauer Foundation, Rio de Janeiro, 2006, p. 17.

202 See: Ayala, Enrique, “Resumen de la”, p. 56; See: de la Torre, De la Torre, Carlos, *Populismo*, p. 11.

203 *Ibidem*

204 See: Zachary Torres-Fowler “A New Model for Restraining Authoritarianism: Popular Protest and Ecuador's Presidential Vote of No Confidence” *UCLA Journal of International Law and Foreign Affairs* No. 16, vol. 1, Los Angeles, 2011, p. 179.

205 See: Torres-Fowler, Zachary, “A New Model, p. 179.

206 *Ibidem*

international policy by negotiating the last BITs with Costa Rica,²⁰⁷ Guatemala,²⁰⁸ Honduras,²⁰⁹ Nicaragua,²¹⁰ Finland,²¹¹ Italy,²¹² and Sweden.²¹³

4.5. The Last Shift: Repudiation of IIAs

The elections of 2007 marked the end of the political crisis, and the start of a period of relative political stability, until the present day.²¹⁴ President Rafael Correa Delgado presented a socialist program based on a rejection of the neo-liberal policies conducted by his predecessors.²¹⁵

In order to implement his program, Correa paid the totality of its US\$ 9 million debt with the IMF.²¹⁶ In a controversial move, the President also expelled the World Bank representative in Ecuador, José Somensatto.²¹⁷ Correa accused him of “blackmailing” him when he was Minister of Economy.²¹⁸ According to the President, Somensatto put on hold a loan already approved by the Bank, under the argument that Ecuador had approved an act that destined 70% of an oil-sourced stabilization fund to buy back a part of the external debt. Also, the government decided to “repudiate” part of the debt owed to private creditors.²¹⁹ To do so, the government appointed a Commission of Integral Audit of Public Credit.²²⁰ The Commission’s report concluded that many of the negotiations had inconsistencies due of incompetence or corruption,

207 See: UNCTAD, “Ecuador”.

208 *Ibidem*

209 *Ibidem*

210 *Ibidem*

211 See: UNCTAD, “Ecuador”; See also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República de Finlandia sobre la Promoción y Protección de Inversiones* [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Finland on the Protection and Promotion of Investments] Dictum No. 026-10-DTI-CC, case No 0001-10-TI, 29 July 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

212 See: UNCTAD, “Ecuador”; See also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República de Italia sobre la Promoción y Protección de Inversiones* [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Italy on the Protection and Promotion of Investments] Dictum No. 022-13-DTI-CC, case No 0015-13-TI, 17 July 2013, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

213 See: UNCTAD, “Ecuador”; See also Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Acuerdo entre el Gobierno del Reino de Suecia y el Gobierno de la República del Ecuador para la Promoción y Protección Recíproca de Inversiones* [Dictum on the Constitutionality of the Agreement between the Government of the Government of the Kingdom of Sweden and the Republic of Ecuador for the Reciprocal Protection and Promotion of Investments] Dictum No. 029-10-DTI-CC, case No 0002-10-TI, 6 September 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

214 See: Ayala, Enrique, “Resumen de la”, p. 57; See also De la Torre, Carlos, *Populismo*, pp. 37-8.

215 *Ibidem*

216 See: “Ecuador Se Suma a Venezuela y Paga Deuda al FMI” [Ecuador Joins Venezuela and Pays Debt to IMF] *Ecuador Inmediato* (online) 16 April 2007, <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=52425&umt=ecuador_se_suma_a_venezuela_y_paga_deuda_a_fmi> (accessed: 13-06-2016).

217 See: “Presidente de Ecuador Anuncia Enjuiciamiento a Banco Mundial” [President of Ecuador Announces Legal Actions Against World Bank] *Ecuador Inmediato* (online) 28 April 2007, <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=53124&umt=presidente_ecuador_anuncia_enjuiciamiento_a_banco_mundial> (accessed: 13-06-2016).

218 *Ibidem*

219 See: Ayala, Enrique, “Resumen de la”, 57; See also Lee Buchheit, “The Coroner’s Inquest” *International Financial Law Review* No. 28, 2009, p. 22.

