

# Current Debates on Investor-State Arbitration in Latin America\*

/ Debates actuales  
de arbitraje entre  
inversionista-Estado  
en América Latina

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RESUMEN

El arbitraje inversionista-Estado es el medio más común de resolución de disputas en la Ley de Inversiones Internacionales. El Centro Internacional para la Solución de Diferencias Relativas a Inversiones, creado en 1965 por el Banco Mundial, se establece en institución principal de arbitraje entre inversionistas y el Estado. Hasta hoy en día, 161 países son miembros signatarios de la Convención que establece ICSID. Aunque el arbitraje del estado inversionista sigue siendo el principal medio de resolución de disputas en inversión internacional, tal percepción está cambiando y su legitimidad está siendo puesta en cuestión desde 2005, lo cual da lugar para que se tenga un debate sobre la legalidad y la equidad del arbitraje internacional.

En este artículo será interesante identificar qué argumentos están surgiendo contra este medio de resolución de disputas, ya que América Latina encabeza en un primer plano el desafío a como se lleva a cabo el arbitraje inversionista-estado a través de ICSID. En ese sentido, la doctrina Calvo tiene mucho peso en la percepción y el enfoque de todo el continente en relación a leyes internacionales y relaciones internacionales. Por consiguiente, la doctrina Calvo influye en el proceso del arbitraje entre el inversionista y el estado. La segunda postura de este artículo se centrará en la doctrina Calvo y los efectos de esta en el arbitraje inversionista-estado.

PALABRAS CLAVE

Arbitraje inversionista-estado, América Latina, ley de inversiones internacionales, centro Internacional para la solución de diferencias relativas a inversiones, doctrina Calvo.

ABSTRACT

Investor-state arbitration is the most common dispute resolution mean in International Investment Law. The International Centre for Settlement of Investment Disputes, created in 1965 by the World Bank is known to be the principal institution of investor-state arbitration. To date, 161 countries are signatories to the Convention establishing ICSID. While investor state arbitration is still the main dispute resolution mean in international investment, its perception is shifting and its legitimacy is being challenged. Since 2005, there is a debate around the lawfulness and the equity of international arbitration.

It will be interesting in this article to identify what arguments are being raised against this mean of dispute resolution. Latin America has been at the forefront of the wave of challenges around investor-state arbitration via ICSID. Here, the Calvo doctrine has a huge impact on the continent's perception and approach in International Law and International Relations. Therefore, investor-state arbitration is influenced by the Calvo doctrine. The second articulation of this article will focus on the Calvo doctrine and its effect in investor-state arbitration.

KEYWORDS

Investor-State Arbitration, Latin American, International Investment Law, the International Centre for Settlement of Investment Disputes, Calvo doctrine.

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1. Introduction / 2. Challenging the legitimacy of investor-state arbitration in bilateral investment treaties / 3. Development of investor-state arbitration in Latin America / 4. Investment arbitration in current Latin American context / 5. Conclusion / 6. Bibliography

## 1. INTRODUCTION

Investor-state arbitration is a dispute resolution mechanism by which legal entities of Private Law may assert their economic rights against the states or vice versa. This dispute resolution process is nowadays associated with the International Centre for Settlement of Investment Disputes (ICSID) created in 1965 by a multilateral convention and whose procedures were written in 1976 by UNCITRAL.<sup>1</sup> It's hard to go back to the very first arbitration involving investor-state as parties, but already in the thirties, the Lena Goldfields case involved an arbitral tribunal applying general principles of law.<sup>2</sup> In this particular case, the arbitral tribunal decided that it was competent to declare the concession contract terminated.<sup>3</sup>

We can trace back as far as the Aramco case in 1950, the first international arbitration case.<sup>4</sup> Several lawyers-arbitrators consented that an arbitrator is competent not only to determine the boundaries of the concession contract, but also the law applicable to the concession contracts in cases concerning oil exploitation involving countries such as Qatar, namely based on principles of natural justice and fairness rather than Islamic law.<sup>5</sup> In the sixties and seventies, the first cases of expropriation and nationalization in investor-state arbitration started to occur.<sup>6</sup> The example of Libya in the event of nationalization in the 1970s is a good highlight of this decade.<sup>7</sup> In the eighties, a model of disputes settlement between States and businesses was already necessary. In 1984, the US BIT Model aimed to oust governments in dispute resolution concerning private investment.<sup>8</sup>

<sup>1</sup> Nelson, Timothy, *History ain't changed: Why Investor-state arbitration will survive the new revolution*, Estados Unidos, Kluwer Law International, 2010, pp. 555-575.

<sup>2</sup> *Ibidem*.

<sup>3</sup> *Ibidem*.

<sup>4</sup> *Idem*, pp. 555-575.

<sup>5</sup> *Ibidem*.

<sup>6</sup> *Ibidem*.

