TDM OGEMID

ISSN : 1875-4120
Issue : Vol. 13, issue 2
Published : June 2016

This article is part of the TDM Latin America special edited by:

Dr. Ignacio Torterola
GST LLP
View profile

Quinn Smith
GST LLP
View profile

Terms & Conditions

Registered TDM users are authorised to download and print one copy of the articles in the TDM Website for personal, non-commercial use provided all printouts clearly include the name of the author and of TDM. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of TDM is strictly prohibited. Should the user contravene these conditions TDM reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit www.transnational-dispute-management.com

© Copyright TDM 2016
TDM Cover v5.0

Transnational Dispute Management
www.transnational-dispute-management.com

Two Solutions for One Problem: Latin America's Reactions to Concerns over Investor-State Arbitration
by A. López Ortiz, J.J. Caicedo and W. Ahern

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Two Solutions for One Problem: Latin America's Reactions to Concerns over Investor-State Arbitration

Alejandro López Ortiz, José Joaquín Caicedo and William Ahern[1]

1. Introduction

It has been well publicized that, with the increase in number of investor-State arbitration cases, along with changes in the types of government measures challenged by investors bringing such claims, criticism of the investor-State arbitration system is (and has been for some time) on the rise. Such criticism comes from a number of quarters: States who themselves may have been the subject of claims, civil society groups, or academics and practitioners who participate in the system.

While these criticisms are many, a few are particularly relevant to this article. Perhaps one of the most well known critiques arises out of the use of investor-State arbitration to challenge public policy measures taken by States in sensitive areas such as health and environmental protection.[2] It has been said that such claims restrict the discretion of States to regulate in the public interest.[3] Another criticism focuses on the international investment agreements ("IIAs") that often provide investor-State arbitration tribunals with the jurisdiction to hear disputes. It has been noted that the "standard" investment protections contained in IIAs are too vague and, inevitably, lead to inconsistent and unpredictable application of such standards by investor-State arbitral tribunals.[4] Another criticism, related to the two already mentioned, is aimed at the decisions of investor-State tribunals themselves. It has been argued that such decisions can sometimes be "erratic", poorly-reasoned, and taken in disregard of the regulatory powers enjoyed by States.[5]

The question facing those upon whose consent the operation of the entire system relies, i.e. States, is how to react to these perceived problems. This paper explores two diverging reactions within one geographic region: Latin America. One approach has been to withdraw from the system by renouncing the international conventions and treaties upon which it is built and to instead regulate the treatment afforded to foreign investors and disputes between them and the State through national law ("the withdrawal approach"). Another is to amend such instruments in order to address the kinds of criticisms addressed above ("the reform approach"). As will be explained in Section 2, which examines these two approaches in greater detail, not every Latin American State fits perfectly into one of the categories, and the two approaches have been adopted to varying degrees by different States.

---

[1] Alejandro López Ortiz is a Partner of the International Arbitration practice of the Paris office of Mayer Brown International, José Joaquín Caicedo is a Counsel in the International Arbitration practice of the Paris office of Mayer Brown International. William Ahern is an Associate of the International Arbitration practice of the Paris office of Mayer Brown International. The authors would like to thank Beatriz Restrepo, of Mayer Brown's Paris office, for her valuable research assistance with this article

[2] Jean E. Kalicki and Anna Joubin-Bret (Eds.), *Reshaping the Investor-State Dispute Settlement System, Journeys for the 21st Century, Nijhoff International Investment Law Series*, Volume 4 (2015), p. 1.

[3] *Id.*

[4] Brower and Schill, Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law? *9 Chi. J. Int'l L 2, 573* (2009).

[5] James Crawford in the preface to Zachary Douglas, *The International Law of Investment Claims* (2009).

Before delving into the nature of the two diverging approaches, it should first be noted that Latin America has had its own unique (and again diverging) experiences with investor-State arbitration, and before its creation, investment arbitration more generally. Firstly, Latin American countries have been respondent States in a significant number of investor-State arbitrations. As of the end of 2014, Latin American States (Argentina, Venezuela, Ecuador and Mexico) made up four of the seven most frequent respondent States in known investor-State arbitrations since 1987.[6] In addition, as a region, Latin American States have been the most common respondents in ICSID arbitrations.[7]

This is, of course, a situation very far removed from the recent past. Indeed, the draft ICSID Convention was rejected by the Latin American States members of the World Bank in 1964 as being contrary to their accepted legal principles.[8] Moreover, no Latin American States joined the Convention until the 1980s.[9] The situation changed dramatically, however, in the 1990s, when the majority of Latin American States joined ICSID[10] and participated in the proliferation of bilateral investment treaties ("BITs") that took place during that decade.[11] Prior to this, Latin American States' attitudes towards investment arbitration were largely based on the Calvo Doctrine, which, without entering into detail, can be summarized as rejecting adjudication by international tribunals between foreign investors and States on the principle that foreign investors should not be granted better rights than local citizens.[12] In fact, as of today, Latin America's main economy, Brazil, stands as probably the only jurisdiction of significance in the world which has opted to fully turn its back to investor-State arbitration, refusing to ratify the ICSID convention and any investment protection treaties that enable international arbitration by investors.

It is against this background that this article explores the diverging approaches to change in the investor-State arbitration framework amongst Latin American States. After setting out the two approaches, Sections 3, 4 and 5 of the article examine how the "withdrawal" and "reform" approaches treat the definitions of foreign investors and investments, the substantive protections to be afforded to foreign investments, and access to investor-State arbitration for foreign investors, respectively. The changes implemented by States adopting both the "withdrawal" and "reform" approaches are considered in light of previous decisions rendered by investor-State arbitral tribunals, in order to determine the extent to which such changes might be responses to some of the criticisms of the investor-State arbitration system, discussed above.

2. The Diverging Approaches

The approach described in this article as the "withdrawal approach" has been to denounce to ICSID Convention and, to varying degrees, terminate IIAs that provide for investor-State arbitration. While some States from other regions have begun to embark on this route, at least

---

6 UNCTAD, Recent Trends in IIAs and ISDS, IIAs Issues Note, February (2015).

7 ICSID Caseload – Statistics (Issue 2015-2), available at: https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx (last visited, 7 September 2015).

8 Christoph Screuer et al, *The ICSID Convention: A Commentary, Second Edition* (2009), p. 1271.

9 When Paraguay, Ecuador, Honduras and El Salvador became parties. *Ibid*, p. 1722.

10 *Id*.

11 Kenneth J. Vandevelde, Model Bilateral Investment Treaties: The way Forward, *18 Southwestern J. Int'l. L International Law* (2011), p. 308.

12 Bernardo M. Cremades, The Resurgence of the Calvo Doctrine in Latin America, *Investor-State Disputes - International Investment Law*, TDM 5 (2005), p. 2.

with respect to the termination of IIAs,[13] certain Latin American States, namely Ecuador, Bolivia and Venezuela have been pioneers of this approach. While it is beyond the scope of this article to examine the reasons behind these diverging approaches in significant depth, a number of potential contributing factors are briefly addressed.

Bolivia was the first of the "withdrawing" Latin American States to denounce the ICSID Convention, filing a notice of denunciation of the Convention on 2 May 2007.[14] To date, Bolivia has also terminated a number of its IIAs, including BITs with Spain, the Netherlands, Austria, Germany, the United States and Sweden.[15] In addition, the Government announced its intention to denounce all of its remaining BITs and to renegotiate such treaties. Such renegotiated treaties would include dispute resolution through a not yet established regional arbitral institution.[16] Bolivian government officials have since confirmed the denunciation of all of its remaining BITs, though the status of any renegotiations is not known.[17]

On 4 April 2014, Bolivia enacted the Law No. 516 on Investment Promotion (the "Investment Promotion Law"). It subsequently enacted, on 25 June 2015, Law No. 708 on Conciliation and Arbitration (the "Conciliation and Arbitration Law"), which stipulates the procedures for settlement of disputes arising out of the Investment and Promotion Law. As with the other national laws set out in this section, the content of this law is addressed in more detail in Sections 3, 4 and 5 of this article.

Ecuador served its notice of denunciation of the ICSID Convention on the World Bank on 6 July 2009,[18] having already communicated to ICSID on 4 December 2007[19] that it excluded future disputes related to the oil, gas and mining sector from ICSID jurisdiction.[20] Interestingly, Ecuador terminated eight BITs in 2008, prior to its denunciation of the ICSID Convention.[21] Also interesting is that all of these terminations took place on the same day and all except one (Ecuador's BIT with Romania) were BITs entered into with other Latin American States.[22] In 2010, the Ecuadorian government began the internal process of

---

[13] Such states include Indonesia and South Africa with respect to BITs: Jeswald W. Salacuse, The Law of Investment Treaties, Second Edition (2015), p. 20, and Italy, which has recently withdrawn from the Energy Charter Treaty: Anna de Luca, Renewable Energy in the EU, the Energy Charter Treaty, and Italy's Withdrawal Therefrom, *Renewable Energy Disputes*, TDM 3 (2015).

[14] ICSID News Release, Denunciation of ICSID Convention, 16 May 2007, available at: https://icsid.worldbank.org/apps/ICSIDWEB/Pages/News.aspx?CID=113&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us (last visited 8 September 2015).

[15] UNCTAD Investment Policy Hub, IIAs of the Plurinational State of Bolivia, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/24#iiaInnerMenu (last visited 8 September 2015).

[16] Rodrigo Polanco Lazo, Is there a life for Latin American countries after denouncing the ICSID Convention? TDM, Vol. 11, Issue 1 (2014), p. 14.

[17] See Orellana López, A., McDonagh, T, Bolivia denuncia sus Tratados Bilaterales de Inversión (May, 2014), available at: http://es.justinvestment.org/wp-content/uploads/2014/07/Entrevista-a-Walter-Clarems-Endara-Vera-Viceministro-de-Comercio-Exterior-e-Integraci%C3%B3n-del-Estado-Plurinacional-de-Bolivia.pdf (last visited 11 September 2015).

[18] ICSID News Release, December 5, 2007, Ecuador's Notification under Article 25(4) of the ICSID Convention, available at http://icsid.worldbank.org/ICSID/Index.jsp# (last visited 8 September 2015).

[19] ICSID News Release, 9 July 2009, Ecuador Submits a Notice under Article 71 of the ICSID Convention, available at: http://icsid.worldbank.org/ICSID/Index.jsp# (last visited 8 September 2015).

