INTERNATIONAL ARBITRATION IN LATIN AMERICA: A BLEND OF PROTECTIONISM AND PRO-ARBITRATION STANCE

Fernando Pérez Lozada*

ABSTRACT: Latin America is perhaps the best example of a region with most divergent positions towards international arbitration. This region hosts the only three countries that have denounced the ICSID Convention (Bolivia, Ecuador and Venezuela) while Mexico, in a stark contrast, has recently ratified it. A number of Latin American States have shifted back and forth from protectionism to (1) Pro-arbitration rules on commercial arbitration, and (2) Pro-investor standing in investment arbitration. This article addresses, first (1) the key doctrines and reforms that have shaped the arbitration landscape in Latin America, while looking at laws and court decisions tipping the scale between protectionism and pro-arbitration in the commercial sphere; and secondly: (2) the diverse approaches over Investor-State arbitration in the region and the reformation of NAFTA (now USMCA).

KEYWORDS: Arbitration, Investment, Latin America, NAFTA.

I. Introduction

Considering the interplay of different laws, court decisions and practices in Latin America, it is well recognised that international arbitration cannot be seen as a single approach in the region.[1] In order to assess the traits of arbitration in Latin America it is essential to understand how the so-called Calvo doctrine has influenced the foreign policy in the region. Some may contend that this doctrine is still influencing Latin America's arbitration landscape.[2]

In Latin America, the development of different positions towards international arbitration has increased the complexity and scope of this field in the Region. In practice, foreign investors may have to navigate in uneven policy and regulatory environments, and often changing political regimes and judicial controls, which may embody divergent position towards international arbitration.

* Fernando Pérez Lozada is a dual-qualified lawyer admitted in Paris and Mexico. As an associate in Mayer Brown (Paris) he has specialised in Investor-State arbitration under NAFTA and ICSID Rules. He holds both an LL.M from the University of Manchester and the MIDS programme from the Graduate Institute, Geneva. This paper is inspired by a conference given by the author in the 78th bi-annual conference of ILA in Sydney. The opinions and views expressed in this publication are only those of the author. They do not purport to reflect the opinions or views of Mayer Brown or of any of its members.

[1] Catherin Titi, 'Investment Arbitration in Latin America; The Uncertain Veracity of Preconceived Ideas*'* (2014) 30, Arb. Int., 357.

[2] Bernardo M. Cremades, 'The Resurgence of the Calvo Doctrine in Latin America' (2006) 7 Business Law Int.

Whilst some countries have denounced the ICSID Convention,[3] as Bolivia (2007), Ecuador (2009) and Venezuela (2012) departing from the ICSID regime,[4] others like Mexico (2018) have recently ratified it. Other regional initiates emerged such as the Investment Arbitration Centre in Latin America under the auspices of UNASUR[5] led by Ecuador, addressing most of the concerns against the ICSID regime while innovating in other fronts.

Moreover, in the commercial arbitration front, Peru for example has codified pro-arbitration rules with mandatory arbitration in public contracts since 1997, and has incorporated dispute boards in public contracts since 2014.[6] More recently, another reformist trend has emerged in Latin America with the enactment of laws by a number of countries including Colombia in 2012, followed by Argentina, Bolivia, Brazil, Chile and Ecuador.

II. The Calvo Doctrine's influence

This doctrine was embraced since the mid-nineteen century to prevent foreign investors to invoke diplomatic protection, and/or to refer disputes to international tribunals.[7] Since then, Latin America has arguably been tainted by the Calvo doctrine as a region reluctant towards international arbitration. At that time, Latin American courts had embraced the exclusive jurisdiction over disputes involving foreign investors that were substantiated under the laws of the host State.[8]

Initially, the so-called Calvo clause was predominately integrated into the Constitutions, laws and investment contracts across Latin America. This doctrine may have influenced some of the first Bilateral Investment Treaties (BITs) in the region, which incorporated the exhaustion of local remedies requirement (i.e. UK-Argentina BIT).[9]

The origins of the exhaustion of local remedies can be found in the diplomatic protection mechanism. Before the ICSID Convention entered into force in 1966, diplomatic protection was the only remedy available for a natural or legal person to request the protection of his or her own government against another State. However, this protection was subject to the exhaustion of *available* local remedies,[10] as illustrated in the *Diallo case*.[11] The drafters of the ICSID Convention also preserved this requirement in Article 26, under which a

[3] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) 575 UNTS 159.

[4] Supported by the ALBA members: Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Nicaragua, Saint Vincent and the Grenadines, Santa Lucia and Venezuela. See official website: www.alianzabolivariana.org

[5] Union of South American Nations (UNASUR) was established in 2004 by Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela to promote economic, social and political integration in the region. See official website: http://www.unasursg.org/en

[6] Ley Nº 26572, *Ley General de* Arbitraje of 1996 and then reformed in 2008. *See* Jaime Gray, Jonnathan Bravo, et. al. 'ADR in Construction', IBA International Construction Projects Committee (July 2015) 1-2, available in: file:///C:/Users/fp051155/Downloads/ICP%20-%20ADR%20in%20Construction%20-%20Peru.pdf

[7] The Calvo Dotrines was developed by the Argentinean legal Scholar Carlos Calvo, expressed in his *Derecho internacional teórico y práctico de Europa y América* (D'Amyot, Paris 1868).

[8] Bernardo M. Cremades (n 2), 3.

[9] Idem, 4-5.

[10] Articles 14-15, *Draft articles on Responsibility of States for Internationally Wrongful Acts* (2001), International Law Commission.

[11] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, 24 May 2007.

Contracting State may require the exhaustion of local remedies. As it is well established, the exhaustion of local remedies under ICSID Rules is not necessary, unless otherwise agreed.[12]

Indeed, the need to exhaust domestic remedies depends on the agreement given by States.[13] Today, most BITs do not require the exhaustion of local remedies,[14] under which investors can initiate Investor-State arbitration without having to resort to domestic courts. Although Argentina[15] has included this exhaustion requirement its BITs, its applicability has been subject to debate by ICSID tribunals[16] and scholarly legal opinions.[17]

In general, the exhaustion of local remedies is no longer the rule, but the exception.[18] In *BG Group v Argentina*[19] for example, following Argentina's petition to vacate the arbitral award, the U.S. Supreme Court ruled that the 18-month litigation requirement was not mandatory and therefore the arbitral tribunal had not exceeded its jurisdiction.[20] The U.S. Supreme Court concluded that BG Group was not obliged to seek recourse in Argentina's court system as *a condition sine qua non* for arbitration.[21]

The rational of this decision was "a matter of treaty interpretation" of Article 8(2)(a)(1) of the Argentina-United kingdom's BIT that provides for the exhaustion of local remedies.[22] In simple terms, such a requirement *"cannot be construed as an absolute impediment to arbitration"*.[23] In this case Argentina had enacted laws that "hindered" recourse to the domestic judiciary by investors whose rights were allegedly affected by Argentina's emergency measures. Under these circumstances it would be "absurd and unreasonable" to read Article 8 of the BIT as requiring an investor to exhaust local remedies before arbitrating.

[12] Article 26, ICSID Convention (April 2006).

[13] The instruments that contain such requirement are generally Bilateral Investment Treaties, investment contracts or national legislation.

[14] UNCTAD Investment Policy Framework for Sustainable Development (IPFSD), Policy Options, available in http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20 (IIA)/IIA-IPFSD.aspx

[15] i.e. Article 8(3) of the Argentina-Italy Bilateral Investment Treaty (signed on 22 May 1990, entered into force on 14 October 1993): "*Where, after eighteen months from the date of notice of commencement of proceedings before the courts mentioned in paragraph 2 above, the dispute between an investor and one of the Contracting Parties has not been resolved, it may be referred to international arbitration.";* Article 8(1)(a)(i) of the Argentina-United Kingdom's Bilateral Investment Treaty (signed on 11 December 1990, entered into force on 19 February 1993): "*where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision*".

[16] *Ambiente Ufficio S.P.A. and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, 607-608: *"Local remedies do not need to be exhausted where [...] [t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress [...]*".

[17] Alejandro López Ortiz, Patricia Ugalde-Revilla, et al., Chapter 12: 'The Role of National Courts in ICSID Arbitration in Crina Baltag', *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International, 2016), 331.

[18] *Idem*.

[19] *BG Group Plc v. The Republic of Argentina* (UNCITRAL), information about this case available in: http://www.italaw.com/cases/143

[20] This decision reversed the U.S. Court of Appeal that initially had annulled the award for lack of jurisdiction favouring Argentina at the beginning.

[21] *BG Group plc r Republic of Argentina 572 US _ (2014) (12-138) (5 March 2014)* available in: https://www.supremecourt.gov/opinions/13pdf/12-138_97be.pdf

[22] Article 8(1)(a)(i) of the Argentina-United Kingdom's Bilateral Investment Treaty (signed on 11 December 1990, entered into force on 19 February 1993): "*where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision*" (emphasis added).

[23] *BG Group* (n 19), 17-18.