<sup>7</sup> *Ibidem*.

<sup>8</sup> Álvarez, José, "The Evolving bit", *Investment treaty arbitration and international law*, vol. 3, pp. 1-34.

It was therefore necessary to institutionalize a dispute resolution mechanism that would allow investors to manage their own disputes with host countries.<sup>9</sup> For instance, the Iran-US case in the early 1980s is described as the most significant case in the investor-state arbitration history for its exhaustive definition of expropriation and measurement of damages awarded to the expropriated investors.<sup>10</sup> As from the early nineties, investor-state arbitration cases started to multiply and grow with bilateral investment treaties (BIT) and foreign trade agreements (FTA).<sup>11</sup> A lot of countries signed the ICSID Convention as well as investment agreements defining arbitration as the sole dispute resolution mechanism. This ascension of the investor-state arbitration has quickly raised strong protests and debates of legitimacy from some authors and even some states.

In its historic journey, investor-state arbitration detached itself to national law in order to create its own *lex mercatoria* with arbitral awards, the general principles of International Trade Law and international treaties. It is clear that the practice of investor-state international arbitration has also been influenced by regional and international bilateral treaties for the protection and promotion of investments.

Based on these developments, investor-state arbitration is nowadays an institution of its own when it comes to International Investments. Still, at the dawn of the new millennium, the success of investor-state arbitration started to decline. The legitimacy of this dispute resolution mean started to be challenged by various countries and especially Latin American countries influenced by the Calvo doctrine. It is therefore important to examine the recent developments in investor-state arbitration under BIT and specifically the arguments around the challenges of the legitimacy of investor-state arbitration. In Latin America, investor-state arbitration rapidly lost its spark and was confronted to what is known as the Calvo doctrine. We will therefore take a particular look at the perception of investor-state arbitration in Latin American countries in order to understand the evolution of this institution in the particular context of Latin America as well as the reason for its rapid decline in those countries. The last part of the article will then examine the current investment arbitration climate in Latin American countries based on its history.

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<sup>9</sup> *Ibidem*.

<sup>10</sup> Nelson, Timothy, *op. cit.*

<sup>11</sup> *Ibidem*.

## 2. CHALLENGING THE LEGITIMACY OF INVESTOR-STATE ARBITRATION IN BILATERAL INVESTMENT TREATIES

Concluding bilateral investment treaties (BIT) to promote, encourage and facilitate foreign direct investment between two countries goes back to the early sixties. The first BIT was signed in 1959 between Germany and Pakistan. Since then, most of the BIT include a clause defining arbitration as the sole dispute resolution mechanism. The number of BIT drastically increased in the last fifteen years. In June 2007, there were over 2700 BIT worldwide. A second category of investment treaties is that of regional trade agreements. In the last ten years the number of regional trade agreements increased to exceed 250 regional agreements in 2007. These agreements are generally binding countries in the same geographical region to facilitate the movement of goods, persons, capital and goods. The aim of general trade agreements generally ranges from the promotion of economic cooperation in the creation of a free trade zones.

The first case of investor-state arbitration based on the BIT took place in 1987 at the ICSID. Until 1988, there had only been 14 cases of investor-state arbitration at the ICSID. However, since the late 90s, until 2007, we can identify up to 290 cases of investor-state arbitration; 182 at the ICSID and the rest at other international arbitration forums.

After 2007, the legitimacy of Investor-State arbitration under BIT started to decline. Some States started to challenge this mean of dispute resolution between State and investors. It is therefore important to look at the criticism of investor-state arbitration based on the perception of arbitral institutions and also examine the arguments challenging the arbitrator's role in investor-state arbitral proceedings.

### *2.1 Challenges of investor-state arbitration based on the functioning of arbitration institutions*

Investor-state arbitration, from the beginning has faced criticism. For the past few years, criticism around the functioning of arbitral institutions seem to be reasoning louder as various countries are withdrawing from BIT with investor-state arbitration and writing new models of BIT. The most common criticisms are the following.

Form of privatization of justice. International arbitration can be *ad hoc* or institutionalized with ICSID or other arbitration institutions. Either way, it escapes the scope of the national judicial system institutions. Some countries now feel that it is unfair for foreign investors to be held to different standards than national investors. Justice in the case of investor-state arbitration becomes a private and privileged pursuit of justice rather than an institutionalized one under the scope of national sovereignty.

The investor-state arbitration is biased from the start. Authors such as Susan D. Franck showed that the States continues to win the majority of investor-state dispute. Moreover, in 2012, investor-state arbitration was strongly criticized as a pro-investor system of corporate rights.<sup>12</sup> Criticism to which the 2014 UNCTAD Report showed that “arbitral developments [...] brought the overall of concluded cases to 274”. Of these, approximately 43% of cases were decided in favour of the State, 31% in favour of the investor and 27% were settled.<sup>13</sup> This specific criticism of investor-state arbitration seem to shift from pro-state to pro-investor depending on the tendencies of the ICSID proceedings.