220 See: Buchheit, Lee, “The Coroner’s Inquest”, p. 23.

and thus turned the debt illegitimate.²²¹ On the basis of the report, the government announced that it would cease to pay.²²² After the price of the bonds had reduced because of the default, the government bought them back with a 65% discount.²²³

At the same time, Correa pushed for the election of a constituent assembly.²²⁴ On September 28, 2008, the people approved the new constitution by referendum. Article 422 of the Ecuadorian constitution prohibits to enter into IIAs in which the state waives its jurisdiction to solve investor-state disputes.²²⁵ The only exceptions to this prohibition are the treaties between Latin American countries provided for the settlement of disputes involving Latin American nationals, by regional arbitration panels or tribunals designated by the parties.²²⁶ In application of article 422, the President submitted all BITs to the Constitutional Court to assess their constitutionality, and the Court accepted the charges, as a previous step towards their denunciation.²²⁷

The government stance in international fora has been consistent with its domestic program. First, it denounced the ICSID Convention.²²⁸ Since the first days of his government, Correa pushed for the constitution of the Union of South American Nations (UNASUR).²²⁹ The Ecuadorian government has mentioned in many occasions that one of the objectives of the organization is to replace the international financial ins-

²²¹ *Ibidem*

²²² *Ibidem*

²²³ *Ibidem*, p. 22.

²²⁴ See: Ayala, Enrique, "Resumen de la", p. 57; See: also Nina Sánchez and Yanina Welp, "Legality and Legitimacy: Constituent Power in Venezuela, Bolivia and Ecuador" in Fernando Méndez and Jonathan Wheatley (eds), *Patterns of Constitutional Design: The Role of Citizens in Constitution-Making*. Ashgate, Abingdon, 2013, pp. 108-9.

²²⁵ See: *Constitución de la República del Ecuador* [Constitution of the Republic of Ecuador] 2008, 20 October 2008, Official Registry 449, article 422. Article 422 provides: "[Treaties or international instruments where the Ecuadorian State waives sovereign jurisdiction to international arbitration entities in contract or trade disputes between the State and natural persons or private legal entities cannot be entered into. Treaties and international instruments that provide for the settlement of disputes between States and citizens in Latin America by regional arbitration entities or by jurisdictional organizations designated by the signatory countries are exempted from the aforementioned prohibition. Judges of the States that, by their selves or through their nationals, are part to the dispute, shall not intervene. In the case of external-debt related disputes, the Ecuadorian State will promote arbitral settlement taking into account the origin of the debt and subjected to the principles of transparency and international justice]". The original text says: No se podrá celebrar tratados o instrumentos internacionales en los que el Estado ecuatoriano ceda jurisdicción soberana a instancias de arbitraje internacional, en controversias contractuales o de índole comercial, entre el Estado y personas naturales o jurídicas privadas. Se exceptúan los tratados e instrumentos internacionales que establezcan la solución de controversias entre Estados y ciudadanos en Latinoamérica por instancias arbitrales regionales o por órganos jurisdiccionales de designación de los países signatarios. No podrán intervenir jueces de los Estados que como tales o sus nacionales sean parte de la controversia. En el caso de controversias relacionadas con la deuda externa, el Estado ecuatoriano promoverá soluciones arbitrales en función del origen de la deuda y con sujeción a los principios de transparencia, equidad y justicia internacional.

²²⁶ *Ibidem*

²²⁷ See: "Tratados Bilaterales de Inversión Contravienen Constitución Ecuatoriana" [Bilateral Investment Treaties Contravene Ecuadorian Constitution] *Ecuador Inmediato* (online) 29 April 2013 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=195993&umt=tratados_bilaterales_inversion_contravienen_constitucion_ecuatoriana> (accessed: 13-06-2014).

²²⁸ See: International Centre for Settlement of Investment Disputes, "List of Contracting States and Other Signatories of the Convention" (8 April 2015) *ICSID*, available at <<https://icsid.worldbank.org/apps/ICSIDWEB/icsidocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>> (accessed: 13-06-2014).