Otherwise, Argentina could avoid arbitration by passing a law that close down its judiciary system.[24]

Another example is the decision adopted in *Abengoa v Mexico*, where the arbitral tribunal found that, since the claim was not premised on a denial of justice, there was no obligation for the claimants to exhaust local remedies.[25]

On the one hand, a perceived advantage of primary remedies is that host States can have the opportunity to resolve the dispute by its own means, for example by reconsidering the contested measures through an administrative or judicial review process. In limited cases, this solution may be helpful when investors prefer an specific act to preserve the investment (i.e. granting of a license), instead of receiving compensation.[26] On the other hand, in general the exhaustion of local remedies may be perceived as a delay or increased costs for the parties, which may not contribute to the objectives of the ICSID Convention; namely to the speed, neutrality and flexibility of the process.

Despite the Calvo doctrine initially played a role in the foreign policy in Latin America, several countries in the region have been influenced by pro-arbitration statues and jurisprudence developed in Europe, namely in France and Switzerland, which has contributed to the adoption of pro-arbitrability rules as explained below.

III. Origins and Evolution of Arbitration in Latin America

The practice of arbitration emerged more than five hundred years ago, since the Spanish conquest that promoted dispute resolution practices by *avenidores* or *letrados,* which were previously found in Roman law with influences of the Roman-Germanic structures, and under the administration of the Visigoths and Byzantines.[27] As a legacy of the 'New Spain' civilisation, some new independent countries in Latin America adopted the arbitration practice in the eighteen-century, based on Spanish Law (*Ordenanzas de Bilbao*).

For example, in Mexico, the Code of Commerce of 1854 recognised commercial arbitration as an alternative dispute settlement method, and a civil arbitration was regulated in the Civil Code of 1884, for exceptional circumstances.

The beginning of the international arbitration in Latin American can be traced back to 1889,[28] with the signature of the Montevideo Treaty,[29] which was subsequently improved in 1940; both instruments regulated the enforcement of court judgements and arbitral awards. In 1975 the Panama convention[30] signalled the evolution of a new era of acceptance of

[24] *Ibid*, at 18.

[25] *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013, at paragraph 626: "*El Tribunal Arbitral estima que, efectivamente, al no basarse la reclamación en una denegación de justicia, las Demandantes no tenían la obligación de agotar las vías de recursos internas.*"

[26] A. Van Aaken, 'The Interaction of Remedies between National Judicial Systems and ICSID: An Optimization Problem', cited in N. Jansen Calamita, David Earnest, et al. (Eds.) *The Future of ICSID and the Place of Investment Treaties in International Law*, (2013) British Institute for International and Comparative Law), 324.

[27] Carlos Rodríguez, *México ante el Arbitraje Comercial Internacional* (Porrúa México, 1999) 65.

[28] Luis Malpica, *La Influencia del Derecho Internacional en el Derecho Mexicano* (Limusa, México, 2002), 418-419

[29] Tratado sobre la Unificación de los Estados Sudamericanos respecto del Derecho Procesal, 11 January 1889.

[30] Convención Interamericana sobre Arbitraje Comercial Internacional, 30 January 1975.

international arbitration, adopted by 19 and ratified by 17 countries including the USA.[31] The Panama convention provided the rules on the validity of arbitration agreements, enforcement of arbitral awards, and procedural rules aimed at remedying deficiencies in the domestic arbitration laws of its members.

However, prior to the Panama convention, the New York Convention of 1958 was established, Ecuador being the first country in the region to ratify it in 1962, followed by Mexico (1971), Chile and Cuba (1975), and Colombia (1979), among others. Only three Latin countries are not part of the New York Convention (Guyana, Suriname, and French Guyana).[32] Notably, Brazil, Nicaragua and Bahamas were the last ones to ratify it in 2002, 2003 and 2007, respectively. Although there is unrest with respect to the application of either the New York or the Panama Convention at both regulatory and doctrinal levels, the signature of these conventions paved the way to a reformation era of the arbitration acts in Latin America.

Almost every country in Latin America has adopted arbitration laws, inspired or adopting the UNCITRAL Model Law in whole or in part. However, this trend has been followed with some differences in approach and timing from country to country, as illustrated below.\

A. Mexico's arbitration regime

Mexico, finally adopted the UNCITRAL Model Law in July 1993, by reforming its Code of Commerce marking a new era in commercial arbitration. However, insufficient attempts were made before in 1988 by a first reform to the Code of Commerce that introduced provisions of the UNCITRAL Model Law, New York Convention and Panama Convention.

In June 2008 Mexico approved a notable reform to its Constitution[33] by authorising alternative dispute resolution mechanisms, resolving both technical and academic debates about its constitutionality. This was particularly important given the Latin American legal tradition of the Carta Magna's (Kelsenian)[34] supremacy.

In 1994 Mexico reformed its organic laws to allow PEMEX (Mexico's oil and gas state entity) and CFE (Federal Electricity Commission) to be part of international arbitration proceedings, as well as to apply foreign law in international contracts. In 1999, further reforms were made to the laws governing the contracts celebrated by the government with private parties and Public Private partnerships (PPPs).[35] These reforms marked an important precedent for arbitration, by authorising this mechanism in all federal contracts and public works contracts, except those involving an administrative termination by the State.

[31] OAS website: http://www.oas.org/juridico/spanish/firmas/b-35.html
[32] New York Convention (1958) available in: http://www.newyorkconvention.org/contracting-states
[33] Article 17 "*Las leyes preverán mecanismos alternativos de solución de controversias*".
[34] Ideas advanced by the Austrian jurist Hans Kelsen in his 'Grundnorm' (basic norm) model, as a foundation of a legal system. This notion described the origin and hierarchy of norms, in which the Constitution was the supreme law of the land, and from which the rest of the norms must be derived.
[35] *i.e. Ley de Obras Públicas y Servicios relacionados con las mismas*; *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*.

Furthermore, on 20 December 2013 a significant constitutional amendment was made allowing private participation in the oil, gas and electricity sectors, which were previously restricted to the State for more than 70 years. PEMEX and CFE were to become "Productive State Enterprises" able to participate in the electric power sector in association with private investors.[36]

Under the new Hydrocarbons Law (2014)[37] disputes arising from international contracts for exploration and extraction are arbitrable under the Code of Commerce (UNCITRAL Model Law). However, with some restrictions, namely: i) the applicable laws will be those of Mexico (no foreign laws allowed); and ii) the language shall be Spanish. Notably, the administrative rescission by the State was not subject to arbitration in some cases attributable to the private party. This includes the following scenarios: i) unjustified suspension of activities for more than 180 days; ii) unauthorised transfer of rights, iii) false information provided by the investor; and iv) omission of payments or delivery of hydrocarbons. These statutory restrictions are subject to interpretation by international tribunals and national courts.

As it appears, Mexico has opened investment opportunities to foreign companies aimed at fostering its FDI inflows in the energy sector, while preserving some policies favouring the application of Mexican law in arbitration proceedings and carving out from arbitration measures, such as the peculiar administrative rescission, as discussed below.

In an interesting case, PEMEX sought vacatur of a 2009 ICC award worth USD $465 million rendered in favour of a U.S. investor. In 2011, the Eleventh Collegiate Court in Mexico annulled the award after PEMEX had rescinded a contract to KBR's subsidiary in Mexico (COMMISA) on the ground that a governmental entity could not be forced to arbitrate. This decision was based on Mexico's adoption of Article 98 of the Law of Public Works and Related Services on 28 May 2009,[38] which ended arbitration for certain claims such as those in COMMISA.

However, on 2 August 2016 the U.S. Court of Appeals for the Second Circuit put an end to the prolonged dispute by upholding a decision of a District Court in New York.[39] The U.S. Court of Appeals confirmed the validity of a the 2009 ICC award, which had been annulled by Mexican Courts. The initial dispute arose after a subsidiary of PEMEX rescinded

---

[36] *DECRETO por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia de Energía*, Diario Oficial de la Federación (20 December 2013), Article Third Transitory, available in: http://www.dof.gob.mx/nota_detalle.php?codigo=5327463& fecha=20/12/2013

[37] *DECRETO por el que se expide la Ley de Hidrocarburos y se reforman diversas disposiciones de la Ley de Inversión Extranjera, Diario Oficial de la Federación (11 August 2014)*, Article 21, available in: http://www.diputados.gob.mx/LeyesBiblio/ ref/lhidro/LHidro_orig_11ago14.pdf

[38] *DECRETO por el que se reforman, adicionan y derogan diversas disposiciones de la Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*, Diario Oficial de la Federación (28 May 2009), Article 98*: "No será materia de arbitraje la rescisión administrativa, la terminación anticipada de los contratos, así como aquellos casos que disponga el Reglamento de esta Ley."* available in: http://www.diputados.gob.mx/LeyesBiblio/ref/lopsrm/LOPSRM_ref05_28may09.pdf

[39] *Corporación Mexicana de Mantenimiento Integral, S. De R.L de C.V v. Pemex-Exploración y Producción,* No. 13-4022 (2d Cir. 2016).

a contract to COMMISA in 2004 to build two offshore natural gas platforms in the Gulf of Mexico.