Lack of transparency in investor-state arbitration.<sup>14</sup> Confidentiality to protect the interests of the parties and the commercial nature are inconsistent with public interest in investment law.<sup>15</sup> As a response to that criticism, practice of transparency in investor-state arbitration can be seen in NAFTA provisions for example, which allow non-disputing party participation. This Free Trade practice arose due to the fact that despite arbitral awards having confined and binding effects only on the disputing parties, other non-disputing State Parties can have the opportunity to influence in the treaty interpretation analysis of future awards.<sup>16</sup>

The inconsistency of decisions.<sup>17</sup> International Investment Law is based on BIT and regional agreements. These agreements are general guidelines and do not constitute a substantial source of law.<sup>18</sup> The lack of an elaborated legal regime and rigid Law gives freedom to the arbitrators to interpret the agreements according to their abilities.<sup>19</sup> Critics complain that even though many BIT contain very similar or identical provisions, investment tribunals tend to interpret them differently from case-to-case. This, critics say, precludes the emergence of a consistent body of law.<sup>20</sup>

<sup>12</sup> Eberhardt, Pia, Olivet, Cecilia, Amos, Tyler & Buxton, Nic, “Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom”, *Corporate Europe Observatory*, 2012. [Consulta: 16 de febrero, 2015]. Disponible en: <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>. This report argues that investment arbitration is a system of “proinvestor interpretation of the treaties”.

<sup>13</sup> UNCTAD, *World Investment Report*, 2014, p. 126. [Consulta: 16 de febrero, 2015]. Disponible en: [http://unctad.org/en/publicationslibrary/wir2014\\_en.pdf](http://unctad.org/en/publicationslibrary/wir2014_en.pdf)

<sup>14</sup> Blackaby, Nigel, Richard, Caroline, “Amicus Curie: A panacea for legitimacy in investment arbitration?”, en Micheal Waibel, Asha Kaushal, *The backlash against investment arbitration*, Estados Unidos, Kluwer Law International, 2010, pp. 253-274.

<sup>15</sup> *Ibid.*

<sup>16</sup> European Federation for Investment Law and Arbitration, “A response to the criticism against ISDS”, 2015.

<sup>17</sup> Wells, Louis, *Backlash to investment arbitration: three causes*, Estados Unidos, Kluwer Law International, 2010, pp. 341-352.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

A rigid perception of contracts.<sup>21</sup> In international investment contracts, circumstances are changing. The current law does not provide a clear procedure adapted to changed circumstances. States such as Indonesia have sometimes been relieved of their obligations when the currency devalued for example, or they renegotiated the contract.<sup>22</sup> In the case of the Argentinian crisis, an arbitral tribunal accepted the argument of “necessity” to declare the Argentine government non responsible for acceding a contract, yet, 18 months earlier, and the same argument had been rejected in another case.<sup>23</sup>

## 2.2 Challenges of investor-state arbitration based on arbitrators’ role

Aside from the institution itself, criticisms of investor-state arbitration also challenges the role and the abilities of arbitrators. The birth of the investor-state arbitration and its establishment as a mean of international investment disputes resolution raises the issues of jurisdiction and judicial power of the arbitrators. It is known that national courts hold judicial and jurisdictional power from the state. Arbitrators on the other hand derive their power from the concerned parties.<sup>24</sup> In interpreting the jurisdiction of arbitrators, we have to determine the *ratione materiae* and the *ratione personae* competence of arbitrators.<sup>25</sup>

Arbitrators exercise a jurisdictional function, yet the judge’s ability to rule on its own jurisdiction, also known as *Kompetenz-Kompetenz*<sup>26</sup> is still an ongoing issue in the international legal doctrine. The dominant doctrine argues that it is a power granted to the arbitrator by the parties.<sup>27</sup> Arbitrators must exercise that power in good faith and it is subjected to the compliance of public order and the ordinary conditions of validity of the contract according to the German federal court in 1977.<sup>28</sup> Others criticise that power on the grounds that it would be a principle petition to consider the arbitrator as competent *a priori* as the question he is asked to solve is precisely that of its own jurisdiction.<sup>29</sup>

Arbitral jurisprudence nevertheless demonstrates the autonomy of the arbitrator or of the arbitral tribunal in relation to the state court and state rules. In the sentence *Dow Chemical vs. Isover Saint-Gobain*, in 1982, one

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> Well, Louis, “Double dipping in Arbitration awards? An economist questions damages awarded to Karaha Bodas Company in Indonesia”, *Arbitration International*, núm. 19, p. 471.

<sup>24</sup> Mayer, Pierre, “L’autonomie de l’arbitre international dans l’appréciation de sa propre compétence”, *Recueil de cours*, vol. 217, p. 319.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Bundesgerichtstshof, 5 de mayo, 1977.