²²⁹ See: "Presidentes Firman Acta Constitutiva de UNASUR" [Presidents Sign Constitution Act of UNASUR] *Ecuador Inmediato* (online) 23 May 2008, <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=78681&umt=presidentes_firman_acta_constitutiva_unasur> (accessed: 13-06-2014).

titions, and to end Latin American dependency.²³⁰ Moreover, it has expressed the intention to constitute a centre of investment dispute settlement as part of the organization, based on the “equilibrium of protection to states and investors”.²³¹

While the moves relating to the management of the debt have been the target of many objections and had triggered debates that go beyond the scope of the present document, they did achieve the objective of unfettering the government from the long-standing dependency on the IMF and World Bank policies. Furthermore, they allowed the country to have an unconstrained decision about which legal framework should apply to the protection of foreign investment. In the same sense, they reduced the negative incentives for the government to candidly express a critical position concerning the protection of investments under international law in the universal and regional fora.

²³⁰ See: “Ecuador se Integra al Banco del Sur” [Ecuador Joins Bank of the South] *Ecuador Inmediato* (online) 8 January 2008 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=66612&umt=ecuador_se_integra_a_banco_del_sur> (accessed: 13-06-2014); See: “Presidente de Ecuador Propone Sistema Financiero de África y Sudamérica” [President of Ecuador Proposes Financial System for Africa and South America] *Ecuador Inmediato* (online) 27 September 2009 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=113771&umt=presidente_ecuador_propone_sistema_financiero_africa_y_suramerica> (accessed: 13-06-2014); See: “Países Latinoamericanos Establecerán Alianza Frente al Abuso de las Transnacionales” [Latin American Countries Will Establish Alliance Against Transnational Abuses] *Ecuador Inmediato* (online) 22 April 2013 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=195618&umt=paises_latinoamericanos_estableceran_alianza_frente_al_abuso_transnacionales> (accessed: 13-06-2014).

²³¹ See: “Ecuador Busca que UNSUR Cuente Con un Mecanismo para Solución de Conflictos” [Ecuador Wants UNASUR to Feature a Mechanism for Dispute Settlement] *Ecuador Inmediato* (online) 8 January 2008 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=68594&umt=ecuador_busca_que_unasur_cuenta_con_un_mecanismo_para_solucion_conflictos> (accessed: 13-06-2014); See: also “Ecuador se Suma a Exigencia de Separar Mediación al CIADI” [Ecuador Joins Demand to Separate Mediation From ICSID] *Ecuador Inmediato* (online) 10 May 2008 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=77684&umt=ecuador_se_suma_a_exigencia_separa_mediacion_al_ciadi> (accessed: 13-06-2014); See: also “Ecuador Busca Junto a Bolivia Crear un Nuevo Sistema de Arbitraje” [Ecuador and Bolivia See: k to Create a New Arbitration System] *Ecuador Inmediato* (online) 22 July 2009 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=109097&umt=ecuador_busca_juntoa_bolivia_crear_un_nuevo_sistema_arbitraje> (accessed: 13-06-2014); See: also “Ecuador Propondrá Nuevo Sistema de Arbitraje Durante su Presidencia en la UNASUR” [Ecuador Will Propose New Arbitral System During Its Chair Term in UNASUR] *Ecuador Inmediato* (online) 8 July 2009 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=108137&umt=ecuador_propondra_nuevo_sistema_arbitraje_durante_presidencia_en_unasur> (accessed: 13-06-2014); See: “Ecuador Designa a Representante para Sistema de Solución de Controversias UNASUR” [Ecuador Designates Representative for UNASUR Dispute Resolution System] *Ecuador Inmediato* (online) 17 January 2011 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=141881&umt=ecuador_designa_a_representante_para_sistema_solucion_controversias_unasur> (accessed: 13-06-2014); “Presidente Correa Pedirá en Cumbre de UNASUR Creación “Urgente” de Centro de Arbitraje” *Ecuador Inmediato* (online) 20 August 2013 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=203861&umt=presidente_correa_pedira_en_cumbre_unasur_creacion_urgente_centro_arbitraje> (accessed: 13-06-2014); “UNASUR Tendrá su Propio Centro de Solución de Controversias” [UNASUR Will Have Its Own Centre of Dispute Settlement] *Ecuador Inmediato* (online) 27 September 2014 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=2818770468&umt=unasur_tendra_propio_centro_solucion_controversias> (accessed: 13-06-2014).