In the U.S. Court of Appeal's view, giving effect to the annulment of the arbitral award by Mexican courts would run counter to U.S. public policy and would be "*repugnant to fundamental notions of what is decent and just*".[40] The appeals court held that the lower court in New York had properly exercised its discretion in confirming the award, and did not exceed its authority by ruling an additional USD $106 million payment in favour of COMMISA, attributed to performance bonds collected by PEMEX's subsidiary.

This case illustrates that under "extraordinary" circumstances the enforcement of an arbitral award is possible (in the US), even if it had been annulled in the seat of arbitration when a foreign judgment is inconsistent with the public policy of the State where enforcement is sought.

IV. Domestic courts stance over arbitration in Latin America

A. Argentina

The Argentinean courts have adopted a decision that was celebrated as a positive step for arbitration within a regional context in Latin America.[41] In the so-called YPF saga, the parties involved in a project to export natural gas from Argentina to Brazil, had commenced a multi-party ICC arbitration seated in Montevideo, Uruguay.[42] The parties have previously agreed to the "exclusive" jurisdiction of Argentinean courts for any annulment proceedings (of arbitral awards), which were also governed by Argentinean Law.[43]

Despite the Courts in Uruguay claimed to have exclusive jurisdiction to control the arbitration (as the arbitral seat),[44] the Argentinean Courts followed a "delocalization" approach[45] – under which arbitration is not subject to any particular legal system – and accepted jurisdiction to hear an annulment action of a partial award on liability. In the end, the Argentinean courts annulled the partial award on 22 December 2015 (now worth more than USD $500 million),[46] stating that "party autonomy" should be respected, despite the arbitration was not seated in Argentina.[47]

---

[40] *Idem*, 27.

[41] Diego P. Fernández Arroyo, 'The Curious Case of an Arbitration with Two Annulment Courts: Comments on the YPF Saga', Arbitration Int'l (2017), 11.

[42] A number of ICC cases were consolidated into the *ICC Case No. 16232/JRF/CA*.

[43] As agreed by the parties in the arbitration agreement.

[44] Montevideo Civil Appeals Tribunal No 2, 20 August 2014. *See* Diego P. Fernández (n 41, 2, footnote 4).

[45] Mainly developed and supported by French jurisprudence: *Société Ryanair Ltd et Société Airport Marketing Services Ltd v Syndicat Mixte des Aéroports de Charente (SMAC),* Cour de Cassation, 8 July 2015.

[46] Despite the Argentinean Courts annulled the partial award on liability, the ICC arbitral tribunal rendered its Final Award ordering YPF (the largest Argentinean producer of natural gas) to pay USD $500 million for damages, plus 5 million in costs, *See* Diego P. Fernández (n 69, 8-9).

[47] *Decision of the Federal Court on Administrative Matters*, *Chamber No IV*, 22 December 2015. Sebastian Perry 'Lat Am Courts Clash Over Gas Exports Award' (21 March 2016) Global Arbitration Review, cited in Diego P. Fernández Arroyo, 'The Curious Case of an Arbitration with Two Annulment Courts: Comments on the YPF Saga', Arbitration Int'l (2017) 2.

B. Brazil

The pro-arbitration position in Brazil has been recently confirmed by the Brazilian Supreme Court of justice in a case concerning the extension of an arbitration agreement. In this case, a breach of contract was alleged to be the basis to commence arbitration un-der a Loan agreement between Paranapanema S.A, conducted by its financial advisors Banco BTG Pactual S.A. ('BTG') and Banco Santander S.A. The Brazilian court recognised that third parties that are part of a group of companies, could consent tacitly to arbitration when their actions prevented another contractual party from their contractual rights. Moreover, the Brazilian court agreed with the arbitral tribunal to pierce the corporate veil of the group of companies in order to protect the assets.

Another example in Brazil is the recognition of the principle of competence-competence on 28 May 2018, by the Superior Court of Justice by way of an injunction re-affirmed such principle. In the case at hand, an arbitration claim was filed by a minority shareholder of Petrobras (national oil company) against Petrobras and the Federal Union for mismanagement. This decision reaffirms the principle that the arbitral tribunal is the only one competent to decide over its own competence and domestic courts should not intervene in this decision. Similarly, the same court rejected an anti-arbitration injunction aimed at suspending arbitration proceedings for the same reasons.

However, there are two cases where anti-arbitration injunctions were granted by Brazilian Courts (Copel v UEG and Sulamérica v ENESA) in which the parties where pre-vented to commence arbitration; however, they seem to be the exception rather than the rule.

Overall, Brazil is considered an arbitration-friendly jurisdiction, ranked at the 8th position (São Paulo) in the overall ranking of a 2018 International Arbitration Survey, where London, Paris, Singapore, Hong Kong and Geneva, are considered the most in-demand places of arbitration.

C. Chile

Domestic courts in Chile have adopted interpretations in favour of international arbitration, despite having domestic provisions that were apparently enacted with a protectionist vision.[48]

On 5 October 2016 the Supreme Court in Chile rejected a set aside action of an international arbitral award by applying a broad interpretation of public policy.[49] In this case, the Supreme Court declared inadmissible an *Amparo* (cassation) action that was brought against a commercial award on the ground that it was contrary to the public order *in Chile*, pursuant to its domestic law on international commercial arbitration.[50] The Supreme court also stated that –under the particular circumstances– such a remedy was not compatible with

[48] Ley No. 19971 sobre arbitraje comercial internacional, Article 34(2)(b)(ii): "*El laudo arbitral sólo podrá ser anulado por la respectiva Corte de Apelaciones cuando: [...] [e]l tribunal compruebe: [...] [q]ue el laudo es contrario al orden público* de Chile." (emphasis added). A similar rule is contained in Article 108 of *Law 1563* of Colombia (n 47), although it refers to the "international public order *in Colombia*".

[49] Decision *Rol No. 55.038-16,* Corte Suprema de Justicia de Chile (5 October 2016).

[50] Ley No. 19971 (n 66).

the legal system in Chile and declared that the *Amparo* was an *exceptional* and *restrictive* remedy that does not entail the revision of the merits of the case.

In the case under analysis, the Supreme Court upheld a decision of the Court of Appeals in Santiago, which had conferred a legal presumption in favour of international arbitral awards. At the same time, it had distinguished between national public order and international public order. The latter being the one applicable to international arbitration without covering all domestic mandatory norms. As a result, the Supreme court concluded that there was no violation to fundamental principles under which the arbitral award could be annulled, favouring a restrictive interpretation of public order in line with international practice (despite its domestic law refers to a broader concept under "public order in Chile"). This case confirms the pro-arbitrability stance of the courts in Chile in favour of international arbitral awards (and in the region as a whole), save for isolated examples on the contrary.

D. Colombia

Colombia passed a new arbitration law since 12 July 2012,[51] consistent with the country's intention to attract arbitration. The Colombian law preserved a dualist regime –with differentiated rules for national and international arbitration– following the French model.[52] Whereas under a dualist regime a country can have more liberal rules applicable to international arbitration (while preserving conservative rules for domestic arbitration), it may give rise to conflicts arising from the interaction and interpretation of both national and international rules. In contrast, under a monist approach –that prevails in Latin America, including Argentina, Brazil, Colombia, Mexico and Peru– countries may avoid the risk of applying and transposing domestic arbitration rules into international arbitration cases.

Under the Colombian arbitration act, the *international* character of the arbitration is not (only) determined by the classic approach of international connecting factors (i.e. nationality, domicile of the parties, or place of performance).[53] Alternatively, this question can also be defined by the nature of the interest at stake; namely by assessing whether it involves a movement of goods, services and/or payments across borders. Indeed, this rule was first advanced by French jurisprudence,[54] which was later codified in the French arbitration act in 2011, under which arbitration is international *"when international trade interests are at stake"*.[55]

In addition, under the international arbitration regime in Colombia, parties can validly waive their right to annul an award seated in Colombia[56] akin to other European models, *inter*

---

[51] *Colombian Law 1563 by which the Statute of National and International Arbitration and other provisions are issued* (12 July 2012). This law replaced law 325 of 1996 that comprised only five articles.
[52] Emmanuel Gaillard, 'France Adopts New Law on Arbitration' (2011) 245 NYLJ.
[53] *Colombian Law 1563* (n 47), Article 62(3): "*Se entiende que el arbitraje es internacional cuando: [...] c) La controversia sometida a decisión arbitral afecte los intereses del comercio internacional.*"
[54] *Société KFTCIC v. société Icori Estero et autre,* Cour d'appel de Paris, 13 June 1996, Revue de l'Arbitrage (1997) 2, 251-57.
[55] French Civil Procedure Code (CPC), reformed on 12 May 1981, and subsequently on 13 January 2011 (*Decree No. 2011-48*), Article 1504 "*An arbitration is international when international trade interests are at stake.*"
[56] *Colombian Law 1563* (n 47), Article 107 (Limited to parties not domiciled or residing in Colombia).