<sup>29</sup> *Ibid.*

of the parties contested the jurisdiction of the court in respect of the plaintiffs, non-signatories of the contracts.<sup>30</sup> The court declared itself competent in respect of such plaintiffs. In 1986, in the Franco-Iranian decision, the arbitral tribunal declared itself having jurisdiction in the dispute quoting the terms of The Dow Chemical sentence.<sup>31</sup>

In the US-Brazil award, in 1984, the arbitral tribunal distinguishes the law of the contract from the law governing the appointment of arbitrators and the conduct of the proceedings.<sup>32</sup> The principle promoting autonomy of the parties expects that the choice of law by the parties is respected as regards the substance of the dispute.<sup>33</sup> On the other hand, the procedure is entirely subject to the rules of the ICC.<sup>34</sup> The Spanish-Bermudian award, in 1987 comes to the same conclusion.<sup>35</sup> Finally, in 1986, in the Lebanese-Pakistani award, the ICC chooses to follow the application of *lex mercatoria*.<sup>36</sup> Here, arbitrators will tap into the general principles of Commercial Law, Customary Law and good faith to determine the existence of a joint venture.<sup>37</sup>

Besides jurisdiction and judicial power, arbitrators, in the controversy of investor-state arbitration face some criticism.

Arbitrators' conflict of interest: the same people are juggling the hats of judges and arbitrators from one case to the other. The integrity and impartiality of arbitrators in the arbitration state-investor raises questions because of the freedom in the choice of arbitrators.<sup>38</sup> The issue raised here is the impartiality of arbitrators. It is certainly a strict requirement as to the responsibilities of arbitrators. In practice, arbitrator conflicts of interest usually fall into one of two categories: lack of independence and lack of impartiality. In common usage, independence refers to the absence of improper connections, while impartiality addresses matters related to prejudice. The common assumption is that an arbitrator in international disputes must be both impartial and independent. Both those qualities are criticized as to arbitrators in investor-state proceedings.

Partiality. States, in almost all BIT do not have the opportunity to go to arbitration to receive compensation. Renegotiation is the only option.<sup>39</sup>

<sup>30</sup> Mayer, Pierre, *op. cit.*, p. 319.

<sup>31</sup> *Idem*, p. 379.

<sup>32</sup> *Idem*, p. 380.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Idem*, p. 381.

<sup>37</sup> *Ibid.*

<sup>38</sup> Park, William, William, *Arbitrator Integrity*, Estados Unidos, Kluwer Law international, 2010.

<sup>39</sup> Wells, Louis, *Backlash to investment arbitration: three causes*, Estados Unidos, Kluwer Law International, 2010, pp. 341-352.

Corruption and incompetence.<sup>40</sup> Rarely, the arbitrators concluded that agreements had been negotiated with corruption and incompetence of government members<sup>41</sup> although it is often the case with developing countries.<sup>42</sup> Therefore, unfair contracts and agreements are still executed.<sup>43</sup>

### 3. DEVELOPMENT OF INVESTOR-STATE ARBITRATION IN LATIN AMERICA

The disenchantment of the investor-state arbitration has caused many reactions from the States. By 2007, some states began to withdraw their adherence to treaties requiring arbitration as a dispute resolution method. The Republic of Bolivia, on May 2nd, 2007 announced its withdrawal of the ICSID Convention, in accordance with Article 71 of the Convention. Afterwards, in 2009, Bolivia withdrew from the ICSID treaty. Nicaragua, Ecuador and Venezuela have all threatened or commenced withdrawal from ICSID procedures and free trade regional agreements.

In general, Latin America has always been forward thinking concerning international relations positions. Indeed, from the 19th century, when European countries were conquering less powerful countries to meet their financial needs, the Argentine jurist Carlos Calvo<sup>44</sup> set a precedent in legal doctrine concerning State sovereignty. Thus was born the Calvo doctrine.<sup>45</sup> The Calvo doctrine has had a huge influence on investor-state arbitration in Latin America. We will therefore examine the contentment of this doctrine and its effects.

It is possible to trace the origins of the Calvo doctrine back to the 19<sup>th</sup> century when European governments used aggression and conquest based on weaker countries to meet their financial obligations and needs in natural resources.<sup>46</sup> Carlos Calvo stated that in disputes between an alien and a government, the former has to resort to local remedies waiving diplomatic protection from his own government.<sup>47</sup> By doing so, he originated the most controversial clause in International Law. The Calvo doctrine is based on specific points:

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<sup>40</sup> *Ibid.*

<sup>41</sup> Summerfield, Jason, "The corruption defense in investment dispute: A discussion of the imbalance between international discourse and arbitral decisions", *Transnational Dispute Management*, vol. 6. Disponible en: [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Orrego, Francisco, *Key-note remarks made at the conference on regulatory expropriations in international law*, New York, New York University School of Law, 2002.