[20] The basis of such exclusion was Article 25(4) of the ICSID Convention, which provides that Contracting States may notify ICSID of a class or classes of disputes that it would not consider submitting to the jurisdiction of ICSID.

[21] *Op.cit*. Rodrigo Polanco Lazo, p. 17.

[22] UNCTAD Investment Policy Hub, IIAs of Ecuador, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/61#iiaInnerMenu (last visited 8 September 2015).

denouncing all remaining BITs.[23] According to the UNCTAD IIA database, Ecuador's BIT with Finland was unilaterally denounced in December of 2010, however a number of other BITs remain in force.[24]

Ecuador enacted a new investment law applicable to foreign (as well as national) investments on 21 December 2010 named the General Organic Code of Production, Commerce and Investment. As discussed further in Section 5, this law provides for international arbitration to settle disputes between foreign investors and the Ecuadorian State under certain circumstances.

Venezuela also terminated a BIT prior to denouncing the ICSID Convention, doing so with respect to its BIT with the Netherlands on 30 April 2008.[25] When Venezuela took this measure, Government officials explicitly invoked the "abuse" of this treaty by numerous companies that registered subsidiaries in the Netherlands for the sole purpose of gaining protection under the BIT.[26] Venezuela served its notice on the World Bank denouncing the ICSID Convention on 24 January 2012.[27] It does not, however, appear that Venezuela has subsequently terminated any of its other BITs.[28] Venezuela enacted a new investment law in 2014 named the Foreign Investment Law. As discussed further below, such law provides no mechanism for international arbitration between foreign investors and the State.

There are a number of possible factors that may have influenced these States to take such actions, including the number investor-State arbitrations filed against them, the nature of such claims and the size of awards rendered. Venezuela has faced over 35 investor-State arbitral claims as a respondent State, second only to Argentina.[29] Ecuador has faced more than 20 claims, coming seventh on the list of States that have faced the most claims.[30] In addition, it has been on the receiving end of two of the largest known investor-State arbitral awards, with US$ 700,000,000 in the *Chevron v. Ecuador* case[31] and US$ 1.77 billion (at that time a record) in the *Occidental Petroleum Corporation v. Ecuador*[32] case. These two awards were heavily relied upon in the recent Special Resolution of the Bolivarian Alliance for the Peoples of Our America ("ALBA"), approved during a meeting in Ecuador that denounced bias in investor-State arbitration in favor of foreign investors and lamented the effect of such awards

---

[23] *Op.cit*. Rodrigo Polanco Lazo, p. 18.

[24] UNCTAD Investment Policy Hub, IIAs of Ecuador, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/61#iiaInnerMenu (last visited 8 September 2015).

[25] Luke Eric Peterson, "Venezuela gave notice of its intention to withdraw from the BIT in order to avoid the treaty's automatic renewal for an extension period of 10 years", International Arbitration Reporter, 16 May 2008, available at: http://www.iareporter.com/Archive/IAR-05-16-08.pdf (last visited 8 September 2015).

[26] See comments of the then Venezuelan Minister of Energy and Petroleum in "Venezuela denuncia tratado de inversiones con Holanda", El Universal, dated 1 May 2008, available at: http://www.eluniversal.com/2008/05/01/eco_art_venezuela-denuncia-t_01A1549161 (last visited 11 September 2015).

[27] ICSID News Release, Venezuela Submits a Notice under Article 71 of the ICSID Convention, 26 January 2012, available at: http://icsid.worldbank.org/ICSID/Index.jsp# (last visited 8 September 2015).

[28] See UNCTAD Investment Policy Hub, IIAs of Venezuela, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/228#iiaInnerMenu (last visited 8 September 2015), showing that the remainder of Venezuela's BITs appear to remain in force.

[29] See UNCTAD, Investor-State Dispute Settlement: Review of Developments, IIA Issue Note No. 2, May (2015), Annex 2, pp. 26-27.

[30] *Id*, p. 3.

[31] *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Partial Award on the Merits (30 March 2010).

[32] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012).

on economic development.[33] Bolivia, while having faced far fewer claims than Venezuela and Ecuador[34], was the respondent in the particularly controversial *Aguas de Tunari v. Bolivia*[35] investor-State arbitration, which was invoked as justification for its denunciation of the investor-State arbitration system.[36]

Of course, such factors alone cannot alone explain the divergence of approaches in Latin America. Argentina has faced the most investor-State arbitral claims out of any State by far.[37] Yet while the Argentinean legislature has considered reinstating the Calvo Doctrine (in 2004 and 2005[38] and again more recently[39]) by subjecting all disputes involving the government to local courts, as well as denouncing or renegotiating all international agreements that provided otherwise (including the ICSID Convention and BITs), it has for now not withdrawn from the investor-State arbitration system. On the other hand, Argentina does not fall into the "reform" category of Latin American States discussed below, as it has refrained in recent times from entering into any new IIAs that provide for investor-State arbitration.[40]

Additional influencing factors clearly include the political and policy leanings of the governments of the day. For example, when Venezuela denounced the ICSID Convention in 2012, it explained that the original decision to join the Convention was taken "*by order of a provisional government weak and lacking in popular legitimacy, pressured by transnational economic efforts involved in the dismantling of Venezuela's national sovereignty*."[41] The membership of States in regional bodies such as the ALBA, along with the goals and initiatives of such organizations, may also play a role. This group was founded by an agreement signed between Venezuela and Cuba in 2004 and counts amongst its members Venezuela, Bolivia and Ecuador.[42] Venezuela and Bolivia proclaimed their intention to withdraw from ICSID (amongst other international institutions) at an ALBA presidential summit in April of 2007, noting that the pressure applied by multinational companies through the threat of international arbitration impeded upon sovereign national laws and rules, including environmental and labor regulatory measures.[43] Notably, Ecuador joined the ALBA on 24 June 2009, a matter of days before serving its notice of denunciation of the ICSID Convention on the World Bank.[44]

---

[33] *Op.cit*. Rodrigo Polanco Lazo, p. 17.

[34] Over 11 claims. UNCTAD, Investor-State Dispute Settlement: Review of Developments, *Supra,* p. 26.

[35] *Aguas del Tunari S.A. v. Republic of Bolivia,* ICSID Case No. ARB/02/3. For a description of the issues at hand in that case, see Alexandre de Gramont, "After the Water War: The Battle for Jurisdiction in Aguas Del Tunari, S.A. v. Republic of Bolivia", *Transnational Dispute Management* (TDM) Vol. 3, Issue 5 (2006).

[36] *Op. cit*. Rodrigo Polanco Lazo, p. 12.

[37] 56 known cases by the end of 2014. UNCTAD, Investor-State Dispute Settlement: Review of Developments, *Supra,* p. 26

[38] Christopher M. Ryan, Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law, *756 U. Pa. 1. Int'l L. 29:3* (2008), p. 747.

[39] At least 7 draft bills have been proposed since 2011 to date. See Proyectos de ley No. 5545-D—2014 (14 July 2014); No. 6347-D-2013 (10 September 2013); No. 1450-S-2013 (11 April 2013); No. 8544-D-2012 (14 December 2012); No. 1089-S-2012 (2 May 2012); No. 1311-D-2012 (21 March 2012); No. 1201-D-2011 (28 March 2011), available at: http://www.diputados.gov.ar/proyectos/buscador2015-99.html (last visited 11 September 2015).

[40] According to the UNCTAD database, *supra*, the last such agreement signed by Argentina was its BIT with the Dominican Republic dated 16 March 2001, which has not entered into force.

[41] *Op.cit*. Rodrigo Polanco Lazo, *Supra*, citing Notas ALBA-TCP, "Gobierno Bolivariano denuncia convenio con Ciadi", 25 January 2012.

42 See the ALBA website, available at: http://albainfo.org/ (last visited 9 September 2015).

[43] *Op.cit* Rodrigo Polanco Lazo, p. 11.

[44] *Ibid*., p. 16.

The approach taken by a number of other Latin American State, referred to in this article as the "reform" approach, has been to enter into new IIAs, both in the form of BITs and investment chapters in free trade agreements ("FTAs"). These more recent IIAs often contain new treaty language aimed at, *inter alia*, addressing the criticisms discussed in the introduction to this article such as the vagueness of treaty standards, the inconsistency of awards, or awards that encroach upon States' rights to regulate in the public interest. Such new treaties, which have been described as "new generation treaties"[45] are, of course, not unique to the Latin American States discussed in this article. It is nevertheless interesting to note the number of new generation treaties that have been signed by some Latin American States in recent times, notably as investment chapters in FTAs, and often with other Latin American States.

This article focuses, *inter alia*, on new generation IIAs entered into by States including Colombia,[46] Peru,[47] Panama,[48] Mexico[49] and Costa Rica.[50] While it is true that such countries have generally faced less investor-State arbitration claims than the countries that have adopted the "withdrawal approach", this is not uniformly the case. Indeed, as at the end of 2014, Mexico had been respondent State in more investor-State arbitrations than both Ecuador and Bolivia.[51] While Mexico is yet to accede to the ICSID Convention, it continues to enter into new generation IIAs that provide for investor-State arbitration.[52] One possible factor for this could be Mexico's experience with NAFTA, the investment chapter of which has been described as containing "pioneering provisions" that have provided inspiration for many new generation IIAs.[53] The same could be said with respect to the US-DR-CAFTA and its Latin American signatories, including Costa Rica. It is possible to imagine that such regional developments have had an impact on neighboring countries that may not themselves

---

[45] See for example Suzanne A. Spears, The Quest for Policy Space in a New Generation of International Investment Agreements, *13 (4) J Int Economic Law* (2010); Chestor Brown and Kate Miles, Evolution in Investment Treaty Law and Arbitration (2011).

[46] See for example Colombia-Turkey BIT (2014); Colombia-France BIT (2014); Protocol Pacific Alliance (2014); Colombia-Singapore BIT (2013); Colombia-Israel FTA (2013); Colombia-Panama FTA (2013); Colombia-Costa Rica FTA (2013); Korea-Colombia FTA (2013); Colombia-EU-Peru FTA (2012); Colombia-Japan BIT (2011); Colombia-United Kingdom BIT (2010); Colombia-India BIT (2009); Colombia-Peru BIT (2007); Colombia-Switzerland BIT (2006); Canada-Colombia FTA (2008); Chile-Colombia FTA (2006).