alia, in Switzerland,[57] France,[58] and Sweden[59]. Furthermore, the Colombian law had clarified the arbitrability of disputes involving the State –inspired by the Swiss model–[60] under which a State cannot invoke its own law to contest its capacity to arbitrate or the arbitrability of a dispute.[61] It also eliminated the judicial review of an arbitration agreement allowed under the UNCITRAL Model Law.[62] An interesting Colombian footprint is that arbitrators are no longer required to be lawyers to be appointed by the parties.[63]

However, a State entity or any organization controlled by the Colombian State must justify *ex ante* the suitability to celebrate an arbitration agreement, as mandated by a Presidential decree aimed at discouraging this practice in respect to State entities.[64]

As a result, it seems that the arbitration rules adopted in Colombia and Latin America as a whole over the last decade, contain a blend of pro-state and pro-investor policies. While a number of countries in the region have codified pro-arbitration rules inspired by case law and statues in other European countries, the real challenge is how domestic courts in Latin America can and would apply and interpret arbitration rules.[65]

Previously, on the one hand, the Colombian Supreme Court of Justice refused to enforce a foreign arbitral award based on the non-compliance with domestic procedural rules.[66] However, on the other hand, positive steps can be traced in a later decision from the Constitutional Court in Colombia on 6 August 2015, "*which rejected the challenge of an international arbitration award issued in Bogota against a State-owned company*".[67]

Admittedly, some of the recent decisions adopted by courts in Latin America may hint some progress towards a pro-arbitrability policy stance at this point in time; however, domestic courts have –and will continue to play– an important role in bringing clarity over the prevailing position vis-à-vis international arbitration in the future.

---

[57] Swiss Private International Law Act (PILA), Article 192(1): *"Where none of the parties has its domicile, its habitual residence, or a place of business in Switzerland, they may, by an express statement in the arbitration agreement or in a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds [...]".*

[58] French Code of Civil Procedure (CPC), Article 1522: "*By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside.*".

[59] Swedish Arbitration Act (SFS 1999:116), Article 192(1): "*Where none of the parties is domiciled or has its place of business in Sweden, such parties may in a commercial relationship through an express written agreement exclude or limit the application of the grounds for setting aside an award [...]*"

[60]Swiss Private International Law Act (PILA), Article 177(2): "*If a party to the arbitration agreement is a state [...], it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement.*"

[61] *Colombian Law 1563* (n 47), Article 62(2): "*Ningún Estado, [...] podrá invocar su propio derecho para impugnar su capacidad para ser parte en un arbitraje o la arbitrabilidad de una controversia comprendida en un acuerdo de arbitraje.*".

[62] UNCITRAL Model Law on International Commercial Arbitration (amended in 2006), Article 8.1.

[63] *Colombian Law 1563* (n 47), Article 73(2); *See* Fernando Mantilla Serrano, 'Colombia Enacts a New International Arbitration Law' (2013) 30 Jour. Int'l A.

[64] Alejandro López Ortiz and Gustavo Fernandes, 'A Year of Legal Developments for International Arbitration in Latin America' (11 January 2016) Kluwer Arbitration Blog, available in: http://kluwerarbitrationblog.com/2016/01/11/a-year-of-legal-developments-for-international-arbitration-in-latin-america/?_ga=1.266957390.173502462.1491306573)

[65] Juan Antonio Gaviria, 'The New Colombian Legal Rules on International Arbitration' (2013) 3 The Arbitration Brief, 85.

[66] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ., mayo 12, 2011, M.P. W. Namen, Expediente 11001-0203-000-2011-00581-00, Gaceta Judicial [G.J.] (Colom.) in Juan Antonio Gaviria, 'The New Colombian Legal Rules on International Arbitration' (2013) The Arbitration Brief, 85.

[67] Alejandro López (n 64).

V. Investment Arbitration in Latin America

A. ICSID

Latin America has faced the largest number of investment treaty arbitration cases than any other region in the world, holding over 30% of the total caseload administered by the ICSID (i.e. 225 out of 730 cases).[68]

Evidently, the Proliferation of BITs in the 1990's initially contributed to the expansion of investment arbitration with an explosion of ICSID cases in the Latin American region, mainly from USA and European investors.[69] Argentina alone has the largest number of ICSID cases by country with almost 10% of ICSID caseload.[70]

As the liberalisation of trade emerged and the import substitution industrialisation policies were abandoned at the end of the twentieth century, the appearance of radically new regimes of international arbitration emerged in an attempt to attract Foreign Direct Investment (FDI), as a result of the international commitments. For example, in 1995 Argentina, Bolivia, Ecuador, and Venezuela ratified the ICSID Convention.

However, Bolivia, Ecuador, and Venezuela have withdrawn from the ICSID Convention in the period of 2007-2012 with more political implications than legal effects. As expressed by Bolivia, its denunciation was an objection to the confidentiality (secrecy) of ICSID hearings when dealing with issues of public interest, and the lack of an appeal mechanism that could correct *error in judicando* (mistakes). The fact that most BITs celebrated by these three countries provide for other mechanism of investment arbitration (i.e. under UNCITRAL or ICC rules) it does not paralyse investors from initiating claims against a host State if it considers the latter has breached any of its obligations under the BIT in question.

Mexico, on the other hand has ratified the ICSID Convention on 27 July 2018, which entered into force on 26 August 2018,[71] sending a message of trust in the ICSID regime in a stark contrast with previous denunciation from other countries.

Following Mexico's signature of the ICSID Convention on 11 January 2018, the Mexican Senate approved the ICSID Convention on 26 April 2018, only few months before the Presidential elections took place were a new left-wing President and all senators and deputies were elected on 1 July 2018. The Senator's commissions in charge at the time, stated that the ICSID Convention was not incompatible with Mexico's legislation or other bilateral or multilateral agreements signed by Mexico. Mexico has over 20 BITs and/or FTAs in force with Investor-State arbitration provisions,[72] under which investors can submit a claim under the ICSID Arbitration Rules.

[68] ICSID Search Cases Database, World Bank Group (as of 20 March 2019) available in: https://icsid.worldbank.org/en/ Pages/cases/AdvancedSearch.aspx

[69] Daniel de Andrade, Rodrigo Moreira 'ICSID in Latin America; Where Does Brazil stand?' (2013) KLI 19.

[70] Catherin Titi (n 1) 357.

[71] 30 days after the deposit of the instrument of ratification pursuant to Article 68 of the ICSID Convention. Database of ICSID Member States, available in: https://icsid.worldbank.org/en/ Pages/about/Database-of-Member-States.aspx

[72] This includes BITs in force with France, Germany, Netherlands, United Kingdom, Switzerland, as well as with China, Japan and Korea, among others, all of which are contracting States of the ICSID Convention.

Mexico is the 162nd signatory member of the ICSID Convention, having a seat on the ICSID Administrative Council under which it can nominate up to four arbitrators and four mediators of the ICSID panels, used most often to appoint arbitrators where the parties are unable to agree on a nominee. This ratification signals a new era for ISDS in Mexico, particularly with respect to the enforcement of arbitral awards, which would no longer be subject to domestic courts revision, but to *ad hoc* annulment proceedings under ICSID Rules.

The number of arbitrators and method of appointment can be agreed by the disputing parties under ICSID Rules.[73] Any party can request the disqualification of an arbitrator once the Tribunal is constituted, to be decided by the unchallenged co-arbitrators or the Chairman of the ICSID Administrative Council when the other cannot agreed upon.[74]

The ICSID Rules may require in principle a higher standard for disqualification of arbitrators than any other regime, under the so-called 'manifest lack test'.[75] This analysis requires a case-by-case analysis under the particular circumstances of the case, but are usually based on his/her reliability to exercise independent judgment.[76] On the contrary, UNCITRAL Rules require as a disqualification test the "appearance" of lack of impartiality, under justifiable doubts, which is to be decided by an impartial body.[77]

Interestingly, there have been five disqualification of arbitrators upheld under ICSID Rules only –out of around seventy four attempts–[78] three of which involved Latin American countries as respondent States, namely i) *Víctor Pey Casado v Chile*[79] (2006)*;* ii) *Blue Bank v Venezuela* (2013);[80] iii) *Burlington Resources v Ecuador* (2013)*;*[81] iv) *Caratube v Kazakhstan* (2014);[82] and v) *Big Sky Energy v Kazakhstan* (2018).[83]

---

[73] Article 37 ICSID Convention; Rules 1, 2 and 3 of the ICSID Arbitration Rules.

[74] Articles 57 and 58, ICSID Convention; Rule 9(4) of the ICSID Arbitration Rules.

[75] Articles 14 and 57, ICSID Convention.

[76] Article 14(1), ICSID Convention ("*Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment*.").

[77] Interestingly, the application of different standards under UNCITRAL and ICSID Rules may not alter the outcome of a challenge, as illustrated in *Suez v Argentina*. In this case the same challenge was rejected under both rules.