<sup>45</sup> Garcia-Mora, Manuel, "The Calvo clause in Latin American constitutions and constitutional law", *Marquette Law Review*, vol. 33, núm. 4..

<sup>46</sup> *Ibidem.*

<sup>47</sup> *Ibidem.*

- Equality, sovereignty and state independence are key State rights,
- States are equal, sovereign and independent, the interference in each other is void,
- Foreigners must respect national legislation of the countries where they settle without mentioning the diplomatic protection of their governments in the event of prosecution arises from contracts, insurrection or civil war.

Latin American countries were the first to use the concept of “diplomatic protection” based on the Calvo doctrine.<sup>48</sup> Historically, the Calvo doctrine was directed mainly at the countries of Latin America, especially Mexico in 1861.<sup>49</sup> It later spread to developing countries in general. The Calvo doctrine gave birth to the Calvo clause; it was therefore incorporated in constitutions and contracts between South and Central America on one side and Europe on the other. This clause stipulates that European countries should use local dispute resolution mechanisms to settle disputes arising from the contract without invoking diplomatic protection or intervention of its government. Since 1886, the Calvo clause was incorporated in most Latin American legislation, constitutions and contracts.<sup>50</sup>

Several variables of the Calvo Clause emerged over time. The clause excluding diplomatic protection no matter the circumstances, in the Mexican Constitution for instance was related to the ability to acquire real estate in the country.<sup>51</sup> Bolivia has a similar clause that gives the right to diplomatic protection to foreign subjects and enterprises only in case of denial of justice still in the procurement of goods. The Nicaraguan and Cuban constitutions have included clauses in their constitutions that share the same spirit. Cuba also incorporate the Calvo Doctrine in its constitution providing that foreign enterprises for all purposes is subject to treatment and obligations equal with nationals.

Obviously, the purpose of these constitutional provisions is to compel foreigners, companies or individuals to use internal courts before they resort to diplomatic channels. That goes the same for investor-state arbitration. Based on the Calvo clause, Latin American countries will prefer national court to ICSID arbitration. The idea being that International arbitration will provide an advantage to international enterprises that nationals will not have when it comes to dispute resolution mechanisms.

<sup>48</sup> Polanco, Rodrigo, *Lessons Learned and Lessons to Be Learned: Investment Law & Development for Developed Countries*. Disponible en: [https://law.yale.edu/system/files/documents/pdf/SELA14\\_Polanco\\_CV\\_Eng\\_20140430.pdf](https://law.yale.edu/system/files/documents/pdf/SELA14_Polanco_CV_Eng_20140430.pdf)

<sup>49</sup> *Ibidem*.

<sup>50</sup> García-Mora, Manuel, *op. cit.*

<sup>51</sup> *Ibidem*.

Over the years, the Calvo clause has had many criticisms. Professor Brierly expressed that the Calvo Clause attempts to exclude altogether the responsibility of States towards foreigners.<sup>52</sup> United States, rejected the Calvo Clause on the ground that an unaccredited agent may not renounce the right or privilege of the government in protecting its citizens abroad.<sup>53</sup> The British Government also felt that the Calvo Clause could not be applied to tortious acts of revolutionary forces or to willful destruction of foreigners' property, and that in claims arising from these torts, the governments have the right of espousing the claims of their nationals.<sup>54</sup> The principal reasoning behind the use of diplomatic protection was that home States would not always agree with the level of protection host States could provide to foreign investors via domestic courts, and the idea of an "International Minimum Standard" was advanced by developed countries *vis-à-vis* a "National Standard" espoused by certain developing countries notably in Latin America.<sup>55</sup>

Even so, most Latin American host States tried to confine investment remedies to its local courts and institutions, holding that domestic courts had a primary role in the settlement of foreign investment disputes and rejecting diplomatic protection except in cases of denial of justice or evident violation of principles of international law.<sup>56</sup>

Obviously, Latin American countries were forcefully opposed to International or diplomatic dispute resolution means responding to minimum international standards. They valued and recognized nation standards for all national and foreigners under national courts. Still, international arbitration found a way to penetrate Latin American Countries. The solution of every international conflict arising between Latin American States, by means of arbitration was advanced as a "principle of American Public Law" in Pan-American Conferences, being commonly used by the end of the 19<sup>th</sup> century and early on the 20<sup>th</sup> century.<sup>57</sup> From 1794 to 1938, Latin American countries participated in almost 200 arbitrations. The bulk of the arbitrations took place during the first century following the independence of Latin American countries from 1829 through 1910. In that period, Latin American States entered into 160 arbitrations, including almost 80 arbitrations with European States, around 40 with the United States, around 40 among themselves, and 1 with Japan.<sup>58</sup> It is clear to see that investor-state

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<sup>52</sup> *Ibidem*.