5. Conclusion

Along the present document we have examined the different positions concerning the issue of whether the state practice that consists in entering into IIAs could be considered to amount to customary international law, apply to states regardless of whether they have agreed to it or not. As we have witnessed, the academic discussion on the topic makes many assumptions about how the international order works, and the reasons for states to behave in a certain way. The danger in making such assumptions is that we may probably form a prejudiced conception about the problem, which may dress it in the garbs of the hegemonic discourse, as if it were “a kind of Esperanto”.²³² This document argues that the investment protection discourse, under those conditions, may overlook concrete circumstances that most likely would undermine, or at least, temper the bias of the discourse.

The Ecuadorian experience concerning IIAs has been useful to show us the reasons behind the decision of entering into such treaties. While the particular ideological framework of the political organization in power has played an important role in the willingness of the government to accept those burdening deals, the action of the Bretton Woods institutions as preachers and enforcers of a specific set of doctrines has also been determinant. In that sense, the position held in the previous lines is that countries from the South did not enter into IIAs because they recognized the existence of a legal obligation. Instead, they have acted to a great degree out of economic necessity.

The Ecuadorian example presents evidence supporting that hypothesis. The country's dependence on oil high prices, and external debt to avoid economic backwardness has prompted governments to accept whatever conditions the international financial institutions presented to them. Among those conditions, there was the obligation to open their markets to foreign investment. That obligation, instead, created a powerful incentive for the country to enter into IIAs as a way to compete for capital with other indebted countries. Similarly the Ecuadorian attitude once the government managed to lift the burden of the external debt demonstrates that the practice was determined by Ecuadorian dependency on its good image before the Bretton Woods institutions. Consequently, it would be unwise to attribute the decisions of the Ecuadorian government to *opinio juris*.

While the Ecuadorian case may be deemed exceptional, it is also the sign of a significant movement towards a revision of international investment law as it stands at the moment. Venezuela and Bolivia also decided to denounce the ICSID convention.

²³² Koskenniemi, Martti, *The Politics of*, p. 66.

Equally, countries like South Africa had begun to assess the content of its BITs, and had terminated some of them.²³³ Moreover, as UNCTAD recognizes, "... an increasing number of cases against developed countries has placed ISDS high-up on the list of issues for attention, also for developed country IIA policy makers".²³⁴ All those elements may contribute to conclude that the state practice is slowly shifting away from the position it was back in the 1990s and the first half of the 2000s.

233 See: Robert Hunter, "South Africa Terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland" *International Arbitration and Investment Law* < <http://www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherlands-and-switzerland>>.

234 United Nations Conference on Trade and Development, *Recent Developments in Investor-State Dispute Settlement (ISDS)* (April 2014) IIA Issues Note No 1, 24.

Bibliography

- AFESE, "Sixto Durán Ballén (1992-1996)", in Revista AFESE No. 59, Quito, 2006.
- Ayala Mora, Enrique, Resumen de la Historia del Ecuador [Summary of the History of Ecuador], Corporación Editora Nacional, 3rd. ed., Quito, 2008.
- Buchheit, Lee, "The Coroner's Inquest", in International Financial Law Review No. 28, 2009.
- Committee on Foreign Relations, Treaty With the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments, United States Congress Report, Washington D.C., 1993.
- De la Torre, Carlos, Populismo, Democracia, Protestas y Crisis Políticas Recurrentes en Ecuador [Populism, Democracy, Protests and Recurring Political Crises in Ecuador], Konrad Adenauer Foundation, Rio de Janeiro, 2006.
- Eicher, Theo S., Mutti, John S. and Turnovski, Michelle H., International Economics, Routledge, 7th ed., London, 2009.
- Elkins, Zachary, Guzman, Andrew T., and Simmons, Beth A., "Competing for Capital: The Diffusion of Bilateral Investment Treaties 1960-2000", in International Organization No. 60, 2006.
- European Commission, "Transatlantic Trade and Investment Partnership – The Economic Analysis Explained" (September 2013) European Commission <http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf#world> (accessed: 13-06-2016).
- Guzman, Andrew T., "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties", in Virginia Journal of International Law No. 38, Charlottesville, 1998.
- Hanratty, Dennis M., (ed), Ecuador: A Country Study, Federal Research Division, Library of Congress, 3rd ed., Washington DC, 1989.
- Jones, Dough, "Investor-State Arbitration in Times of Crisis", in National Law School of India Review No. 25, vol. 1, Bangalore, 2013.
- Kishoiyian, Bernard, "The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law", in Northwestern Journal of International Law & Business No. 14, vol. 2, Chicago, 1994.