[78] ICSID resources, Table of Decisions on Disqualification, World Bank, available at ICSID website available in: https://icsid.worldbank.org/en/Pages/process/Decisions-on-Disqualification.aspx

[79] *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), decision taken by the Permanent Court of Arbitration (PCA) (February 21, 2006).

[80] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20) (November 12, 2013), José María Alonso –a partner of Baker & McKenzie in Madrid– was disqualified as the claimant-appointed arbitrator, given that his law firm was acting simultaneously against Venezuela in another ICSID case with similar issues (*Longreef v Venezuela*).

[81] *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No ARB/08/5), decision on the proposal for disqualification of Prof Francisco Orrego Vicuña (December 13, 2013).[81] In this case, the respondent challenged the arbitrator based on three grounds: i) eight repeated appointments by Freshfields acting as counsel; ii) breach of the duty to disclose information, regarding prior and subsequent appointments; and iii) a blatant lack of impartiality during a pre-hearing telephone conference, including *in personam* attacks directed at Ecuador's Counsel (Dechert Paris).

[82] *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13), decision on the Proposal for disqualification of Mr Bruno Boesch (March 20, 2014). The unchallenged arbitrators upheld the disqualification of Mr. Bruno Boesch, appointed by Curtis, Mallet-Prevost, Colt & Mosle and Kazakhstan. This was based on his participation in a previous case (*Ruby Roz Agricol* v *Kazakhstan)*[82] in which he dealt with similar issues under the same factual context.

[83] *Big Sky Energy Corporation v. Republic of Kazakhstan* (ICSID Case No. ARB/17/22), The proposal for disqualification of arbitrator Rolf Knieper is upheld by the co-arbitrators, Bernardo M. Cremades (Spanish), President and Stanimir Alexandrov (Bulgarian), appointed by the Claimant, 3 May 2018.

However, in *Vivendi v Argentina*[84] the assessment of a challenge against Yves Fortier, intended to clarify that although the ICSID Convention requires a manifest lack test, "reasonable doubts" would suffice to determine a lack of impartiality, aimed at lowering the standard.[85] However, this interpretation has not followed suit.

B. Ecuador

Over the last decade Ecuador has virtually terminated all the BITs that have signed with more than 25 countries.[86] This was based on a controversial decision of the Constitutional Court endorsed by the National Assembly, under which the State considered the BITs to be incompatible with Ecuador's new constitution of 2008.[87] In particular, Article 422 of the *Magna Carta* now establishes that "*[n]o international treaties or instruments may be concluded in which the Ecuadorian State confers sovereign jurisdiction to international arbitration entities [...]*".[88] However, this was subject to debate.[89]

In March 2018 a new Bilateral Investment Agreement (BIA) model was presented by Ecuador, which is currently negotiating with other nations.[90] Since then, Ecuador offered tax incentives to investments made between 2018-2019, expecting to receive US $7,000 million of dollars of investments between 2018 and 2021.[91]

The 2018 BIA aims to balance the rights and obligations between investor and States.[92] For example, it includes new rules on prevention of investment disputes, recognised legitimate policy objectives and incorporated an appellate stage after arbitration proceedings.[93] Moreover, the 2018 BIA model places new obligations on foreign investors to respect human rights and environmental obligations. It makes clear that investors may

[84] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Challenge to the President of the Committee, 3 October 2001, paragraph 28: "*All the circumstances need to be considered in order to determine whether the relationship is significant enough to justify entertaining reasonable doubts as to the capacity of the arbitrator or member to render a decision freely and independently.*" (emphasis added).

[85] Also cited in *OPIC Karimum Corporation v Venezuela* ICSID Case No ARB/10/14 (May 5, 2011) 211.

[86] The first wave of denunciations started in 2008 (*Uruguay, the Dominican Republic, Guatemala, El Salvador, Cuba, Nicaragua, Honduras, Paraguay and Romania*), which followed in 2010 (*Finland, the United Kingdom and Germany*), 2011 (*Sweden and France*), and finally in 2017 (*Argentina, Bolivia, Canada, Chile, China, Spain, USA, Italy, Netherlands, Peru, Switzerland and Venezuela*).

[87] Javier Jaramillo, 'New Model BIT proposed by Ecuador: Is the Cure Worse than the Disease?' (2018) Kluwer Arbitration Blog.

[88] Constitution of the Republic of Ecuador, 20 October 2008, Article 422 "*No international treaties or instruments may be concluded in which the Ecuadorian State confers sovereign jurisdiction to international arbitration entities, in contractual or commercial disputes between the State and private natural or legal persons.*" (unofficial translation).

[89] Mario Alejandro Flor, 'El Artículo 422 de la Constitución y su Incidencia en el Arbitraje Internacional' 3 (2011) 189, REA, 192-197; Javier Jaramillo, Ecuadorian BITs' Termination Revisited: Behind the Scenes' (2017) Kluwer Arbitration Blog.

[90] Ministry of Foreign Affairs, 'Ecuador propone nuevos acuerdos de inversión que protegen al país y defienden los derechos humanos' 8 March 2018, available at: https://www.cancilleria.gob.ec/ecuador-propone-nuevos-acuerdos-de-inversion-que-protegen-al-pais-y-defienden-los-derechos-humanos/

[91] Ministry of Foreign Affairs, 'Ecuador propone a inversionistas extranjeros un nuevo modelo de Convenio Bilateral de inversiones' 30 May 2018, available at: https://www.cancilleria.gob.ec/ecuador-propone-a-inversionistas-extranjeros-un-nuevo-modelo-de-convenio-bilateral-de-inversiones/

[92] Ministry of Foreign Affairs, 'Ecuador propone nuevos acuerdos de inversión que protegen al país y defienden los derechos humanos' 8 March 2018, available at: https://www.cancilleria.gob.ec/ecuador-propone-nuevos-acuerdos-de-inversion-que-protegen-al-pais-y-defienden-los-derechos-humanos/

[93] Javier Jaramillo, 'Ecuadorian BITs' Termination Revisited: Behind the Scenes' (2017), Global Arbitration Blog.

lose their investment protection should they act corruptly, facing criminal sanctions as a result.[94]

Ecuador's new BIA aims to enhance the scope for cooperation between foreign investors and the host country vis-à-vis technology transfer to promote and improve the State's capabilities.[95] The success of the BIA model would be tested in the coming years, however it is an example of new generation treaties that are aimed at balancing pro-investment policies with the protection of the State's legitimate interests that is worth following up closely.

C. Brazil

Brazil stands out as the only country in Latin America that has not ratified any BIT with ISDS provisions –under which investors can sue the State before international investment tribunals– and yet Brazil has remained as one of the Top-10 host economies to attract foreign direct investment in the world, [96] and is the leading country in the region.[97]

In the last few years, Brazil has advocated a new model to promote foreign investment based on risk mitigation and dispute prevention, under a "Cooperation and Facilitation Investment Agreement" (CFIA).[98] Since 2015, Brazil has executed nine CFIAs,[99] in addition to a couple of investment treaties with similar provisions.[100] However, amongst all of theme, only the Brazil-Angola CFIA is in force.[101]

The CFIA model is supported by the assistance of an Ombudsman and joint-committees on each country –that would assist and give non-binding recommendations– as a departure of the investor-state arbitration scheme.[102]

It has been recognized that the Brazilian model "*seek[s] a greater balance between investment protection and host state's development agenda*".[103] This is a different approach to the traditional ISDS. However, it is difficult to predict whether the establishment of ISDS in Brazil would have generated a different result.

---

[94] *Idem.*
[95] *Idem.*
[96] After the U.S., China, United Kingdom, Hong Kong, Singapore, Spain, Netherlands and Australia. See Global FDI Flow continue their slide in 2018, Investment Trends Monitor, UNCTAD, January 2019, Issue 31, 3 available in: https://unctad.org/en/PublicationsLibrary/diaeiainf2019d1_en.pdf
[97] In 2017 Foreign Direct Investment grew 10% in Brazil, more than the 8% average in Latin America and the Caribbean. In 2017 Brazil attracted US$63 billion of FDI by a significant influx in the energy sector. In the same period Colombia's FDI grew 5%. while Mexico remain at US$ 30 billion of FDI supported by record-high investments into the automotive industry. See World Investment Report 2018, Investment and New Industrial Policies UNCTAD, 12-13.
[98] Natali Cinelli Moreira, Cooperation and Facilitation Investment Agreements in Brazil: The Path for Host State Development (2018), Kluwer Arbitration Blog.
[99] Chile (signed in 2015); Colombia (signed in 2015); Malawi (signed in 2015); Mexico (signed in 2015); Angola (signed in 2015); Mozambique (signed in 2015); Ethiopia (signed in 2018); Suriname (signed in 2018); Guyana (signed in 2018).
[100] Brazil-Peru Economic and Trade Expansion Agreement (signed in 2016); Intra-MERCOSUR Investment Facilitation Protocol (signed in 2017).
[101] Angola-Brazil CFIA (signed in 2015), entered into force on 28 July 2017.
[102] Presentation given by the Ministry of Development, Industry and Foreign Trade - MDIC (2015), UNCTAD website, available in: https://worldinvestmentforum.unctad.org/wp-content/uploads/2015/03/Brazil_side-event-Wednesday_model-agreements.pdf
[103] Natali Cinelli Moreira, Cooperation and Facilitation Investment Agreements in Brazil: The Path for Host State Development (2018), Kluwer Arbitration Blog.