[47] See for example Protocol Pacific Alliance (2014); Colombia-EU-Peru FTA (2012); Panama-Peru FTA (2011); Costa Rica-Peru FTA (2011); Mexico-Peru FTA (2011); Korea-Peru FTA (2010); Japan-Peru BIT (2008); Canada-Peru FTA (2008); Peru-Singapore FTA (2008); Chile-Peru FTA (2006); Colombia-Peru BIT (2007); Canada-Peru BIT (2006).

[48] See for example Mexico-Panama FTA (2014); Colombia-Panama FTA (2013); EFTA-Costa Rica-Panama FTA (2013); Panama-Peru FTA (2011); Canada-Panama FTA (2010); Finland-Panama BIT (2009); Italy-Panama BIT (2009); Costa Rica-Panama FTA (2007); Panama-US FTA (2007); Chile-Panama FTA (2006); Panama-Singapore FTA (2006).

[49] See for example Mexico-Panama FTA (2014); Protocol Pacific Alliance (2014); Central America-Mexico FTA (2011); Mexico-Peru FTA (2011); Mexico-Singapore BIT (2009); Belarus-Mexico BIT (2008); Mexico-Slovakia BIT (2007); India-Mexico BIT (2007); Mexico-Spain BIT (2006); Mexico-United Kingdom BIT (2006).

[50] See for example EFTA-Costa Rica-Panama FTA (2013); Colombia-Costa Rica FTA (2013); Central America-Mexico FTA (2011); Costa Rica-Peru FTA (2011); Costa Rica-Singapore FTA (2010); Costa Rica-Panama FTA (2007).

[51] See UNCTAD, Investor-State Dispute Settlement: Review of Developments, *supra*, p. 3.

[52] Though admittedly fewer than the majority of other "reform approach" States, and often with other Latin American States.

[53] Marie-Claire Cordonier Segger & Avidan Kent, Promoting Sustainable Investment through International Law, Chapter 30, Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (Eds.), *Sustainable Development in World Investment Law* (2011), p. 785.

have been parties to such agreements. Colombia, for example, has stated that in drafting its revised 2006 model BIT it took into consideration interpretations from the NAFTA Free Trade Commission.[54] One such interpretation of the Commission focused on the minimum standard of treatment under customary international law, which argued that fair and equitable treatment and full protection and security are included in, and not additional to, the minimum standard of treatment.[55] As is explained in Section 3 of this article, such a position has been largely adopted in the new generation IIAs of Latin American States.

As already stated, new generation IIAs, as well as the perceived problems with the *status quo* that spawned them, are not unique to Latin America. In this respect global developments and practice are sure to have influenced the recent practice of Latin American States in adopting new generation treaties. One example of such a global development is the UNCTAD Investment Policy Framework for Sustainable Development (IPFSD), which sets out a number of recommendations or policy options for IIAs, and which have been adopted by some Latin American States in recent IIAs.[56]

Finally, it is fair to assume that the decisions of previous investor-State arbitral tribunals have influenced the drafting of new generation treaties of Latin American States. To use once more the example of Colombia, its chief IIA negotiator stated that its new model "*included specific provisions drafted after careful consideration of ISDS awards*."[57] Such awards may not necessarily be those rendered against the State itself, or even against other Latin American States, as evidenced by the explicit rejection of the "Maffezini Doctrine" in the treaty practice of Latin American States (discussed further below). It can be imagined, however, especially in light of the fact that many new generation IIAs have been entered into between two Latin American States, that particular attention has been paid by those States to cases involving Latin American States parties. Therefore, when exploring potential links between classes of arbitral decisions that may have influenced subsequent treaty practice of Latin American States (or national legislation in the case of those adopting the "withdrawal approach"), this article focuses primarily on decisions from cases involving Latin American States parties.

In exploring potential links between classes of arbitral decisions and clauses found in new generation Latin American IIAs, it is not only the decisions that have been subject to criticism and that have gone against States that will be focused upon. As is highlighted below, new generation IIAs seem to have adopted positions taken by classes of arbitral decisions just as much as they have rejected others. This article will highlight examples of when treaty language in certain new generation IIAs could be said to be a form of 'codification' of investor-State arbitral tribunal decisions.

---

[54] 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: accessible at http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Vargas-Saldarriaga.pdf (last visited 9 September 2015).

[55] Gabrielle Kaufmann-Kohler, Interpretive Powers of the Free Trade Commission and the Rule of Law, Chapter 6, Emmanuel Gaillard and Frédéric Bachand (Eds.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (2011), p. 181.

[56] Statement by Colombia's Chief Negotiator of IIAs at the IIA Conference "Reforming the International Investment Agreements Regime", *supra*, p. 2: "Currently the Colombian BIT Model included most of the UNCTAD's IPFSD."

[57] *Id*.

3. Definitions of Investor and Investments

A. The IIA Reform Approach

i. Definitions of legal persons

It has been well document that the definition of, or nationality requirements for, companies or legal entities under a vast majority of IIAs is broad, and simply requires that the company be incorporated or constituted under the laws of the relevant contracting party. Such definitions do not take into account the nationality of the company's shareholders, the origin of capital, the actual seat of the company or the location of the company's management.[58] Such broad criteria for determining the nationality of legal persons has given rise to criticism of the tenuous and artificial links between investors and the host States against which they bring a claim. It has been argued that this in turn encourages "treaty shopping" by companies.[59]

One recent example of a case touching upon such issues is that of *Gold Reserve v. Venezuela*.[60] The applicable treaty contained broad nationality requirements for legal persons such as those described above. Venezuela argued that the claimant company was not entitled to protection under the treaty because its management was not in fact located in Canada and that the company was therefore a mere "shell" or "mailbox" company.[61] The tribunal rejected this argument, noting that "[a]*s many previous ICSID tribunals have found, where the test for nationality is* '*incorporation*' *as opposed to control or a* '*genuine connection*'*, there is no need for the tribunal to enquire further unless some form of abuse has occurred*."[62] In discussing what would constitute "abuse", the tribunal gave the example of a company becoming incorporated in a State after a dispute arose in order to take advantage of an applicable treaty.[63]

Other cases brought against Venezuela, such as *Venezuela Holdings v. Venezuela*[64] and *Cemex v. Venezuela*,[65] were brought pursuant to the Netherlands-Venezuela BIT (1991) (which as discussed above was terminated by Venezuela in 2008). In *Venezuela Holdings*, Venezuela argued that one of the claimants in that case, a company incorporated in the Netherlands, was a "corporation of convenience" created for the purpose of gaining access to ICSID arbitration in anticipation of an arbitration, which amounted to an abuse of right.[66] It also objected to the tribunal's jurisdiction over a number of co-claimants that were

[58] Piero Bernadini, Nationality Requirements Under BITs and Related Case Law, in Fredirico Ortino, Lahra Liberti, Audley Sheppard and Hugo Warner (Eds), *Investment Treaty Law: Current Issues II* (2007), pp.20-21.

[59] Suzy H. Nikièma, International Institute for Sustainable Development, Best Practices Series, Definition of Investor (2012).

[60] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014).

[61] *Ibid*, § 251.

[62] *Ibid*, § 252.

[63] *Id*.

[64] *Venezuela Holdings B.V. and others (Case formerly known as Mobil Corporation and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010).

[65] *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction (30 December 2010).

[66] Similar objections were made, and rejected, in *Autopista Concesionada de Venezuela. C.A v. Bolivarian Republic of Venezuela*, ICSID Case ARB/00/5, Decision on Jurisdiction (27 September 2001) and *Aguas del Tunari S.A. v. Republic of Bolivi*a, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005).

subsidiaries of the Netherlands incorporated company and themselves incorporated under the laws of Delaware and the Bahamas.[67] The objection based on the lack of Dutch nationality of the Delaware and Bahamas incorporated companies was dismissed on the basis of the specific language of the applicable treaty, which provided that legal persons not incorporated under the laws of the contracting party, but controlled by a legal person of the contracting party, qualified as nationals. The tribunal found that the claimants incorporated in the Bahamas and Delaware were controlled by the Netherlands incorporated parent company by virtue of its 100% ownership of them.[68]

The tribunal partially upheld the objection for abuse of right, finding that some of the disputes before the tribunal pre-existed the incorporation of the claimant in the Netherlands and that such incorporation was motivated by a desire to have those disputed brought before an ICSID tribunal. Claims that concerned actions by Venezuela after the claimant company's incorporation in the Netherlands, on the other hand, were allowed to proceed to the merits.[69]

As can be seen from the examples given above, investor-State arbitral tribunals relied on the wording of the applicable treaty, disregarding broader concepts (effectiveness, good faith) invoked by States in addition to the mere text of the treaty.

Latin American States in the "reform" group have dealt with such issues in treaty practice in different ways. One approach is to expressly add additional requirements to the definition of a company or legal entity beyond that of the unrestricted place of incorporation requirement. Recent IIAs of Latin American States including Guatemala,[70] Chile[71] and Colombia have sought to achieve this aim by requiring that, to meet the definition of investor, a "company", "enterprise" or "legal person" must have substantial business activities or operations in its place of incorporation. One such example is the following Colombian treaty provision:

> *The term "investor" means:*
> [...]
> *(b) In respect of Colombia: Natural persons of Colombia who, according to the law of Colombia, are considered to be its nationals; and legal entities including* ***companies, corporations, commercial associations and other organisations****, constituted or otherwise organised according to the law of Colombia* ***which have their seat, as well as substantial business activities, in the territory of Colombia****.*[72]

---

[67] *Venezuela Holdings, B.V. and others (Case formerly known as Mobil Corporation and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010). § 27.

[68] *Ibid*, § 160.

[69] *Ibid*, § 203-206.

[70] See Article 1(c) of the Guatemala-Trinidad & Tobago BIT (2013): "*(c) 'investor' of a Contracting Party means any natural or legal person of a Contracting Party that invests in the territory of the other Contracting Party and which has substantive business operations in the territory of that Contracting Party.*"

[71] See for example Article 10.1(f) of the Australia-Chile FTA (2008): "*enterprise of a Party means an enterprise constituted or organised under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.*" It should be noted that, as explained below, Chile has in fact - along with a handful of other (non-Latin) States - included the substantial business activities requirement in its treaty practice going back some time.