- Koskenniemi, Martti, *The Politics of International Law*, Hart Publishing, Oxford, 2011.
- Loibl, Gerard, "International Economic Law", in Evans, Michael (ed), *International Law*, Oxford University Press, 2nd ed., Oxford, 2006.
- Lowenfeld, Andreas, *International Economic Law*, Oxford University Press, 2nd ed., Oxford, 2008.
- Meltzer, Joshua, "Investment" in Simon Lester and Bryan Mercurio (eds), in *Bilateral and Regional Trade Agreements: Commentary and Analysis*, Cambridge University Press, Cambridge, 2009.
- Pahuja, Sundhya, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality*, Cambridge University Press, Cambridge, 2011.
- Peet, Richard, *Unholy Trinity: The IMF, World Bank and WTO*, Zed Books, London, 2009.
- Pineo, Ronn, *Ecuador and the United States: Useful Strangers*, University of Georgia Press, Athens, 2007.
- Procuraduría General del Estado, *Oxy Case: The Defense of a Sovereign and Legal Decision of the Ecuadorian State*, Procuraduría General del Estado, Quito, 2014, available at: <http://104.130.171.14/images/stories/boletines/libroca-sooxy_20141021/oxy_case_book/libro_oxy_translation_low.pdf> (accessed: 13-06-2016).
- Sánchez, Nina and Welp, Yanina, "Legality and Legitimacy: Constituent Power in Venezuela, Bolivia and Ecuador" in Méndez, Fernando and Wheatley, Jonathan (eds), *Patterns of Constitutional Design: The Role of Citizens in Constitution-Making*, Ashgate, Abingdon, 2013.
- Stiglitz, Joseph, "Dealing with Debt: How to Reform the Global Financial System", in *Harvard International Review* No. 25, Cambridge, 2003.
- Torres-Fowler, Zachary, "A New Model for Restraining Authoritarianism: Popular Protest and Ecuador's Presidential Vote of No Confidence", in *UCLA Journal of International Law and Foreign Affairs* No. 16, vol. 1, Los Angeles, 2011.
- Treves, Tulio, "Customary International Law", in *Oxford Public International Law*, Max Planck Encyclopaedia of Public International Law (November 2006) <<http://opil.ouplaw.com.ezp.lib.unimelb.edu.au/view/10.1093/>

law:epil/9780199231690/law-9780199231690-e1393?rskey=I6BPfc&result=1&prd=EPIL> (accessed: 13-06-2016).

United Nations Conference on Trade and Development, Investor-State Dispute Settlement: Review of Developments in 2014 IIA Issues Note No. 2, May 2015.

United Nations Conference on Trade and Development, Latest Developments in Investor-State Dispute Settlement, IIA Monitor No. 1, 2009.

United Nations Conference on Trade and Development, Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note No. 1, April 2014.

United Nations Conference on Trade and Development, "Reforming International Investment Regime: An Action Menu" in World Investment Report, 2015.

Woods, Ngaire, "Bretton Woods Institutions", in Weiss, Thomas and Daws, Sam (eds), *The Oxford Handbook of the United Nations*, Oxford University Press, Oxford, 2007.

Yannaca-Small, Katya, "Fair and Equitable Treatment Standard in Yannaca-Small, Katia (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, Oxford, 2010.

Cases

ICSID Arbitral Tribunal, *Occidental Petroleum Corporation v The Republic of Ecuador* (Award) Case No ARB/06/11, 5 October 2012.

International Arbitral Tribunal, *Norwegian Shipowners' Claims* (Norway v United States) (1922) 1 Reports of International Arbitral Awards 307.

International Court of Justice, *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)(Merits) [1969] ICJ Rep 6.

PCA Arbitral Tribunal, *Yukos Universal Ltd v The Russian Federation* (Award) Case No AA 227, 18 July 2014.

Permanent Court of International Justice, *Factory at Chorzów* (Germany v Poland) (Claim for Indemnity) (Merits) PCIJ Series A No. 17.