The Brazilian CFIA model embrace the investor's obligations towards corporate social responsibility, and sustainable development of the Host State.[104] Only direct expropriation is protected, excluding for example the concept of creeping expropriation.[105]

The participation of the private sector in *ad hoc* working groups is also encouraged, while State-to-State arbitration remain open (as a last resort) if no agreement is reached through the dispute prevention mechanisms between an investor and the host State.[106]

VI. The new NAFTA

A. The influence of NAFTA

Over 25 years ago the North America Free Trade Agreement between the U.S., Canada and Mexico (NAFTA) entered into force, as the first regional trade agreement with an investment chapter comprising Investor-State Dispute Settlement (ISDS).[107] Since then, around 85 known NAFTA investment claims were made,[108] giving rise to some of the most influential awards. The top-3 most cited investment decisions out of 644 investment cases were issued by NAFTA tribunals, with around 100 citations to each of them by other investment tribunals.[109]

NAFTA has influenced other countries to include ISDS in Bilateral Investment Treaties (BITs) and/or Free Trade Agreements (FTAs). For example, Peru signed a FTA with the USA with ISDS provisions back in June 2006.[110] Colombia's 2006 BIT Model was also influenced by the interpretations of NAFTA's Free Trade Commission (FTC)[111] over the scope of the Minimum Standard of Treatment.[112] This was also the case for other CAFTA States,[113] and several BITs celebrated by Canada and the U.S. with other Latin American countries.[114] Indeed, the emergence of NAFTA jurisprudence has contributed to the interpretation of international standards of investment protection. For example, by determining that bath faith was not required (but if present would support a finding) for a

[104] See for example Guyana-Brazil CFIA, Article 15.
[105] See for example Angola-Brazil CFIA, Article 9.
[106] Presentation given by the Ministry of Development, Industry and Foreign Trade - MDIC (2015), UNCTAD website, available in: https://worldinvestmentforum.unctad.org/wp-content/uploads/2015/03/Brazil_side-event-Wednesday_model-agreements.pdf
[107] NAFTA Chapter Eleven, Article 1122 (Consent to Arbitration).
[108] Scott Sinclair, 'Canada's Track Record Under NAFTA Chapter 11; North American Investor-State Disputes to January 2018' (2018) CCPA, 3.
[109] *Monde International Ltd v United States* (103 citations); Técnicas Medioambientales Tecmed SA v United Mexican States (101 citations); and *Waste Management, Inc v United Mexican States (No. 2) (91 citations)* as of January 2016; See Rishab Gupta, Katrina Limond, 'Who is the most influential arbitrator in the world?' (2016) GAR News, 2-3.
[110] Emmanuel Gaillard, 'Anti-Arbitration Trends in Latin America' (2008) 108 NYLJ.
[111] North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions NAFTA Free Trade Commission, July 31, 2001.
[112] World Investment Forum 2014, Statement by Colombia's Chief Negotiator of IIAs at the IIA Conference "Reforming the International Investment Agreements Regime", 16 October 2014, cited in Alejandro López Ortiz, José Joaquín Caicedo, et al., 'Two Solutions For One Problem: Latin America's Reactions to Concerns', *Spain Arbitration Review* 27 (Club Español del Arbitraje; Wolters Kluwer España 2016, 2016) 14.
[113] The Central America Free Trade Agreement (CAFTA) is an expansion of NAFTA to five Central American nations (Guatemala, El Salvador, Honduras, Costa Rica and Nicaragua), and the Dominican Republic.
[114] Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law' in *Fifteen Years of NAFTA Chapter 11 Arbitration* (Jurisnet, 2011) 176-177.

breach of Fair Equitable Treatment,[115] or by analysing the meaning of legitimate expectations,[116] which has become one of the most common breaches claimed in by investors.[117]

B. The new NAFTA (USMCA) is under way

After a year of negotiations, the U.S., Mexico and Canada reached a consensus to modify the NAFTA and signed the new "*United States-Mexico-Canada Agreement*" (USMCA) during the G-20 summit in Buenos Aires, Argentina on 30 November 2018. The Congresses of Mexico and the U.S. have already ratified the USMCA on 19 June 2019[118] and 16 January 2020,[119] respectively. The Canadian Parliament approval for its ratification is in progress, which is estimated to be concluded in 2020.[120] The USMCA would then enter into force on the first day or the third month following the last country (Canada) notified its ratification to the other parties. If one of them fails to do so, this could delay (or even block) the entry into force of USMCA.

After USMCA enters into force, pending NAFTA arbitration claims will be not affected.[121] NAFTA Chapter 11 (investment) may continue to govern investor-state arbitrations (on both procedural and substantive rules) irrespective of the ratification of USMCA. The same would be for NAFTA claims initiated before the USMCA enters into force.

Furthermore, NAFTA Chapter 11 will remain applicable for 3 years after USMCA enters into force, but only for investments established or acquired between 1994 and before the entry into force of USMCA,[122] and in existence when the USMCA enters into force. Those investment made prior to USMCA are known as “legacy investments”.[123] In principle, during the first 3 years of USMCA, investors from the U.S., Mexico and (notably) Canada would have standing to initiate investment arbitration under 1994 NAFTA Chapter 11, despite the termination of NAFTA, subject to the interpretation of tribunals and/or the circumstances of the case.

---

[115] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, §116 ("*a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith*").

[116] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, §154 ("*requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment*").

[117] Rishab Gupta, Katrina Limond, 'Who is the most influential arbitrator in the world?' (2016) GAR News, 3.

[118] Decreto aprobatorio del Tratado entre México, Estados Unidos y Canadá (T-MEC), available in: https://www.gob.mx/se/prensa/decreto-aprobatorio-del-tratado-entre-mexico-estados-unidos-y-canada-t-mec

[119] Senate approves new North American trade deal with Canada and Mexico, CNBC, 16 January 2020, available in: https://www.cnbc.com/2020/01/16/senate-passes-usmca-trade-deal-sends-it-to-trump.html

[120] The following summarises the internal proceeding in Canada: the USMCA is implemented after a full review by the Parliament pursuant to the parliamentary sub-committees’ reports and debate, to be then put to a vote in the House of Commons and Senate.

[121] There are 12 NAFTA ongoing investment arbitration, 6 against Mexico and 6 against Canada (as of March 2019) Global Affairs Canada, available in: https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng; Mexico's Ministry of Economy, available in: https://www.gob.mx/se/acciones-y-programas/comercio-exterior-solucion-de-controversias?state=published

[122] This rule seems to exclude investment made before NAFTA entered into force in 1 January 1994.

[123] USMCA, Annex 14-C “Legacy Investment Claims and Pending Claims”, §§1-4.

However, investments "*established, acquired or expanded*" after USMCA enters into force will be governed by USMCA new Chapter 14 (investment).[124] In other words, USMCA offers no protection to investors regarding a pre-investment, save for "legacy investment" limited to the first three years of USMCA.

Furthermore, Canada would not be bound by ISDS provisions under the new USMCA.[125] This is not surprisingly considering Canada has been sued 41 times under NAFTA, almost twice as much as Mexico (23 times) and the US (21 times) having to pay $CAN 219 million in compensation to investors so far.[126] Moreover, "*[n]o Canadian investor has ever won a NAFTA case*".[127] As of January 2018, NAFTA States have won 27 and lost 13 of concluded cases (i.e. that ended in payment to investors either by award or settlement).[128] The U.S. has never lost a NAFTA case, while Mexico has lost 5 cases.[129]

The USMCA would be subject to a joint review every six years (2026), and can be terminated 16 years after (2036), unless each party confirms it wishes to continue for another 16-year term (2052).[130] However, a withdrawal clause is maintained, under which a party may withdraw from the USMCA, six months after notification. In this case, the USMCA shall remain in force for the remaining parties.