[72] Article 1.1(b) of the Colombia-UK BIT (2010). See also Article 1.1(e) of the Colombia-Japan BIT (2011), that requires that an "*enterprise*" be "*carrying out substantial business activities in the Area of the Contracting Party*", in order to meet the definition of investor. See also Article 1.2, Colombia-France BIT (2014); Article 10.1, Colombia-Israel FTA (2013); Article 1.1(b), Colombia-India BIT (2009); Article 1.1(b), BLEU (Belgium-Luxembourg Economic Union)-Colombia BIT (2009); Article 1.2, Colombia-

A more common approach by Latin American States in approaching these issues in their new generation IIAs has been to leave a broad definition of investor in place and to include a denial of benefits clause, which allows States to deny the benefits of IIAs to investors on a number of grounds, including the fact that they have no substantial business activities in the State in which they are incorporated. An example of once such denial of benefits clause is the following article from the Mexico-Peru FTA (2011):

> *1. A Party may deny the benefits of this Chapter to an investor of the other Party that is a company of that Party and to its investments if those companies are owned or are controlled by investors of a non-Party State, and: a) the denying Party does not maintain diplomatic relations with the non-Party State; or b) the denying Party adopts or maintains measures with respect to the non-Party State to prohibit transactions with the company or that would be violated or circumvented if the benefits of this Chapter were granted to the company or to its investments. 2. A Party, upon notification to the other Party, may deny the benefits of this Chapter to an investor of the other Party that is a company of that Party and to its investments if investors of a non-Party State own or control the company and it has no substantial commercial activities in the territory of the Party under whose law it is constituted or organized.*[73]

This denial of benefits clause, like those contained in a number of other new generation Latin American IIAs, sets out the grounds upon which a party can deny the benefits of the treaty to an investor of the other party and imposes a notification requirement prior to the denial of benefits in certain situations.[74] Other denial of benefits clauses in new generation Latin American IIAs contain no such notification requirement.[75]

Denial of benefits provisions are not new to treaties involving Latin American parties. For example, such provisions are included in NAFTA, US-DR-CAFTA, the Ecuador-US BIT (1993) and the Bolivia-US BIT (1998). While such provisions were contained in only a small minority of older Latin American IIAs, the vast majority of new generation IIAs now contain such clauses.[76]

Switzerland BIT (2006). It should also be pointed out that Chile, along with a handful of other non-Latin American states have included the substantial business activities requirement to meet the definition of investor in its BITs since the mid 1990s. See for example Article 1.3(b), Chile-Korea (1996); Article 1.1(b), Czech Republic BIT (1995); Article 1.2(b), Chile-Austria BIT (1997); Article 1.1(b), Chile-Costa Rica BIT (1996).

[73] Article 11.16 of the Mexico-Peru FTA (2011) (unofficial translation). See also Article 10.14, Canada-Honduras FTA (2013); Article 10.12, Panama-US FTA (2007).

[74] See for example Article 10.14,Panama-Central America FTA (2002); Article 10.15, Mexico-Panama FTA (2014); Article 11.13, Mexico-Central-America FTA (2011); Article 11.16, Mexico-Peru FTA (2011); Article 29, Colombia-Singapore BIT (2013); Article 115, Peru-Japan FTA (2011); Article 8.12,Colombia-Korea FTA (2013); Article 10.12, Panama-US FTA (2007); Article 11.14, Costa Rica-Singapore FTA (2010).

[75] See for example Article 12.12, Guatemala-Peru FTA (2011); Article 12.12, Panama-Peru FTA (2011); Article 12.12, Costa Rica-Peru FTA (2011); Article 10.13, Protocol Pacific Alliance (2014); Article 14.13, Colombia-Panama FTA (2013); Article 12.13, Colombia-Costa Rica FTA (2013); Article 11, Colombia-India BIT (2013); Article 22, Colombia-Japan BIT (2011); Article 13, Colombia-Turkey BIT (2014); Article 9.15, Panama-Canada FTA (2010); Article 10.14, Canada-Honduras FTA (2013); Article 10.13, Australia-Chile FTA (2008).

[76] See footnotes 72 and 73 above.

One question that arises in considering the differing approaches of requiring, *inter alia*, substantial business activities in the definition of investor, or making it part of a denial of benefits clause, is whether such requirement would prevent a tribunal from hearing an investor's claims. When such requirement is contained in the definition of investor, it clearly involves a jurisdictional issue; if the legal entity does not have substantial business interests in the territory of the party in which it was incorporated, then it does not meet the definition of investor and cannot bring a claim. When the requirement is contained in a denial of benefits clause, tribunals have debated whether the requirement for substantial business activities can deprive it of jurisdiction . In answering this question, tribunals have considered if the benefits of a treaty can be denied for lack of substantial business activities (or other conditions set out in the clause) retrospectively. This question has arisen in arbitrations in which States have sought to deny investors the right to treaties' substantive protections for the first time after the commencement of an arbitration.

To date the responses given by arbitral tribunals considering this question have been inconsistent. In *Empresa Eléctrica v. Ecuador*, the tribunal found that Ecuador's invocation of its right to deny the benefits of the treaty at the jurisdictional stage of the arbitration was timely and that "*Ecuador has the power to deny* [the claimant] *the advantages of the BIT if the company has no substantial business opportunities in the United States*."[77] In *Ulysseas v. Ecuador* the tribunal found that benefits could be denied retroactively to preclude jurisdiction of a tribunal[78], while the tribunals in both *Pac Rim v. El Salvador*[79] and *Guaracachi v. Bolivia* [80] both found that benefits could be denied retroactively after a dispute had arisen.

A different approach has been taken by some tribunals considering the denial of benefits clause contained in the Energy Charter Treaty.[81] Examples include the decisions of the tribunals in both *Plama v. Bulgaria*[82] and *Liman Caspian Oil v. Kazakhstan*[83], which found that benefits could not be denied with retroactive effect after a dispute had already arisen. While it appears that the prevailing view (particularly amongst tribunals interpreting denial of benefit provisions more in line with those found in the new generation Latin American FTAs) is that benefits can be denied after a dispute has arisen, it is not to be discounted that another view might be taken by a tribunal applying these provisions. The choice between narrowing the definition of investor and including a denial of benefits clause may well therefore carry practical consequences for State parties.

ii. Definition of Investment

The modifications to the definition of investment in new generation IIAs, including those entered into by Latin American states, provides one of the clearest examples of the adoption of principles laid out by investor-State investment tribunals.

---

[77] *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award (2 June 2009), §71.

[78] *Ulysseas, Inc. v. Ecuador*, UNCITRAL, Interim Award (28 September 2010), § 172-173.

[79] *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, (1 June 2012), §§ 4.83-4.91.

[80] *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award (31 January 2014), §§ 376-378.

[81] The Energy Charter Treaty, adopted in Lisbon on 17 December 1994.

[82] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005), §§ 162-165.

[83] *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award (22 June 2010), § 225.

Indeed, it is well known that investor-State arbitral tribunals first sought to define the term "investment" contained in Article 25(1) of the ICSID Convention by developing a set of criteria. Named after the tribunal in *Salini v. Morroco*, these criteria have come to be known as the "*Salini* criteria" or the "*Salini* test". The *Salini* tribunal, based on the doctrine at the time, stated that the existence of an investment inferred: (i) a contribution, (ii) a certain duration of performance of the contract, (iii) a participation in the risks of the transaction, and (iv) a contribution to the economic development of the host State of the investment.[84]

Since the decision in *Salini*, investor-State arbitral tribunals have differed on which of these criteria define the term "investment" for the purposes of the ICSID Convention, and whether they should be considered as jurisdictional requirements at all, given that States have provided their own definitions of investment in IIAs.

Concerning the first issue, a number of tribunals have concluded that of these criteria, only contribution to host State development does not form part of the definition of investment. The decision in *Quilborax v. Bolivia* provides an example of a tribunal taking this approach:

> *The Tribunal agrees with the Parties that a contribution of money or assets (that is, a commitment of resources), risk and duration are all three part of the ordinary definition of investment […]. The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong Salini test. Yet, such contribution may well be the consequence of a successful investment; it does not appear as a requirement*.[85]

Others have added, or refined certain criteria, so that expectation of a return or profit from the investment is now often included amongst the criteria.[86]

Moreover, some tribunals have questioned whether the *Salini* criteria should be considered as jurisdictional requirements. On this point the tribunal in *Abalcat v. Argentina* stated the following:

> *[T]he Tribunal does not see any merit in following and copying the Salini criteria. The Salini criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create*.[87]

---

[84] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (16 July 2001), § 54.

[85] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012), §§ 219-220. Other examples of tribunals endorsing the *Salini* criteria, whether all or in part, see *Noble Energy Inc. and MachalaPower Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (5 March 2008), §228 *et seq*; *Ulysseas, Inc. v. Ecuador*, UNCITRAL, Final Award (12 June 2012), § 251 *et seq*.

[86] *See, for example, Ulysseas, Inc. v. Ecuador*, UNCITRAL, Final Award (12 June 2012), § 251.

[87] *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), § 165.

The tribunal in *Phillip Morris v. Uruguay* went further, pronouncing that "[w]*hether the so-called Salini test relied upon by the Respondent has any relevance in the interpretation of the concept of "investment" under Article 25(1) of the ICSID Convention is very doubtful.*[88]

Recent treaty practice of Latin American States would indicate a quite uniform agreement that certain of the elements of the *Salini* criteria are part of the definition of "investment". One example is the following extract from the definition of investment contained in the Mexico-Central America FTA (2011):

> "*Investment: any assets owned or controlled directly or indirectly by an investor, that have the characteristics of an investment, such as commitment of capital or other resources; the expectation of gain or profit; or assumption of risk.*"[89]

Numerous other recent Latin American IIAs, such as of the Guatemala-Peru FTA (2011)[90] the Mexico-Panama FTA (2014)[91] or the Costa Rica-Singapore FTA (2010)[92], provide an almost identical formulation in their definitions of investment.[93] In doing so, it could be said that the State parties to these treaties have to some extent codified the elements of the jurisprudence on the definition of investment to which they agreed and at the same time prevented tribunals applying such treaties from discounting such factors when determining the existence of an investment.