<sup>53</sup> *Ibid*.

<sup>54</sup> Hackworth, G. H., "Dissenting opinion of the British Commissioner in the British-Mexican Claims Commission", *Digest*, pp. 647-650.

<sup>55</sup> Montt Santiago *State Liability in Investment Treaty Arbitration*, Issue n. 33 Studies in international law, v. 26, Oxford; Portland, Or, Hart Pub 2009.

<sup>56</sup> *Ibid*.

<sup>57</sup> Dugan, Christopher, *Investor-State Arbitration*, Nueva York, Oxford University Press, 2008.

<sup>58</sup> Summers Lionel, *Arbitration and Latin America*, 3 CAL. W. INT'L L.J. 1, 7 1972.

arbitration has been influenced by the Calvo doctrine. The Calvo doctrine might not have been enacted specifically for International Arbitration Law, but its effects will definitely determine the reception of investor-state arbitration in Latin America.

### 3.1 *The effects of the Calvo doctrine*

Even at the very creation of the ICSID by the World Bank, Latin American countries defended domestic courts as a natural forum to solve investment disputes, with peaceful diplomatic protection only eventually allowed, always after exhaustion or at least exercising local remedies.<sup>59</sup> From 1910 to 1939, there were only 30 arbitrations involving Latin American States, and since World War II, the only significant arbitrations were those related to the boundaries between Chile and Argentina, and Honduras and Nicaragua.<sup>60</sup>

By the end of the '80s and early '90s, a reversal of this doctrine started growing in Latin America, as some countries began to sign bilateral investment treaties (BIT) in order to stimulate economic growth through foreign direct investment (FDI) and at the same time privatized their energy and utility companies, pursuing their economic interests, in order to become attractive countries to potential foreign investors.<sup>61</sup>

Initially, BIT and FTA were concluded between one developing and one developed country, usually at the initiative of the developed country. With the increasing integration of the world economy and trade liberalization, this pattern changed especially during the '90s, when developing countries and economies in transition started signing bilateral investment treaties among themselves and in large numbers.<sup>62</sup> NAFTA for example placed the regime in a new context, and we can consider its Chapter 11 as the first investment treaty signed between two developed countries, Canada and the United States.<sup>63</sup> So now, developed countries could be the target of investor-state arbitration. And they did not like it.<sup>64</sup> In the case of NAFTA, investors from Canada and the United States started attacking each other's country.<sup>65</sup>

In 2013, as ICSID caseload statistics showed that Latin America became the region with the higher number of cases registered under the ICSID Convention

<sup>59</sup> *Ibid.*

<sup>60</sup> Anghic, Antony, *Imperialism, Sovereignty and The Making of International Law*, Cambridge, Cambridge University Press, 2007.

<sup>61</sup> Guzman, Andrew, "Why Idcs Sign Treaties that Hurt Them", *Virginia Journal of International Law*, núm. 639.

<sup>62</sup> Gomez, Katia, *Latin America and ICSID*, Nueva York, Social Science Research Network, Rochester, 2010.

<sup>63</sup> Canada - Mexico - United States, *North American Free Trade Agreement (NAFTA)*, 17 de diciembre, 1992.

<sup>64</sup> Aguilar Guillermo, *New Face of Investment Arbitration*, 28 Yale J. INT'L L. 365, 367 2003.

<sup>65</sup> *Ibid.*

and Additional Facility Rules by State Party involved (34%).<sup>66</sup> Several countries in Latin America have responded to one or more investment treaty arbitration. Argentina was the most frequent respondent in the overall statistics, followed by Venezuela, Ecuador and Mexico.<sup>67</sup>

At the same time, the State of Bolivia, the Republic of Ecuador and the Republic of Venezuela, which denounced the ICSID Convention, and terminated several investment treaties. In January 2012, Venezuela expressed to the World Bank its ‘irreversible denunciation’ of the International Centre for Settlement of Investment Disputes (ICSID).<sup>68</sup> Presumably, After a recent ICC award against *Petroleos de Venezuela S. A.*, a Venezuelan oil company, in favor of an Exxon Mobil, the Venezuelan government decided to withdraw from the ICSID.<sup>69</sup>

The Calvo doctrine initiated as an alternative, with Ecuador leading, the proposal to create a regional investment court with an appeal facility, and the promotion of ADR mechanisms (like mediation) in the framework of Unasur (Union of South American Nations) — a proposal also endorsed by ALBA (Bolivarian Alliance for the Peoples of Our America).<sup>70</sup>

Also, as another alternative, some bit started introducing a variety of dispute resolution clauses requiring the use of domestic remedies for a certain period of time before international arbitration may be initiated.<sup>71</sup> This is not a requirement to exhaust local remedies. The claimant is free to return to International arbitration once the time as elapsed.<sup>72</sup> An example of this clause can be found in article 10 of the Argentina-Germany BIT. The period of time foreseen in such treaties will usually vary from 3 months to 2 years. In practice, this requirement has been honored mainly through its non-applicants. Although, in *Maffezini vs. Spain* and *Siemens vs. Argentina*, the claimants were able to rely on most-favored-nation (MFN) clauses to avoid this requirement.<sup>73</sup>