Notably, investor-State arbitration would remain binding only between the U.S. and Mexico, albeit with some limitations and changes regarding some: (a) definitions; (b) procedural rules; and (c) substantive protections, as explained below in more detail.

a) Definitions

The new definition of investment under USMCA either expands, excludes and/or indicate factors characteristic of investments, in contrast to NAFTA. Notably, it starts by defining as an investment every asset that has the characteristics of "*commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk*",[131] (influenced by the Salini test).[132]

Furthermore, USMCA includes a positive list ("*investment may include*") and a negative list ("*investment does not mean*") akin to NAFTA, but with some modifications as follows:

i. The definition of "enterprise" in USMCA also covers "trust" as well as "association and similar organization.";133

[124] As provided for in the definition of "covered investment" and the scope of new Chapter 14 (Investment).
[125] The USMCA eliminated Investor-State arbitration between Canada and the U.S. (i.e. for U.S. investors in Canada and Canadian investors in the U.S.).
[126] Scott Sinclair, 'Canada's Track Record Under NAFTA Chapter 11; North American Investor-State Disputes to January 2018' (2018) CCPA, 1-3, 46.
[127] *Ibid*, 11.
[128] *Ibid*, 4-5.
[129] *Ibid*, 46.
[130] Estimates dates (in years) assuming the USMCA would enter into effect in 2020.
[131] USMCA Article 14.1.
[132] *Salini v Morocco* (ICSID Case No Arb/00/04) (Decision on Jurisdiction, 23 July 2001).
[133]USMCA Articles 14.1 (Investment) and Article 1.4 (General Definitions): "***enterprise** means an entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization;*" (emphasis added).

ii. USMCA expands the definition of investment to "management" and “revenue sharing and other similar contracts” under Article 14.1(e), in addition to "turnkey or construction contracts, or concessions" covered under NAFTA Article (h)(i);

iii. USMCA includes "licenses, authorizations, permits, and similar rights conferred pursuant to a Party’s law" under Article 14.1(g) in consideration to the nature and extent of those rights.

iv. Mortgages are expressly recognized as investments under USMCA. 134 A NAFTA tribunal has recognized that mortgages are "intangible real estate" and thus qualify as investments under NAFTA Article 1139(g), despite not been enunciated;135

v. Regarding "loans", while NAFTA requires a minimum maturity of 3 years,136 USMCA indicates a criterion between "long term" (as more likely) and "immediately due" (as less likely) to have the characteristics of an investment;137

vi. USMCA eliminates "an interest in an enterprise that entitles the owner to share in income or profits", covered under NAFTA Article 1139 sub-section (e); and

vii. USMCA expressly excludes as investment (negative list) "an order or judgment entered in a judicial or administrative action".138

b) Procedural rules

Before a claim can be pursued before an investment tribunal, a domestic court action must be pursued to completion or for at least 30 months.[139]

In order to initiate a claim under USMCA, no more than four years must have elapsed from the date on which the claimant first acquired (or should have first acquired) knowledge of the breach alleged and knowledge that the it has incurred loss or damage.[140] This is a one year more from NAFTA's 3 years rule.

However, *if one assumes that knowledge* of the loss and the breach commenced by the time the matter was brought to a local court (for at least 30 months of adjudication), at best that leaves an 18-month window to bring a claim, effectively cutting time for notice in half. It is yet to been seen if the time limitation rule is always required when a recourse to domestic courts is considered futile by investment tribunals, under the particular circumstances of the case.[141]

Furthermore, a U.S. investor may not submit to arbitration a claim against Mexico if the

[134] USMCA Article 14.1(h);

[135] *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2), Decision on Jurisdiction, 30 July 2018, §§234, 262, 266.

[136] NAFTA Article 1139(d):

[137] USMCA Article 14.1(c): "*long-term notes or loans, are more likely to have the characteristics of an investment, while […] claims to payment that are immediately due, are less likely to have these characteristics.*" (emphasis added).

[138] USMCA Article 14.1(i).

[139] Annex 14-D, “Mexico-United States Investment Disputes”, Article 5.

[140] USMCA, Article 3.1 (Submission of a Claim to Arbitration).

[141] Carlos Vejar, 'Mexico Keeps Investment Disputes Mechanism Under New USMCA' (2018) Holland & Knight's post available in: https://www.hklaw.com/publications/Mexico-Keeps-Investment-Disputes-Mechanism-Under-New-USMCA-10-05-2018/

investor has alleged the alleged breach of an obligation under new Chapter 14 before a court or administrative tribunal of Mexico, subject to interpretation of this rule under a case-by-case.[142]

The USMCA also provides rules over the selection of arbitrators, conduct of arbitration, transparency, governing law, consolidation, interpretation, amongst other aspects.

c) Substantive protection

The USMCA incorporates a special regime for "covered sectors" for investments under governmental contracts, including: (i) oil and natural gas (i.e. exploration, extraction, refining, transportation, distribution, or sale); (ii) power generation services; (iii) telecommunications services; (iv) supply of transportation services; and (v) ownership or management of infrastructure (i.e. roads, railways, bridges, canals, or dams).[143] In principle, investors in such sectors under a governmental contract may have certain advantages under the treaty. For example, the exhaustion of local remedies (i.e. 30 months under the USMCA) as a condition precedent to initiate arbitration seems to be waived for investors in covered sectors.[144] However, it remains to be seen how investment tribunals would interpret these provisions under the particular circumstances of each case.

Furthermore, a number of variations to the standards of protection seems to be included, concerning the scope of ‘fair and equitable treatment’ and ‘full protection and security’, which is more in line with previous interpretations given by the NAFTA Free Trade Commission.[145]

Some guidelines have been given to arbitrators. For example, Arbitration final awards may include separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.[146]

VII. European Union-Mexico Global Agreement

Parallel to NAFTA negotiations, on 21 April 2018 Mexico and the European Union have reached a trade agreement, which would be part of a broader and modernised agreement containing investment provisions. This agreement is aimed at “*encouraging investment and ensuring a transparent and accountable resolution of disputes through an Investment Court System*”.[147]

---

[142] Appendix 3 “Submission of a claim to arbitration”.
[143] Article 6 of Annex 14-E
[144] Robert Landicho and Andrea Cohen, What’s in a Name Change? For Investment Claims Under the New USMCA Instead of NAFTA, (Nearly) Everything, Kluwer Arbitration Blog, available in: http://arbitrationblog.kluwerarbitration.com/2018/10/05/whats-in-a-name-change-for-investment-claims-under-the-new-usmca-instead-of-nafta-nearly-everything/
[145] Niyati Ahuja, USMCA: An Analysis of the Proposed ISDS Mechanism, Kluwer Arbitration Blog, available in: http://arbitrationblog.kluwerarbitration.com/2019/11/26/usmca-an-analysis-of-the-proposed-isds-mechanism/
[146] Annex 14-D “Mexico-United States Investment Disputes”, Article 13.
[147] European Commission’s memorandum, Brussels, 21 April 2018, available in: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1831

Following the approach adopted by the European Union in other agreements with Canada (CETA), Singapore and Vietnam, the EU-Mexico Global Agreement adopts a new approach to investment dispute resolution, by replacing the traditional ISDS system with the new investment court system. Under this approach, investment disputes would be resolved by a multilateral investment court, yet to be established.

In the interim, under the current draft of the EU-Mexico agreement disputes would be heard by an arbitral tribunal (chosen amongst an initial nine-members roaster on a random basis).[148] The decision of the arbitral tribunal may be challenged before a permanent appeal tribunal,[149] under the same grounds of annulment provided for in Article 52 of the ICSID Convention, as well as an error in the interpretation of the applicable law or facts.[150]

VIII. Concluding remarks

The development of international arbitration in Latin America was initially characterised by a slow start.[151] However, after the end of the Calvo era, Latin America has quickly transformed into a more experienced region and has gradually incorporated rules in favour of international arbitration, albeit, with some reservations and regional peculiarities.

The denunciation of ICSID convention by three Latin American States –and the adverse effect of investment awards against States– have raised the need to re-evaluate the global investment regime (ICSID and BITs) in order to ensure a fairer and more balanced outcome for both States and investors. Some efforts have emerged without success aimed at resolving Investor-State disputes at a regional level to counterweight the ICSID regime (i.e. UNASUR Arbitration Centre).

A new reformist trend started in 2015, resulting in a new reconfiguration of the arbitration regimen and practice in the Latin American region. Today, most of its countries are well equipped with new laws, inspired by pro-arbitration laws in other European countries, led by France and Switzerland. However, new reforms and policies may continue to emerge, thereby balancing again the scale from Pro-State to Pro-Investor policies.

The interpretation of domestic courts is an important element for the development of the international arbitration practice in the region. Recently, there have been positive steps in this front in Argentina, Brazil, Chile, Colombia, as illustrated in this article. For example, the adoption of a delocalization approach by the Argentinean courts in the YPF saga –advanced by French jurisprudence in favour of party autonomy– to the adoption of broad interpretation of public policy by the courts in Chile and the implied consent of third parties in Brazil.

There is an interesting interplay between the enactment of arbitration laws and their interpretation by domestic courts, which sometimes can be aligned or contradict one another.

[148] Article 11, "Section [X]: Resolution of Investment Disputes", EU-Mexico trade agreement: chapter on dispute investment, 25 April 2018 (text under negotiation and not finalised).

[149] All person serving on both arbitral and appeal tribunals shall stay abreast of other dispute settlement activities and would receive a monthly retainer fee.

[150] Article 30, "Appeal Procedure", EU-Mexico trade agreement: hapter on dispute investment, 25 April 2018 (text under negotiation and not finalised).

[151] As shown by the late accession to the New York Convention and ICSID Convention.

For example, courts may adopt pro-arbitration interpretation of its own statues, despite the legislative efforts in keeping a more protectionist approach, as illustrated by the decision of the Supreme Court in Chile. The striking separation of powers (i.e. legislative from judicial) in Latin American could make it difficult to align those efforts; however, attention should be given to both legislative and judicial activity for the development of international arbitration.