B. The Withdrawal Approach

The states that have (at least to some extent) withdrawn from the mainstream investor-State arbitration system have also adopted new practices in their definitions of foreign investor and investment via national legislation. In certain instances it could be argued that such definitions may also be influenced by the experiences of these States in the investor-State arbitration system.

i. Definition of investor

Article 4 of the Venezuelan Foreign Investment Law of 2014 provides that it applies to:

> "*1. Foreign companies and their affiliates, subsidiaries or related companies, as well as other foreign forms of organization with economic and productive purposes who make investments in the national territory. 2. Grand National Companies, whose purposes and operations are subject to a*

---

[88] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013), § 204.

[89] Article 11.1 of the Mexico-Central America FTA (2011) (unofficial translation).

[90] Article 12.30 of the Guatemala-Peru FTA (2011).

[91] Article 10.1 of the Mexico-Panama FTA (2014).

[92] Article 11.1 of the Costa Rica-Singapore FTA (2010).

[93] See also Article 1(b), Guatemala-Trinidad and Tobago BIT (2013); Article 1.4, Colombia-Turkey BIT (2014); Note 1 to the Article 1(a), Colombia-Japan BIT (2011); Article 8.28, Colombia-Korea FTA (2013); Article 1, Singapore-Colombia BIT (2013); Article 1, France-Colombia BIT (2014); Article 10.1, Protocol Pacific Alliance (2014); Article 10.1, Colombia-Israel FTA (2013); Footnote 11 to the Article 14.37, Colombia-Panama FTA (2013); Article 12.31, Colombia-Costa Rica FTA (2013); Article 9.28, Chile-Colombia FTA (2006); Article 12.30, Costa Rica-Peru FTA (2011); Article 12.30, Panama-Peru FTA (2011).

> *strategic plan of two or more states in order to make investments for mutual interest. 3. National private, public and mixed companies and their affiliates, subsidiaries or related companies and other organizations with economic and productive purposes who receive foreign investments according to the laws of the republic.4. National and foreign individuals domiciled abroad, who make foreign investments in the national territory. 5. Foreign individuals resident in the country who make foreign investments.*"[94]

Foreign investor is defined under Article 6.5 of the Law as "*foreign natural or legal persons that make an investment registered before the National Foreign Trade Centre. Venezuelan natural or legal persons that directly or through intermediaries are listed as shareholders of foreign companies do not qualify as foreign investors*."[95]

This definition of foreign investor covers issues that were at stake in the very recent decision in the *Venoklim v. Venezuela* case.[96] This case was initiated while Venezuela's old foreign investment law was still in place, and it continued during the period that the new Foreign Investment Law of 2014 was drafted and enacted, with the decision being handed down following the enactment of the Law. The case involved a Dutch incorporated company that the tribunal found, after "piercing the corporate veil", was controlled by a Venezuelan company, which in turn was controlled by Venezuelan nationals. The majority of the tribunal ruled that, therefore, the claimant company did not qualify as a foreign investor under the investment law in force at the relevant time because that law referred to "ownership" and "control", rather than the place of incorporation,[97] and that as a consequence, it also did not qualify as an investor under the Netherlands-Venezuela BIT.[98]

Article 6.5 of the Foreign Investment Law goes further than the previous investment law by specifically spelling out that investors such as those behind the claimant in the *Venoklim* case would not qualify as foreign investors. It appears, however, that Article 6.5 would not prevent a foreign company controlled by Venezuelan natural or legal persons from qualifying as a foreign investment. It is not clear whether this is intentional or a problem of drafting.

The Ecuadorian Code of Production, Commerce and Investment does not contain a definition of "investor" as such but distinguishes between foreign and national investments as follows:

> "*Foreign Investment. - Investment that is property of foreign national citizens or that is run by foreign legal entities domiciled abroad, or that implies money not generated in Ecuador.*
> *National Investment. - Investment that is property of Ecuadorean national citizens or that is run by legal Ecuadorean entities, or by expatriates residents of Ecuador, unless they demonstrate that it is capital not generated in Ecuador; and,*
> *Persons or legal Ecuadorean entities owners that exercise control of an investment made in Ecuadorean territory. Also included under this concept*

[94] Article 4 of the Venezuelan Foreign Investment Law of 2014 (unofficial translation).
[95] *Ibid*, Article 6.5.
[96] *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award (3 April 2015).
[97] *Ibid*, §§ 140-150.
[98] *Ibid*, § 159.

are national citizens or legal Ecuadorean entities, or from the cooperative, associative and community Ecuadorean sectors made in Ecuadorean territory. The national Ecuadorean citizens that have dual citizenship, or expatriates residents of this country for the purpose of this code, will be considered national investors. It shall not be considered a national investment that made by a national or foreign company whose shares, participation property or control, both total or majority, belongs to a national citizens or legal Ecuadorean entity."[99]

Similarly, the Bolivian Investment Promotion Law defines investor but makes no distinction between foreign and national investors. Some guidance can, however, be found in the definitions of "national" and "foreign investment" as follows:

Investor: Is a natural or legal person, Bolivian or foreign, public or private that makes an investment in the Plurinational State of Bolivia."
Bolivian Investment: Is an investment of national origin made by Bolivian natural or legal persons, public or private, or by foreign natural persons whose permanent residence is Bolivia. Bolivian legal persons are those incorporated in Bolivia and whose majority of the share capital is owned by Bolivian natural persons, reflected in the direction and control of the legal person. When the Bolivian investment is made with public and private, national or foreign resources, it will be considered as mixed investment.
Foreign Investment: Is an investment of foreign origin, private or public, made by foreign natural or legal persons or by natural Bolivian persons residing abroad for no less than 2 years." [100]

These provisions, like Article 6.5 of the Venezuelan Foreign Investment Law of 2014 exclude Bolivian and Ecuadorian nationals that control foreign companies, including through shares, from being considered as foreign investors or as holding foreign investments. The concept of the origin of capital is also introduced as an element that determines whether an investment is characterized as foreign or national.

ii. Definition of investment

The definition of investment in the Venezuelan Foreign Investment Law of 2014 is as follows:

"*All the resources obtained by licit means and intended, by a national or foreign investor, to the production of goods and services incorporating raw materials or intermediate products with focus into those of national origin or manufacture, in the proportions and conditions laid down in this Decree Rank, Value and Force of Law, that contribute to the creation of jobs, the promotion of small and middle industries and the development of the productive innovation.*"[101]

---

[99] Article 13(c)-(e) of the Ecuadorian General Organic Code of Production, Commerce and Investment of 2010.
[100] Article 4(b), (c), and (g) of the Bolivian Investment Promotion Law of 2014.
[101] Article 6.1 of Venezuelan Foreign Investment Law of 2014.

This definition clearly focuses on investments that will contribute to the economic development of Venezuela. In this sense, it is a strong endorsement of the fourth *Salini* criteria that requires a contribution to host State development, which has been rejected by a number of investor-State arbitration tribunals and which has generally not been included in the definition of investment in new generation IIAs of Latin American.

The same comments can be made with respect to definitions of investment in both the Bolivian Investment Promotion Law[102] and the Ecuadorian Code of Production, Commerce and Investment,[103] which place significant emphasis on the requirement than an investment be "productive" and generate benefits for the local economy.

4. Substantive Protections

A. The IIA Reform Approach

i. Fair and Equitable Treatment

The fair and equitable treatment standard has, in the space of a relatively short period, gone from a standard rarely used by investors to the standard most commonly invoked (and upheld) in investor-State arbitrations.[104] This rapid rise in the prominence of the fair and equitable treatment standard has coincided with allegations that it has been applied in an overly broad manner that favours investors and frustrates the right of States to regulate in the public interest.[105] It has been claimed that such decisions have resulted in a lack of predictability that makes it difficult for States to know which conduct will be in breach of the fair and equitable treatment standard[106] and have "*raised some concern among governments that, the less guidance is provided for arbitrators, the more discretion is involved and the more closely the process resembles* ex aequo et bono*, i.e., based on the arbitrators' notion of 'fairness' and 'equity'.*"[107]

A number of the decisions most commonly invoked as falling into the category of "overly-broad" interpretations of the fair and equitable treatment standard have been rendered in arbitrations brought against Latin American States, and have found breaches of the standard due to regulatory changes or broadly applied the concept of legitimate expectations.

An example of one such decision is that of the tribunal in *Tecmed v. Mexico*, which upheld claims on the grounds that the Mexican authorities had acted in an ambiguous and uncertain way in their actions regarding the renewal of a licence to operate a hazardous waste landfill,

---

[102] Article 4: "*Investment is every contribution aimed at the permanent development of the economic activities and the generation of income that contributes to the economic and social development of the country.*"

[103] Article 13(a): "*Productive Investment. - Productive Investment shall be understood, irrespective of the type of property, as the cash flow destined to produce goods and services, to enlarge productive capacity, and to generate employment sources in the national economy.*"

[104] Lise Johnson, Ripe for Refinement: The State's Role in Interpretation of fair and equitable treatment, MFN, and Shareholder Rights, GEG Working Paper 2015/101, The Global Economic Governance Programme, University of Oxford (2015), p. 9.

[105] UNCTAD, Series on International Investment Agreements II: Fair and equitable treatment, p.11.

[106] Mahnaz Malik, International Institute for Sustainable Development Best Practice Series: Bulletin No. 3 Fair and Equitable Treatment (2009).

[107] Katia Yannaca-Small, Fair and Equitable Treatment Standard: Recent Developments, in August Reinisch (Ed.), *Standards of Investment Protection* (2008), p. 118. The author then notes that "*[e]xperience has proven these concerns not to be entirely well founded.*"

thereby frustrating the legitimate expectations of the claimant. The often-cited expression of what was required under the relevant treaty's fair and equitable treaty standard is as follows:

> "*The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, 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. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations*."[108]

Despite the fact that the description of the fair and equitable treatment standard by the *Tecmed* tribunal has been the subject of some criticism,[109] a number of subsequent tribunals (often involving Latin American States) have picked up on the so-called "*Tecmed* standard" and to some extent relied on it to arrive at decisions that have been similarly described as offering a broad or "far reaching" interpretation of the fair and equitable treatment standard.[110]

In both *CMS v. Argentina* and *Enron v. Argentina* (which considered similar claims and had the same tribunal president) the tribunals (both invoking *Tecmed*) held that emergency measures taken by Argentina in the wake of the 2000–2002 currency crisis were in breach of the fair and equitable treatment standard, as they had removed the regime of tariff guarantees under which the investment was made and which were crucial to the claimants' decisions to invest.[111] In arriving at these decisions the tribunals stated that the fair and equitable treatment standard included the requirement of a stable legal and business framework or environment for the investment.[112] The tribunals in both cases also held that the motivation behind the complained of measures was not determinative as to whether a breach of the fair and equitable treatment standard had occurred.[113]

In another case, *Occidental v. Ecuador*, the arbitral tribunal found that the fair and equitable treatment standard included the requirement of a stable and predictable legal and business framework. The tribunal's finding was that Ecuador's changes to its tax regime for oil

---

108 *Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003) §154.