The most obvious consequence of the Calvo doctrine will have to be the selection of domestic forums in BIT and contracts.<sup>74</sup> Cases involving domestic forum selection have been very prominent in recent years. An example could be the *Holiday Inns vs. Morocco*. In this case, the contract contained a

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<sup>66</sup> By December 31, 2013, this percentage accounts 27% for South America and 7% for Central America and the Caribbean.

<sup>67</sup> United Nations Conference on Trade and Development (UNCTAD), Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note, marzo, 2013.

<sup>68</sup> Singh, Sachet and Sharma, Sooraj, “Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap”, *Utrecht Journal of International and European Law, Mercurios - International and European Law: General Issue*, vol. 29/76.

<sup>69</sup> *Ibid.*

<sup>70</sup> Fiezzoni, Silvia Karina, “The Challenge of Unasur Member Countries to Replace ICSID Arbitration”, *Beijing Law Review*, núm. 134.

<sup>71</sup> Schreuer, Christoph, *Calvo’s grandchildren: the return of local remedies in investment arbitration*, The Law and Practice of International Courts and Tribunals, 2005.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Singh, Sachet and Sharma, Sooraj, *op. cit.*

forum selection courts in favor of Moroccan courts rather than the ICSID.<sup>75</sup> In *Vivendi vs. Argentina*, the tribunal distinguished between claims based on the Argentina-France BIT and claims based on a concession contract. The tribunal discussed the obligation to pursue national remedies in the case of claims based on the contract.<sup>76</sup>

Finally, the last extension of the Calvo doctrine in International Investment Law is the resort to domestic courts as a substantive requirement to international standards.<sup>77</sup> In *Waste Management vs. Mexico*, the issue of the prior use of local remedies arose in the context of the host state obligation to guarantee fair and equitable treatment and full protection and security.<sup>78</sup> This decision requires, based on the resort to domestic courts as a substantive requirement to international standards, that domestic courts should reasonably be attempted if not exhausted before an international remedy be sought for a claim of expropriation or violation of fair and equitable treatment.<sup>79</sup>

Despite all those alternatives deriving from the Calvo doctrine, investor-state arbitration via ICSID still stands tall in International Investment Law. The exhaustion of local remedies is not a requirement for investment arbitration. The requirement is to use domestic courts before going to arbitration. That will appear to be a result of a compromise between investor-state arbitration and the Calvo doctrine.

#### 4. INVESTMENT ARBITRATION IN CURRENT LATIN AMERICAN CONTEXT

Based on these developments, Latin America is perceived as hostile when it comes to investment arbitration.<sup>80</sup> Still, there must be consideration for the complexity of the relationship between Latin America and investor-state arbitration. Authors such as Carlos González-Buena have been denouncing and resisting ICSID arbitration. Obviously, although it is not expressly acknowledged, the growing number of ICSID cases against Latin American countries has a lot to do with their dissatisfaction with its system. Cases have arisen from financial crises, as well as nationalization and expropriation initiatives. Statistics shows that in 2016, Argentina faced over 60 investment claims, Venezuela came second with more than 50 cases, followed by Mexico in third with close to

<sup>75</sup> Lalive, Philippe, “The first World Bank Arbitration (Holiday Inns vs. Morocco) and some legal problems”, *British Year Book of International Law*, núm. 123.

<sup>76</sup> “Compañía de Agua del Aconquija S. A. and Compagnie Générale des Eaux vs. Argentina Republic”, *ICSID Review*, núm. 16.

<sup>77</sup> Schreuer, Christoph, *op. cit.*

<sup>78</sup> *Waste management Inc. v. United Mexican States*, Award, 30 April 2004.

<sup>79</sup> *Ibid.*

<sup>80</sup> Titi, Catharine, “Investment Arbitration in Latin America. The Uncertain Veracity of Preconceived Ideas”, *Arbitration International, The journal of the London Court of International Arbitration*, vol. 30, núm. 2.

twenty cases.<sup>81</sup> These dissatisfaction reveals and inadequacy of the ICSID at one level or another. To this effect, as discussed by Mariano Tobías de Alba Uribe, Unasur's announced desire to create its own (regional) investment arbitration center to replace ICSID.<sup>82</sup> Brazil's withdrawal has a considerable impact considering its growing role in the global economy.<sup>83</sup>

For countries that are developing, the burden of being the biggest respondents in ICSID cases, without being the largest recipients of foreign direct investments certainly call for reflexion. A wide range of developing countries relied on foreign investment to guide them to the path of development via technology transfer, production boost and job creation. Attracting international investment led Latin American countries to accept ICSID arbitration. On the long run, it seems to not be as valuable as it should be based on case statistics.