Constitutional Court of Ecuador, *Dictamen de Constitucionalidad sobre la Denuncia del Acuerdo para la Promoción y Protección Recíproca de Inversiones entre*

el Reino de España y la República del Ecuador [Dictum on the Constitutionality of the Agreement for the Reciprocal Protection and Promotion of Investments Between the Kingdom of Spain and the Republic of Ecuador], Dictum No. 010-13-DTI-CC, case No 0010-11-TI, 25 April 2013, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

____, Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República Argentina para la Promoción y Protección Recíproca de Inversiones [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Argentina for the Reciprocal Protection and Promotion of Investments], Dictum No. 003-13-DTI-CC, case No 0009-10-TI, 17 January 2013, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

____, Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República de Finlandia sobre la Promoción y Protección de Inversiones [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Finland on the Protection and Promotion of Investments], Dictum No. 026-10-DTI-CC, case No 0001-10-TI, 29 July 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

____, Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República de Italia sobre la Promoción y Protección de Inversiones [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Italy on the Protection and Promotion of Investments], Dictum No. 022-13-DTI-CC, case No 0015-13-TI, 17 July 2013, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

____, Dictamen de Constitucionalidad sobre la Denuncia del Acuerdo entre el Gobierno del Reino de Suecia y el Gobierno de la República del Ecuador para la Promoción y Protección Recíproca de Inversiones [Dictum on the Constitutionality of the Agreement between the Government of the Government of the Kingdom of Sweden and the Republic of Ecuador for the Reciprocal Protection and Promotion of Investments], Dictum No. 029-10-DTI-CC, case No

0002-10-TI, 6 September 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

- ____, Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República Francesa para la Promoción y Protección Recíprocas de Inversiones [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the French Republic for the Reciprocal Protection and Promotion of Investments], Dictum No. 031-10-DTI-CC, case No 0007-10-TI, 16 September 2010, available at <http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>
- ____, Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República de Chile para la Promoción y Protección Recíprocas de Inversiones [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Chile for the Reciprocal Protection and Promotion of Investments], Dictum No. 038-10-DTI-CC, case No 0010-10-TI, 11 November 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).
- ____, Dictamen de Constitucionalidad sobre la Denuncia del Tratado entre la República del Ecuador y la Confederación Suiza sobre Protección y Fomento de las Inversiones [Dictum on the Constitutionality of the Treaty Between the Republic of Ecuador and the Swiss Confederation on the Protection and Promotion of Investments], Dictum No. 040-10-DTI-CC, case No 0012-10-TI, 11 November 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).
- ____, Dictamen de Constitucionalidad sobre la Denuncia del Convenio Suscrito entre el Gobierno del Reino Unido de Gran Bretaña e Irlanda del Norte y el Gobierno de la República del Ecuador para la Promoción y Protección de Inversiones [Dictum on the Constitutionality of the Agreement Signed between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ecuador for the Protection and Promotion of Investments], Dictum No. 020-10-DTI-CC, case No 0008-10-TI, 24 June 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).
- ____, Dictamen de Constitucionalidad sobre la Denuncia del Tratado entre la Repú-

blica del Ecuador y los Estados Unidos de América Sobre Promoción y Protección Recíproca de Inversiones [Dictum on the Constitutionality of the Treaty between the Republic of Ecuador and the United States of America for the Reciprocal Protection and Promotion of Investments], Dictum No. 043-10-DTI-CC, case No 0013-10-TI, 25 November 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

____, Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República de Venezuela para la Promoción y Protección Recíprocas de Inversiones [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Venezuela for the Reciprocal Protection and Promotion of Investments] Dictum No. 041-10-DTI-CC, case No 0011-10-TI, 25 November 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

____, Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno del Ecuador y el Gobierno de Canadá para el Fomento y la Protección Recíproca de Inversiones [Dictum on the Constitutionality of the Agreement between the Government of Ecuador and the Government of Canada for the Reciprocal Protection and Promotion of Investments], Dictum No. 035-10-DTI-CC, case No 0003-10-TI, 7 October 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

____, Dictamen de Constitucionalidad sobre la Denuncia del Tratado entre la República del Ecuador y la República Federal de Alemania sobre Fomento y Recíproca Protección de Inversiones de Capital [Dictum on the Constitutionality of the Treaty between the Republic of Ecuador and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Capital Investments], Dictum No. 023-10-DTI-CC, case No 0006-10-TI, 24 June 2010, available in <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

____, Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República Popular de China para el Fomento y Protección Recíprocos de Inversiones [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Popular Republic of China for the Re-

ciprocal Protection and Promotion of Investments] Dictum No. 027-10-DTI-CC, case No 0004-10-TI, 29 July 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