109 See Zachary Douglas, Nothing if not Critical for Investment Arbitration: Occidental, Eureko and Methanex (2006) *22 (1) Arbitration International*, 27, "*The Tecmed "Standard" is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain*."

110 See for example McLaughlan, Shore and Weiniger, *International Investment Arbitration: Substantive Principles* (2007), § 7.101, describing the application of the fair and equitable treatment standard by the *Tecmed*, *Occidental* and *CMS* tribunals as "far-reaching". See also Rudolf Dolzer and André Von Walter, Lines of Jurisprudence in Customary Law, in Fredirico Ortino, Lahra Liberti, Audley Sheppard and Hugo Warner (Eds), Investment Treaty Law: Current Issues II (2007), pp. 109-110, noting that Tecmed "*has now become famous for its often-cited wide-ranging paragraph 154*" and noting the similar approaches taken by the *Occidental* and *CMS* tribunals.

111 *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005), § 275; Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007), §264.

112 *CMS*, § 274; *Enron*, § 260.

113 *CMS*, § 280; *Enron*, § 268.

exports had altered the legal and business framework of the investment in breach of the fair and equitable treatment standard.[114]

As observed by Dolzer and Schreuer, "*what is not so often noted is that*" the *Tecmed*, *Occidental* and *CMS* tribunals equated their understandings of the scope of the fair and equitable treatment standard with general or customary international law, and considered that, for the purpose of those cases, treaty law and customary international law were the same.[115] These tribunals therefore adopted a position on the relationship between the fair and equitable treatment standard and the international minimum standard of treatment owed to aliens under international customary law ("the minimum standard of treatment"). Under this view, the minimum standard of treatment is one that has evolved over time to now include elements that have been held by investor-State tribunals to be required by the fair and equitable treatment standard, but would not have previously been required by the minimum standard of treatment.[116]

Other tribunals have taken different positions. In *Vivendi II v. Argentina* and *Perenco v. Ecuador*, for example, the tribunals concluded that the fair and equitable treatment standard is autonomous of and goes beyond the minimum standard of treatment.[117] Another approach has been adopted most often by tribunals applying Article 1105(1) of NAFTA,[118] which explicitly links the minimum standard of treatment and fair and equitable treatment standard. Under this view, the inclusion of the fair and equitable treatment standard by states in IIAs was an incorporation of the minimum standard of treatment into those treaties, and the fair and equitable treatment standard does not go beyond the minimum standard of treatment.[119] This was expressed by the tribunal in *Mobil v. Canada* as follows: "*[w]hat the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment. Those standards are set* [...]. *The Tribunal has not been provided with any material to support the conclusion that the rules of customary international law require a legal and business environment to be maintained or set in concrete*."[120]

It is this last approach that is most consistent with the more recent treaty practice of Latin American States that have adopted new generation IIAs. One such example is found in the article of the investment chapter of the Canada-Panama FTA (2010) entitled "minimum standard of treatment":

---

[114] *Occidental Exploration and Production Company v. Republic of Ecuador,* LCIA Case No. UN3467, Final Award (1 July 2004), § 187.

[115] Rudolf Dolzer and Christoph Schreur, *Principles of International Investment Law* (2008), pp. 127-128, citing *op.cit*. *Tecmed v. Mexico*, § 155; *Occidental v. Ecuador*, §§ 189-190; *CMS v. Argentina*, §§ 282-284.

[116] *Op. cit*. Lise Johnson, p. 10, citing *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012), §§ 216-219.

[117] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007), § 7.4.7; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability (12 September 2014), § 557.

[118] See for example *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award (8 June 2009), § 22; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 August 2014), § 9.40.

[119] *Op.cit*. Lise Johnson, p. 10.

[120] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), § 153.

> *1. Each Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. 2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. 3. A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article*.[121]

This provision adopts the NAFTA approach of explicitly linking fair and equitable treatment (as well as full protection and security – discussed further below) to the minimum standard of treatment, but also adds the additional stipulation that fair and equitable treatment does not require treatment that goes beyond that required by the minimum standard of treatment under customary international law. This therefore rules out the approach taken by the *Vivendi I* and *Perenco* tribunals described above, whereby the fair and equitable treatment standard is characterised as going beyond the minimum standard of treatment. Other new generation Latin American IIAs also specifically define the State parties' understanding of what constitutes the minimum international standard under customary law.[122]

Another approach includes additional language and sets out examples of conduct that would be a breach of the minimum standard of treatment and therefore fair and equitable treatment. One such is example is the minimum standard of treatment article in the investment chapter of the Costa-Rica Singapore FTA:

> *1. Each Party shall accord to investments of investors of the other Party treatment in accordance with customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens and do not create additional substantive rights. (a) The obligation to provide "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world. (b) The obligation to provide "full protection and security" requires each Party to provide the level of police protection required under customary international law. 3. A determination that there has been a breach of another provision of this*

[121] Article 9.06 of the Canada-Panama FTA (2010). See also Article 10.6 of the Canada-Honduras FTA (2013).

[122] See for example Annex 10-A of the Panama-US FTA: "*The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens*." See also Annex A, Colombia-Peru BIT (2007); Footnote to the Article 14.5, Colombia-Panama FTA (2013); Annex 12A, Colombia-Costa Rica FTA (2013); Annex 9A, Chile-Colombia FTA (2006); Annex 12.4, Costa Rica-Peru FTA (2011); Annex 10.5, Mexico-Panama FTA (2014); Annex 12.4, Guatemala-Peru FTA (2011).

Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.[123]

The article states that fair and equitable treatment "includes" the obligation not to deny justice. It is not clear whether (and in fact does not appear likely) this language is limiting, in so far that it is an expression of the State Parties' intention that the fair and equitable treatment standard be limited to the obligation not to deny justice. Such an intention could quite easily have been formulated had the Parties so intended. In this respect it is interesting to contrast the specific language on full protection and security with that of fair and equitable treatment, which (as discussed further below) appears more inclined to limit the scope of that standard.

A number of new generation Latin American IIAs, notably very recent BITs to which Colombia is a party, do contain language, including limiting language, that attempts to further define the fair and equitable treatment standard. In addition to linking the fair and equitable treatment standard to the minimum standard of treatment and including the obligation not to deny justice within its scope, the Colombia-France BIT (2014) includes the following language:

> *1. […] a) […] b) The obligation to act in a transparent, non-discriminatory and non-arbitrary manner with respect to the investors of the other Contracting Party and their investments. This treatment is consistent with the principles of predictability and the consideration of the legitimate expectations of investors. […]. It is understood that the obligation to provide fair and equitable treatment does not include a clause of legal stabilization, nor does it prevent a Contracting Party from adapting its legislation in accordance with the terms of this paragraph.*[124]

The Colombia-Turkey BIT (2014) also provides in its minimum standard article that "*[n]either Contracting Party shall in any way impair the management, maintenance, operation, enjoyment, extension, or disposal of such investments by discriminatory measures*"[125] and that "*'[f]air and equitable treatment' shall not be construed as to prevent a Contracting Party from exercising its regulatory powers in a transparent and non-discriminatory manner and in accordance with the principle of due process of law*."[126]

In one sense the Colombia-France BIT broadens the scope of the fair and equitable treatment standard by explicitly providing that it includes the obligations of transparency, non-discrimination and non-arbitrary conduct. It also appears to provide that legitimate expectations can be taken into account in determining if there has been a breach of fair and equitable treatment. On the other hand, the boundaries of the standard is limited in that it is specifically provided that fair and equitable treatment does not amount to a legal stabilization

[123] Article 11.6 of the Costa Rica-Singapore FTA (2010). See also Article 4, Colombia-Peru BIT (2007); Article 4, Singapore-Colombia BIT (2013); Article 10.6, Protocol Pacific Alliance (2014); Article 14.5, Colombia-Panama FTA (2013); Article 12.4, Colombia-Costa Rica FTA (2013); Article 9.4, Chile-Colombia FTA (2006); Article 12.4, Guatemala-Peru FTA (2011); Article 12.4, Panama-Peru FTA (2011); Article 11.6, Costa Rica-Singapore FTA (2010); Article 8.5, Colombia-Korea FTA (2013); Article 10.5, Chile-Australia FTA (2008).

[124] Article 4 of the Colombia-France BIT (2014) (unofficial translation from Spanish to English).

[125] Article 4.1 of the Colombia-Turkey BIT (2014).

[126] *Ibid*, Article 4.4.

clause that prevents the Parties from modifying their legislation or exercising regulatory powers.

The stipulation that the fair and equitable treatment standard includes obligations of non-discrimination and non-arbitrary conduct is supported by the decisions of a significant number of investor-State tribunals[127] and is therefore not particularly surprising. In considering whether the obligations of non-discrimination and non-arbitrary conduct are part of the international minimum standard, some tribunals have stated that the arbitrariness must be manifest and the discrimination evident,[128] while others have not required such qualifiers.[129]

The inclusion of obligations of transparency and the recognition of the role of legitimate expectations in the enunciation of the fair and equitable treatment standard is less expected. There has been some debate amongst NAFTA tribunals interpreting the minimum standard of treatment as to whether it contains an obligation of transparency. While the *Metalclad v. Mexico* tribunal stated that the minimum standard of treatment entailed an obligation of transparency,[130] that award was overturned by the reviewing Canadian Court on the basis of that finding,[131] a position that was endorsed by subsequent NAFTA tribunals. With respect to legitimate expectations, while their role in determining if there has been a breach has been endorsed by a significant number of investor-State tribunals, the recent trend is to limit the application of the tribunal by requiring, for example, that they exist at the time the investment is made,[132] or that they arise out of a specific commitment.[133] It would perhaps be expected that such stipulations be set out in a treaty explicitly recognizing their role.[134]

Moreover, by specifying that fair and equitable treatment does not "*prevent a Contracting Party from exercising its regulatory powers in a transparent and non-discriminatory*

[127] With respect to arbitrariness, see for example *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award (16 June 2010), § Part VII, Paragraph 72; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011), § 333; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012), §§ 485-488; *Waste Management Inc. v. United Mexican States [II]*, ICSID Case No. ARB(AF)/00/3, Final Award (30 April 2004), § 98. With respect to discrimination: *Waste Management Inc. v. United Mexican States [II]*, ICSID Case No. ARB(AF)/00/3, Final Award (30 April 2004), § 98; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (8 May 2008), §§ 671-674; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012), §§ 485-488

[128] See for example *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award (8 June 2009), § 618;

[129] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), § 152-153.