At the same time, the emergence of new generation of BITs, FTAs and regional mechanisms may continue to steer Latin America's standing either as a pro-arbitration or protectionist region. However, most countries are likely to continue to pursue a balance between pro-State and pro-investment policies. Furthermore, foreign investors may be best served by a "hybrid" system that embraces both ICSID and regional features. However, its success will depend on the correct implementation of the new rules by its member States, and above all, on their capacity to build up trust in the system from investors in the coming years.

Given the 1994 NAFTA impact on the development of ISDS, it would not be a surprise that the new USMCA will continue to influence other countries in Latin America and beyond. Latin America cannot be seen as a homogeneous policy block. This region will still be a fertile ecosystem for the development of policies and practices of international arbitration, in which sovereign rights and investors interests could be reconciled.

References

A. Books and Articles

Usmca Niyati Ahuja. "An Analysis of the Proposed ISDS Mechanism, Kluwer Arbitration Blog.

Bernardo M. Cremades 'The Resurgence of the Calvo Doctrine in Latin America'" *Business Law Int.* 7, 2006, 53-72.

Daniel de Andrade and Rodrigo Moreira. "ICSID in Latin America; Where Does Brazil Stand?" In: Daniel de Andrade et al. (eds.) *Investment Protection in Brazil.* KLI, 2013, pp.17-36.

Joaquim de Paiva Muniz. "Brazilian Superior Court of Justice Reaffirms the Principle of Competence-Competence." *Global Arbitration News*, 2018.

Diego P. Fernández Arroyo "The Curious Case of an Arbitration with Two Annulment Courts: Comments on the YPF Saga." *Arbitration Int'l*, pp. 1-28.

Mario Alejandro Flor. "El Artículo 422 de la Constitución y su Incidencia en el Arbitraje Internacional" *REA*, 3(189), 2011.

Juan Antonio Gaviria. "The New Colombian Legal Rules on International Arbitration" *The Arbitration Brief 3,* 2013.

Emmanuel Gaillard. "Anti-Arbitration Trends in Latin America" *NYLJ* 108, 2008.

Emmanuel Gaillard. "France Adopts New Law on Arbitration" *NYLJ* 245, 2011.

Jaime Gray; Jonnathan Bravo et. al. "ADR in Construction." *IBA International Construction Projects Committee* July 2015.

Rishab Gupta and Katrina Limond. "Who is the most influential arbitrator in the world?" *GAR News,* 2016.

Jonathan C. Hamilton. "Three Decades of Latin American Commercial Arbitration" *U. Pa. J. Int'l L* 30, 2009, pp. 1099-1119.

Gabrielle Kaufmann-Kohler. "Interpretive Powers of the Free Trade Commission and the Rule of Law." In *Fifteen Years of NAFTA Chapter 11 Arbitration*. Jurisnet, 2011.

Robert Landicho and Andrea Cohen. "What's in a Name Change? For Investment Claims Under the New USMCA Instead of NAFTA" (Nearly) *Everything, Kluwer Arbitration Blog*.

Alejandro López Ortiz; José Joaquín Caicedo et al. "Two Solutions For One Problem: Latin America's Reactions to Concerns." *Spain Arbitration Review* 27 (Club Español del Arbitraje; Wolters Kluwer España 2016) 2016, 14.

Alejandro López Ortiz; Patricia Ugalde-Revilla et al. "The Role of National Courts in ICSID Arbitration in Crina Baltag." *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International), 2016.

Alejandro López Ortiz and Gustavo Fernandes. "A Year of Legal Developments for International Arbitration in Latin America" *Kluwer Arbitration Blog* (11 January 2016).

Natali Cinelli Moreira. "Cooperation and Facilitation Investment Agreements in Brazil: The Path for Host State Development" *Kluwer Arbitration Blog*, 2018.

Daniela Paez-Salgado and Fernando Pérez-Lozada. "New Investment Arbitration Center in Latin America: UNASUR, A Hybrid Example of Success or Failure?" Kluwer Arbitration Blog, 2016.

Giovana Perette Leites. "To 'Extend' or Not to 'Extend'? An Analysis of the Brazilian Superior Court of Justice's Judgement in REsp." *Kluwer Arbitration Blog* 1.639.035 – SP', 2018.

Fernando Mantilla Serrano. "Colombia Enacts a New International Arbitration Law" *Jour. Int'l A* 30, 2013, pp. 431-441.

Luis Malpica de la Madrid "La Influencia del Derecho Internacional en el Derecho Mexicano." Limusa: México, 2002.

Andre Luis Monteiro; José Antonio Fichtner et al. "Is Brazil an Arbitration-Friendly Jurisdiction?" *Kluwer Arbitration Blog,* 2019.

Belén M. Olmos Giupponi. "The Protection of Foreign Direct Investment in Latin America; Where Do We Stand on International Arbitration?" *KIL* 2, 2015, pp.113-142.

Carlos Rodríguez. "México ante el Arbitraje Comercial Internacional." Porrúa: México, 1999.

Sebastian Perry. "Lat Am Courts Clash Over Gas Exports Award" Global Arbitration Review (21 March 2016). Cited In: Diego P. Fernández Arroyo. "The Curious Case of an Arbitration with Two Annulment Courts: Comments on the YPF Saga." *Arbitration Int'l* 2, 2017.

Sergey Ripinksy. "Venezuela's Withdrawal from ICSID: What it Does and Does Not Achieve." *IISD*, 2012, pp. 1-5.

Carlos Rodríguez. “México ante el Arbitraje Comercial Internacional.” Porrúa: México, 1999.

Caroline Simson. “Investor State Arbitration Safe With Trump, At Least For Now.” *Law 360,* 2017.

Scott Sinclair. “Canada's Track Record Under NAFTA Chapter 11; North American Investor-State Disputes to January 2018” *CCPA*, 2018.

Trump Administration Formally Launches NAFTA Renegotiation, The Washington Post, 18 May 2017.

Catherin Titi. “Investment Arbitration in Latin America; The Uncertain Veracity of Preconceived Ideas” *Arb. Int.* 30, 2014, pp. 357-386.

Van Aaken A. “The Interaction of Remedies between National Judicial Systems and ICSID: An Optimization Problem.” In: Jansen Calamita N.; David Earnest et al. (Eds.) The Future of ICSID and the Place of Investment Treaties in International Law. *British Institute for International and Comparative Law*. 2013.

Carlos Vejar. “Mexico Keeps Investment Disputes Mechanism Under New USMCA” *Holland & Knight's post*, 2018.

Tori K. Whiting and Gabriella Beaumont-Smith (Ed.) “An Analysis of the United States–Mexico–Canada Agreement.” *Backgrounder, Heritage Foundation*, 3379, 2019.

B. Cases

1. Investor-State Arbitration

Abengoa, S.A. y COFIDES, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013.

Ambiente Ufficio S.P.A. and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic, ICSID Case No. ARB/08/9.

BG Group Plc v. The Republic of Argentina (UNCITRAL).

Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/20)

Burlington Resources, Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5)

Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (ICSID Case No. ARB/13/13)

Víctor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2)

Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3) - Annulment Proceeding

OPIC Karimum Corporation v Venezuela ICSID Case No ARB/10/14 (May 5, 2011).

2. Domestic cases

Argentina – *Decision of the Federal Court on Administrative Matters, Chamber No IV,* 22 December 2015.

Chile – *Decision Rol No. 55.038-16, Corte Suprema de Justicia de Chile*, 5 October 2016.

Colombia – *Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ., mayo 12, 2011, M.P. W. Namen, Expediente 11001-0203-000-2011-00581-00, Gaceta Judicial [G.J.].*

France – *Société KFTCIC v. société Icori Estero et autre,* Cour d'appel de Paris, 13 June 1996, Revue de l'Arbitrage, (1997) 2, 251-57.

France – *Société Ryanair Ltd et Société Airport Marketing Services Ltd v Syndicat Mixte des Aéroports de Charente (SMAC)*, Cour de Cassation, 8 July 2015.

USA – *BG Group Plc v. Republic of Argentina 572 US (2014) (12-138)*, 5 March 2014.

USA – *Corporación Mexicana de Mantenimiento Integral, S. De R.L de C.V v. Pemex-Exploración y Producción, No. 13-4022 (2d Cir. 2016).*

C. Other sources

CNN Money, Trump hammers America's 'worst trade deal'.

Global FDI Flow continue their slide in 2018, Investment Trends Monitor, UNCTAD, January 2019, Issue 31.

ICSID Caseload – Statistics (issue 2017-1), World Bank.

ICSID resources, Table of Decisions on Disqualification, World Bank.

Ministry of Foreign Affairs, 'Ecuador propone nuevos acuerdos de inversión que protegen al país y defienden los derechos humanos' 8 March 2018.

Ministry of Foreign Affairs, 'Ecuador propone a inversionistas extranjeros un nuevo modelo de Convenio Bilateral de inversiones' 30 May 2018.

UNCTAD Investment Policy Framework for Sustainable Development (IPFSD), Policy Options.