International investment arbitration is primarily a protection mechanism for foreign investors, rather than host countries. Given the current dynamic of international investments, multinationals from developed countries will benefit from ICSID arbitration rather than developing countries. For example, statistic shows that United States currently has more than sixty cases (closed or pending) against various Latin American countries.

It is understandable that developing countries feel the need to protect themselves and affirm their sovereignty. We do not believe investment flow in Latin America will suffer from their withdrawal from ICSID arbitration. There are various alternatives to international dispute resolution that do not include ICSID proceedings. We previously mentioned Unasur and national courts. They remain available for international dispute settlement in Latin American countries. Without being necessarily for or against Latin American countries withdrawal from ICSID, we do not believe it is as dramatic as it is perceived to be given the circumstances. Various means of dispute resolution exist and Latin American countries sovereignty allows them to decide which ones to favor or not based on their political, economical and development goals.

## 5. CONCLUSION

The disillusion of investor-state arbitration did not only affect Latin American countries. Australia announced in 2011 that it would no longer include in

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<sup>81</sup> Lindsey, Emma and Angles, Giovanni, "International Arbitration in Latin America: year in review 2016", *Bryan Cave Publications*.

<sup>82</sup> The Union of South American Nations, an intergovernmental union integrating Mercosur and the Andean Community of Nations (CAN) as part of a continuing process of South American integration, and inspired and modeled after the European Union. Unasur's members are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Panama and Mexico hold an observer status.

<sup>83</sup> Giusti, Gilberto & Drummond, Adriano, "As arbitragens internacionais relacionadas a investimentos: a Convenção de Washington, o icsid e a posição do Brasil", *Revista de Arbitragem e Mediação*, núm. 7.

its treaties the investor-state arbitration clause.<sup>84</sup> This change in Australia's position could very much unsettle the legitimacy of investor-state arbitration.<sup>85</sup> Moreover, the situation of BIT being negotiated between Australia and Japan, China, and Korea is being questioned.<sup>86</sup> Will this position slow down FDI attraction in Australia or, will it have the opposite effect?<sup>87</sup> According to some, such a change could have the effect of either reducing trade agreements between Australia and other countries, or increasing them.<sup>88</sup>

In Africa, South Africa took the lead as to disengaging from BIT with investor-state arbitration. The case of South Africa is crucial for developing countries. Will the absence of international arbitration agreement slow the conclusion of BIT with developing countries where national judicial institutions are not trusted by international investors?<sup>89</sup> The position of developing countries is even more important because since the 1980s, over 400 BIT have been signed between developed and developing countries, particularly between Europe and Africa or Asia.<sup>90</sup> As for South Africa, since 2007, the country re-evaluates the relevance and risks of its adherence to bilateral investment treaties which lay investor-state arbitration as a dispute resolution mechanism.<sup>91</sup> South Africa has ended its bilateral investment treaty with Belgium and Luxembourg.<sup>92</sup> The country plans to gradually end other treaties with European countries.<sup>93</sup> The termination of the Treaty is in accordance with the termination provisions contained in BIT. South Africa has begun to reassess its practice in investment treaties. The South African State argues that current BIT modeled are 50 years old models that focus on the interests of developed countries.<sup>94</sup> The important issues for developing countries are not taken in consideration in the BIT negotiation process.<sup>95</sup>

It is interesting to see how Latin America with the Calvo doctrine lead the way for other countries worldwide when it comes to the reception of investor-state arbitration. The bigger question regards the survival of

<sup>84</sup> Kurtz, Jeurgem, "Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication", *icsid Review*, vol. 27, núm. 1, pp. 65-86.

<sup>85</sup> Nottage, L., "Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and its Impact in Asia", *Asian Studies Review*, vol. 37, núm. 2, pp. 253-272.

<sup>86</sup> *Ibid.*

<sup>87</sup> Trackman, Leon, "Investor state arbitration or local courts: Will Australia set a new trend?", *Journal of world trade*, vol. 46, núm. 1, pp. 83-120.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Idem*, pp. 83-120.

<sup>90</sup> Echandi, Roberto, *Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements: Recent Developments in Investment Rulemaking. Arbitration under international investment agreements: a guide to key issues*, Oxford, Katia Yannaca-Small, 2010, pp. 1-36.

<sup>91</sup> Yackee, Jason, "Traité d'investissement et corruption par l'investisseur: une défense émergente pour l'État d'accueil ?", *Investment treaty news*, vol. 3, núm. 1, pp. 13-15.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

investor-state arbitration in International Investment Law. Obviously, it is not going anywhere anytime soon. But It will be interesting to observe the dynamics of BIT and FDI around the world with and without investor-state arbitration clauses.

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