[130] *United Mexican States v. Metalclad Corporation*, ICSID Case No. ARB(AF)/97/1, Reasons for Judgment of the Honourable Mr. Justice Tysoe (2 May 2001), §§ 70-72.

[131] *Merrill & Ring Forestry L. P. v. Government of Canada*, UNCITRAL, ICSID Administrated, Award (31 March 2010), § 231.

[132] See for example *Ulysseas, Inc. v. Ecuador*, UNCITRAL, Final Award (12 June 2012), § 252; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008), § 340; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), § 130.

[133] See for example *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007), § 298; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008), § 340; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010), § 117.

[134] As is the case with some treaty articles recognizing the role of legitimate expectations in determining if there has been an indirect expropriation – discussed below.

manner", an interpreter could be led to conclude that non-transparent exercises of regulatory powers are prohibited. As a result, these provisions could also be interpreted as recognition that transparency does restrict the exercise of regulatory powers. One can wonder, however, whether that is what the drafters intended.

The inclusion of the limiting language, aimed to avoid the fair and equitable treatment standard being used to prevent the State parties from modifying their legislation or exercising their regulatory powers, could be interpreted as a reaction to the above discussed decisions characterized as "overly-broad". They could equally be seen as an endorsement of arbitral decisions that have taken precisely the position that the fair and equitable treatment standard should not operate in such a manner. An example of such a decision is that of *El Paso v. Argentina*, where the tribunal stated that it "*cannot follow the line of cases in which fair and equitable treatment was viewed as implying the stability of the legal and business framework. Economic and legal life is by nature evolutionary*."[135]

ii. Full Protection and Security

As with the fair and equitable treatment standard, the scope of the obligation to provide full protection and security has been interpreted somewhat inconsistently by investor-State arbitration tribunals. The main source of debate has been whether the standard extends beyond the obligation to provide physical protection to investments, i.e., the exercise of police powers, whether it extends to the availability of the legal system to protect the interests of the investor, or even to an obligation of stability of the legal framework and investment climate.[136]

The tribunal in *Azurix v. Argentina* ultimately ruled that there had been a breach of the relevant treaty's full protection and security provision on the basis that it had already found a breach of fair and equitable treatment.[137] After noting that early investor-State arbitral tribunals had dealt with claims arising out of States' failures to provide physical security, it noted that the interrelationship of fair and equitable treatment and full protection and security "*indicates that full protection and security may be breached even if no physical violence or damage occurs as it was the case in* Occidental v. Ecuador",[138] and that "*full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view*."[139] While noting that the (at that time) recently signed US-Uruguay BIT (2005) provided that full protection and security is understood to be limited to the level of police protection required under customary international law, the tribunal found that the "qualifying" word "full" before "protection and security", extended the meaning of those terms beyond physical security.[140]

While decisions of other tribunals, such as that of *Total v. Argentina*, have also found that the obligation to provide full protection and security applies to legal as well as physical security

---

[135] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), § 352.

[136] Guiditta Cordero Moss, Full Protection and Security, in August Reinich (Ed.), *Standards of Investment Protection* (2008).

[137] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), § 408.

[138] *Ibid*, § 406.

[139] *Ibid*, § 408.

[140] *Id*.

of an investor or its property,[141] such position is by no means uniform. The tribunal in *Gold Reserve v. Venezuela* concluded that the full protection and security standard refers to protection from physical harm, while the tribunal in *AWG v. Argentina* found that the standard was limited to physical protection and the availability of legal remedies.[142] In rejecting the approach of tribunals such as *Azurix*, which extended the standard beyond this scope, the *AWG* tribunal noted that this position departed from the historical scope of the standard without providing reasons for doing so.[143]

The new generation IIAs of Latin American States (such as the above mentioned US-Uruguay BIT of 2005) clearly endorse the later approach of investor-State arbitration tribunals. The way the various IIAs seek to achieve this result, however, varies. As seen above, the full protection and security standards in such IIAs, like fair and equitable treatment, are contained in a minimum standard of treatment article. Some of the IIAs simply provide that full protection and security does not require treatment beyond that required by the customary international law minimum standard of treatment, even where more specific language on fair and equitable treatment is provided.[144] Another formulation adopted in a number of the new Latin American IIAs is as follows:

> "[…] *(b) The obligation to provide "full protection and security" requires each Party to provide the level of police protection required under customary international law. 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article*."[145]

The explicit reference to police protection in such treaties, which does not contain the word "includes", as with the references to denial of justice in the above discussed language on fair and equitable treatment, could be interpreted as meaning that such treaties preclude breaches of the full protection and security standard based on a failure to provide legal security (as opposed to access to legal remedies). Under such perspective, full protection and security could be interpreted as a duty to prevent harm by failing to exercise police powers in accordance with what is required under customary international law. Even admitting that police power could also include the exercise of normative power (i.e., the concept of "*policía*

---

[141] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010), § 343. See also, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007), § 7.4.14. In both cases the tribunals emphasized the link between full protection and security and fair and equitable treatment in the applicable treaties.

[142] *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, (30 July 2010), § 175.

[143] *Ibid*, § 177. See also *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012), § 1109, which states that "*[n]othing in the Argentina-France BIT incorporates a duty to maintain a stable legal and commercial environment*."

[144] See for example Article 5.2, Peru-Japan BIT 2008 (incorporated into Peru-Japan FTA of 2011 by Article 2.3); Article 4.2(b), Colombia-Peru BIT (2007); Article 6.2, Mexico-Panama FTA (2006); Article 6.2(b), Protocol Pacific Alliance (2014); Article 14.5.2, Colombia-Panama FTA (2013); Article 9.4.2(b), Chile-Colombia FTA (2006); Article 12.4.2(b), Costa Rica-Peru FTA (2011); Article 4.2, Mexico-Singapore BIT (2009); Article 11.6.2, Mexico-Peru FTA (2011); Article 10.5.2(b), Mexico-Panama FTA (2014); Article 11.3.2(b), Mexico-Central America FTA (2011); Article 12.4.2(b), Guatemala-Peru FTA (2011); Article 12.4.2(b), Panama-Peru FTA (2011).

[145] Article 4.2(b) of the Colombia-Singapore FTA (2011) (unofficial translation from Spanish to English). See also Article 10.3.3(c), Israel-Colombia FTA (2013); Article 12.4.2(b),Colombia-Costa Rica FTA (2013).

administrativa"),[146] it would not include legal security if understood as legal stability or predictability. It could also be argued that the specification that a finding of breach of one provision does not entail the breach of another is designed to prevent rulings such as those discussed above in *Azurix* and *Occidental*, which found breaches of full protection and security on the basis that there had been a breach of fair and equitable treatment.

Language in other new generation Latin American IIAs concerning the full protection and security standard could be said to be drafted with similar intent and possibly produce a similar effect. The Colombia-France BIT of 2014, for example, provides that:

> "*Investments made by investors of a Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party in accordance with the international customary law. For greater certainty, the obligation to provide full protection and security under this article requires that each Contracting Party grants protection to the investors and their investments against physical and material damages*."[147]

The language contained in some other Colombian BITs, namely those with the UK (2010) and India (2009), however, varies:

> "*The 'full protection and security' standard does not imply a better treatment to investments of investors of the other Contracting Party, than that accorded to the investments of investors of the hosting Contracting Party.*"[148]

Such provisions could be interpreted as an invocation of the Calvo Doctrine, which was based, *inter alia*, on the principle that foreign investors could not be granted better rights than local citizens and that States comply with their international law obligations by treating foreigners and nationals equally.[149] As stated below in the "withdrawing" States section, Ecuador has also linked the full protection and security obligation to foreign investors with the level of treatment afforded to nationals.

In the context of full protection and security, it could be argued that an interpretation of the standard that provides security from changes to the legal and business framework and has been accepted by some tribunals (as discussed above) results in a higher level of protection to foreign investors than to local investors. A similar interpretation has, however, been given to the fair and equitable treatment standard and the prohibition against indirect expropriation, so it is not completely clear why such language would be contained exclusively in the full protection and security provision.

[146] Under the administrative law of most Latin American countries, as well as Spain, "administrative police" refers to the interventions by governmental authorities when controlling the application of a specific regulation leading either to a sanction (different from those penalties provided under criminal law) or, more broadly, to the restriction of the activities of private parties based on public or security interests. It can, therefore, involve the exercise of normative powers.

[147] Article 4.2 of the Colombia-France BIT (2014) (unofficial translation).

[148] Article II.4 (d) of the Colombia-UK BIT (2010) and Article 3.4(b) of the Colombia-India BIT (2009), which are identical.