____, Dictamen de Constitucionalidad sobre la Denuncia del Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República del Perú sobre la Promoción y Protección Recíproca de Inversiones [Dictum on the Constitutionality of the Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Peru on the Reciprocal Protection and Promotion of Investments] Dictum No. 032-13-DTI-CC, case No 0016-13-TI, 29 November 2013, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

____, Dictamen de Constitucionalidad sobre la Denuncia del Convenio Para la Promoción y Protección Recíproca de Inversiones entre la República del Ecuador y el Reino de los Países Bajos [Dictum on the Constitutionality of the Agreement on the Reciprocal Protection and Promotion of Investments between the Government of the Republic of Ecuador and the Government of the Kingdom of the Netherlands] Dictum NO. 030-10-DTI-CC, case No 0005-10-TI, 16 September 2010, available at <<http://casos.corteconstitucional.gob.ec:8080/busqueda/index.php>> (accessed: 13-06-2016).

Legislation and Treaties

Constitución de la República del Ecuador [Constitution of the Republic of Ecuador] 2008, 20 October 2008, Official Registry 449.

Constitución Política de los Estados Unidos Mexicanos que Reforma la de 5 de Febrero del 1857 [Political Constitution of the United Mexican States, Amending the One of February 5, 1857] (Mexico) 5 February 1917, Official Diary 30.

Statute of the International Court of Justice.

Electronic Newspaper Articles

“Ecuador Busca Junto a Bolivia Crear un Nuevo Sistema de Arbitraje” [Ecuador and Bolivia Seek to Create a New Arbitration System] Ecuador Inmediato (online) 22 July 2009 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=109097&umt=ecuador_busca_juntoa_bolivia_crear_un_nuevo_sistema_arbitraje> (accessed: 13-06-2016).

“Ecuador Busca que UNSUR Cuento Con un Mecanismo para Solución de Conflictos” [Ecuador Wants UNASUR to Feature a Mechanism for Dispute Settlement] Ecuador Inmediato (online) 8 January 2008 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=68594&umt=ecuador_busca_que_unasur_cuenta_con_un_mecanismo_para_solucion_conflictos> (accessed: 13-06-2016).

“Ecuador Designa a Representante para Sistema de Solución de Controversias UNASUR” [Ecuador Designates Representative for UNASUR Dispute Resolution System] Ecuador Inmediato (online) 17 January 2011 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=141881&umt=ecuador_designa_a_representante_para_sistema_solucion_controversias_unasur> (accessed: 13-06-2016).

“Ecuador Mantiene 34 Casos Pendientes Relacionados al Arbitraje Internacional, Confirma Subsecretario de Planificación y Desarrollo (AUDIO)” [Ecuador Has 34 Pending Cases Related to International Arbitration, Confirms Sub-Secretary of Planning and Development (AUDIO)] Ecuador Inmediato (online) 30 August 2015 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=203967&umt=ecuador_mantiene_34_casos_pendientes_relacionados_al_arbitraje_internacional_confirma_subsecretario_planificacion_y_desarrollo_audio> (accessed: 13-06-2016).

“Ecuador Propondrá Nuevo Sistema de Arbitraje Durante su Presidencia en la UNASUR” [Ecuador Will Propose New Arbitral System During Its Chair Term in UNASUR] Ecuador Inmediato (online) 8 July 2009 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=108137&umt=ecuador_propondra_nuevo_sistema_arbitraje_durante_presidencia_en_unasur> (accessed: 13-06-2016).

“Ecuador se Integra al Banco del Sur” [Ecuador Joins Bank of the South] Ecuador Inmediato (online) 8 January 2008 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=66612&umt=ecuador_se_integra_a_banco_del_sur> (accessed: 13-06-2016).

“Ecuador se Suma a Exigencia de Separar Mediación al CIADI” [Ecuador Joins Demand to Separate Mediation From ICSID] Ecuador Inmediato (online) 10 May 2008 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=77684&umt=ecuador

se_suma_a_exigencia_separa_mediacion_al_ciadi> (accessed: 13-06-2016).

“Ecuador Se Suma a Venezuela y Paga Deuda al FMI [Ecuador Joins Venezuela and Pays Debt to IMF] Ecuador Inmediato (online) 16 April 2007, <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=52425&umt=ecuador_se_suma_a_venezuela_y_paga_deuda_a_fmi> (accessed: 13-06-2016).

“Entregan a Fiscalía Documentación Desclasificada en Caso “Rodós” [Office of the Prosecutor-General Receives Unclassified Information on “Roldós” Case] Ecuador Inmediato (online) 29 June 2015, <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=2818783881&umt=entregan_a_fiscalia_documentacion_desclasificada_en_caso_roldos> (accessed: 13-06-2016).

“Familia de Roldós Pide que se Abran Archivos del “Plan Cóndor en Ecuador (AUDIO)” [Roldós’s Family Asks Ecuador “Plan Cóndor” Archives to be Declassified (AUDIO)] Ecuador Inmediato (online) 27 May 2015, <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=2818781960&umt=familia_roldos_pide_que_se_abran_archivos_del_plan_condor_en_ecuador_audio> (accessed: 13-06-2016).

“Países Latinoamericanos Establecerán Alianza Frente al Abuso de las Transnacionales” [Latin American Countries Will Establish Alliance Against Transnational Abuses] Ecuador Inmediato (online) 22 April 2013 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=195618&umt=países_latinoamericanos_estableceran_alianza_frente_al_abuso_transnacionales> (accessed: 13-06-2016).

“Presidente Correa Pedirá en Cumbre de UNASUR Creación “Urgente” de Centro de Arbitraje” Ecuador Inmediato (online) 20 August 2013 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=203861&umt=presidente_correa_pedira_en_cumbre_unasur_creacion_urgente_centro_arbitraje> (accessed: 13-06-2016).

“Presidente de Ecuador Anuncia Enjuiciamiento a Banco Mundial” [President of Ecuador Announces Legal Actions Against World Bank] Ecuador Inmediato (online) 28 April 2007, <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=53124&umt=presidente_ecuador_anuncia_enjuiciamiento_a_banco_mundial> (accessed: 13-06-2016).

“Presidente de Ecuador Propone Sistema Financiero de África y Sudamérica” [President of Ecuador Proposes Financial System for Africa and South America] Ecuador Inmediato (online) 27 September 2009 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=113771&umt=presidente_ecuador_propone_sistema_financiero_africa_y_suramerica> (accessed: 13-06-2016).

“Presidentes Firman Acta Constitutiva de UNASUR” [Presidents Sign Constitution Act of UNASUR] Ecuador Inmediato (online) 23 May 2008, http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=78681&umt=presidentes_firman_acta_constitutiva_unasur

“Tratados Bilaterales de Inversión Contravienen Constitución Ecuatoriana” [Bilateral Investment Treaties Contravene Ecuadorian Constitution] Ecuador Inmediato (online) 29 April 2013 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=195993&umt=tratados_bilaterales_inversion_contravienen_constitucion_ecuatoriana> (accessed: 13-06-2016).

“UNASUR Tendrá su Propio Centro de Solución de Controversias” [UNASUR Will Have Its Own Centre of Dispute Settlement] Ecuador Inmediato (online) 27 September 2014 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=2818770468&umt=unasur_tendra_propio_centro_solucion_controversias> (accessed: 13-06-2016).

Other

International Centre for Settlement of Investment Disputes, “List of Contracting States and Other Signatories of the Convention” (8 April 2015) ICSID <<https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>> (accessed: 13-06-2016).

Hunter, Robert, “South Africa Terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland” International Arbitration and Investment Law <<http://www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherlands-and-switzerland>> (accessed: 13-06-2016).

Ministerio de Finanzas del Ecuador [Finance Ministry of Ecuador], Presupuesto Ge-

neral del Estado Consolidado por Sectorial Gastos (US Dólares) [State General Budget Consolidated by Sectorial Expenditure (US Dollars)] (2012) Ministerio de Finanzas del Ecuador <<http://www.finanzas.gob.ec/wp-content/uploads/downloads/2014/06/10.SECTORIAL.pdf>> (accessed: 13-06-2016).

United Nations Conference on Trade and Development, "Ecuador" Investment Policy Hub <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/61>> (accessed: 13-06-2016).

World Bank, The, GDP (Current US\$) (2015) The World Bank <<http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>> (accessed: 13-06-2016).