[149] Bernardo M. Cremades, The Resurgence of the Calvo Doctrine in Latin America, *Investor-State Disputes - International Investment Law*, TDM 5 (2005), p. 2.

iii. Expropriation

The interpretation and application of a State's obligation to compensate expropriation in IIAs has also given rise to significant controversy. In particular, claims for indirect expropriation resulting from regulatory measures that could be characterized as taken for legitimate public welfare reasons - for example environmental or health regulations - has given rise to serious criticism of IIAs and investor-State arbitration, and it has been argued that such factors are amongst the major drivers behind the modified IIA clauses that this article explores.[150]

A number of claims that have given rise to discussion and concern in this respect have involved Latin American parties. A recent example is the ongoing *Phillip Morris v. Uruguay* arbitration that has attracted significant public and media attention. In this case Phillip Morris argues that the combined effect of legislation requiring excessive health warning labels and graphic pictograms on cigarette packets amounts to an indirect expropriation of certain of its trademarks.[151]

An example of a decision that was subject to such criticism is the relatively early case of *Metaclad v. Mexico*. In this case a claim was brought on the basis that a regulatory decision of local government officials in Mexico not to allow the operation of a hazardous waste facility by Metalclad - despite the fact that the project had previously been endorsed and approved by the Federal Government – amounted to a measure tantamount to expropriation or an indirect expropriation.[152] These claims were upheld by the arbitral tribunal.[153] The tribunal also found that the issuance of a decree by the Governor of the Mexican State of San Luis Potosi, which created an ecological preserve, amounted in itself to an expropriation because it had the effect of forever barring the landfill.[154] Relevant to the discussion that follows (particularly on recent investment treaty practice) is the tribunal's finding that it "*need not decide or consider the motivation or intent of the adoption of the Ecological Decree*."[155]

The tribunal in *Tecmed v. Mexico*, which decided that the State's refusal to renew an operating licence for a hazardous waste treatment plant amounted to an indirect expropriation, while not completely discarding the intent or motivation behind the measure in question, noted that "*the government's intention is less important than the effects of the*

---

[150] *Op.cit*. Kenneth J. Vandevelde, p. 308. See also the petition by various NGO's and individuals to participate as an intervening party or *amici curiae* dated 29 August 2002 in *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, available at http://www.italaw.com/sites/default/files/case-documents/ita0018.pdf (last visited 30 August 2015). That case, as discussed above, involved an a expropriation claim that arose when a significant rise in water prices, soon after the Bolivian Government granted a concession to the claimant, led to riots and protest that resulted in the departure of the claimant company and the subsequent revision of the agreement by Bolivia.

[151] Request for arbitration in *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), available at http://www.italaw.com/sites/default/files/case-documents/ita0343.pdf (last visited 30 August 2015).

[152] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000).

[153] *Ibid*, at §§ 102-112.

[154] *Ibid*, § 109.

[155] *Ibid*, § 111.

measures on the owner of the assets or on the benefits arising from such assets affected by the measures."[156]

Other tribunals, including those involving Latin American respondent States, have taken a different approach to that of the tribunal in *Metalclad*. In *Feldman v. Mexico*, which involved a claim arising out of Mexico's refusal to rebate excise taxes applied to cigarettes exported by a company controlled by the claimant,[157] the tribunal considered at length where the line between legitimate regulation and expropriation is drawn. The tribunal found that no expropriation had occurred, despite the fact that the claimant *"through the Respondent's actions, is no longer able to engage in his business of purchasing Mexican cigarettes and exporting them, and has thus been deprived completely and permanently of any potential economic benefits from that particular activity*."[158] In reaching this conclusion the tribunal considered, *inter alia*, the existence of rational public purposes for the complained of policy[159] and noted that "*not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation* […]. *Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue*."[160]

In *LG&E v. Agentina*, which heard claims arising from Argentina's regulatory measures in response to the financial crisis of the early 2000s, the tribunal stated that it "*must balance two competing interests: the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies*."[161] Before concluding that there had been no expropriation in that case as the investor had not been deprived of the right to enjoy its investment, the tribunal also stated that "*it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed*."[162]

The definition and limitation of the concept of indirect compensation is one of the most common and consistent features of new generation IIAs, including those of Latin American States. The best known element of the treaty language on indirect expropriation in new generation IIAs is that which limits the application of indirect expropriation by stating that legitimate and non-discriminatory public welfare measures cannot constitute indirect expropriation. In the vast majority of new generation IIAs involving Latin American States,

---

[156] *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, (29 May 2003), § 116.
[157] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002.
[158] *Ibid*, § 109.
[159] *Ibid*, § 136.
[160] *Ibid*, § 112.
[161] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), § 189. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentina* ICSID Case No. ARB/03/17, Award (30 July 2010), § 128: "*in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation*."
[162] *Ibid*, § 195.

the treaty language on indirect expropriation is not confined to this limiting aspect,[163] but also includes non-exhaustive examples of factors to be taken into consideration by arbitral tribunals when considering claims for indirect expropriation. An example of the most detailed provisions on indirect expropriation is found in an annex to the investment chapter of the Korea-Peru FTA of 2011:

> "*The Parties confirm their shared understanding that: (a) An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment. (b) Article 9.12.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure. (c) The second situation addressed by Article 9.12.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. (i) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (A) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (B) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (C) the character of the government action, including its objectives and context. Relevant considerations could include whether the investor bears a disproportionate burden, such as a special sacrifice, that exceeds what the investor or investment should be expected to endure for the public interest. (ii)* ***Except in rare circumstances, such as, for example, when a measure or series of measures have an extremely severe or disproportionate effect in light of its purpose, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate policy measures (for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriatio****ns*."[164]

As can be seen from the final paragraph at (c)(ii) of the Annex, the parties have directly addressed the issue raised in the above discussed cases, by providing that non-discriminatory regulatory actions designed to protect legitimate public welfare objectives, such as public health or the environment, do not constitute indirect expropriations. In this sense the parties are rejecting the position taken by tribunals such as *Metalclad* and confirming the intention of the measures invoked as amounting to an indirect expropriation is not only relevant but of paramount importance. The provision in fact bears significant resemblance to the position

[163] See for example Article 8.4 of the Guatemala-Trinidad & Tobago BIT (2013): "*Non-discriminatory measures of either Contracting Party that are designed and applied to protect a legitimate public welfare objective, such as health, safety, and the environment, do not constitute indirect expropriation*." This comes at the end of the Treaty's expropriation provision and is not accompanied by a list of factors to be taken into consideration such as is the case with the treaties listed in the below footnote.

[164] Annex 9B to the Investment Chapter (Chapter 9), Korea-Peru FTA. For examples of similarly detailed treaty language defining indirect expropriation, see Annex 10-B, Panama-US FTA (2007); Annex 9A, Panama-Singapore FTA (2006); Article IX, BLEU (Belgium-Luxembourg Economic Union)-Colombia BIT (2009); Article VI, Colombia-UK BIT (2010); Article 7, Colombia-Turkey BIT (2014); Annex 8-B, Colombia-Korea FTA (2013).

taken by the tribunal in *LG&E v. Argentina*. It implies, as stated by the tribunal, that there is a presumption that regulatory actions designed to implement legitimate public welfare measures do not constitute indirect expropriations. This presumption can be rebutted if the measure in question, as stated by the *LG&E* tribunal, is disproportionate (although the clause adds the requirement of extreme disproportionality), or discriminatory, as has been required previously by investor-State arbitral tribunals, including in cases involving Latin American respondent states.[165]

Such provisions, therefore, could be seen not only as a rejection of earlier decisions considered to have interpreted treaty provisions - and the international law principles on which they are based - in a matter inconsistent with the understanding of State parties, but also as codifying or incorporating the interpretations of other decisions into these new IIAs, albeit with additional specifications. In this sense, the adopting of new and more detailed language in such treaties could be seen not only as a desire to correct decisions perceived as incorrect or to avoid their reoccurrence, but to avoid the negative effects that come with the apparent inconsistency in the case law.

It is also interesting to note that the factors set out at paragraph (c)(i) of the Annex are all factors that have been subject to discussion by arbitral tribunals when ruling on claims for indirect expropriation. A review of relevant decisions supports this position.

Arbitral tribunals have recognized that the determination of whether there has been an indirect expropriation is a fact specific, case-by-case proposition, as stipulated at paragraph (C)(i) of the Annex.[166] The stipulation at (c)(i)(A) that the economic impact of a measure is determinative, but that an adverse economic impact alone is not enough, is also confirmed by numerous arbitral decisions. Indeed as explained by the tribunal in *Vivendi v. Argentina II*, “[t]*he weight of authority […] appears to draw a distinction between only a partial deprivation of value (not an expropriation) and a complete or near complete deprivation of value (expropriation)*.”[167] The relevance of reasonable investment-backed expectations[168] and the principle of proportionality[169] mentioned at paragraphs (c)(i)(B) and (C) respectively, are also elements that investor-State arbitral tribunals have considered relevant in determining if there is an indirect expropriation. As opposed, therefore, to the limiting language in paragraph (ii) of the Annex, which appears to be, at least in part, designed to avoid the

---

[165] See *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), § 144, stating that non-discriminatory measures of general application could not be considered expropriatory. See also (in a case not involving a Latin American State but interpreting a treaty to which Mexico is a party) *Methanex Corporation v. United States of America,* UNCITRAL, Partial Award (7 August 2002), Part IV - Chapter D - Page 4 , § 7: “*as a matter of general international law, a non-discriminatory regulation for a public purpose* […] *is not deemed expropriatory and compensable*.”

[166] See, for example, the NAFTA case of *Crompton (Chemtura) Corp. v. Government of Canada*, Award (2 August 2010), §§ 49, 59.

[167] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007), § 7.5.11. See also *Nations Energy, Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19, Award (24 November 2010), § 684; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (7 July 2011).

[168] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012), § 123; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), § 120; *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (17 July 2006), § 176(k); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), §§ 316-321.

[169] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003).

reoccurrence of previous undesirable decisions, the factors listed in paragraph (c)(i) as determinative appear to be an incorporation of elements of tribunals' decisions (which of course in many cases were mere applications of existing international law) into the revised treaty practice of the Contracting Parties.

Some Colombian treaties with additional particularities can be noted. The investment chapter of the Colombia-Korea FTA of 2013 provides, as with the above-mentioned IIAs, that the extent to which the government action interferes with distinct, reasonable, investment-backed expectations, should be taken into account when deciding a claim of indirect expropriation. This provision of the Agreement also contains the following footnote:

> *For greater certainty, whether an investor's investment-backed expectations are reasonable depends in part on the nature and extent of governmental regulation in the relevant sector. For example, an investor's expectations that regulations will not change are less likely to be reasonable in a heavily regulated sector than in a less heavily regulated sector or whether at the time the investment was made the host Party had particular regulatory power over the relevant sector can be considered.*[170]

Again, the principles enunciated in this footnote have been taken into account by investor-State tribunals when deciding whether allegedly legitimate expectations could be qualified as reasonable. For example, the tribunal in *Ulysseas, Inc. v. Ecuador* stated that a "*violation of the standard cannot be determined in the abstract, what is fair and reasonable depending on a confrontation of the objective expectations of the investor and the regulatory power of the State in the light of the circumstances of the case*."[171] The tribunal then went on to note that the electricity regulatory framework surrounding the claimant's investment had been experiencing constant evolution for a number of years preceding the investments, in order to meet a growing demand for electricity. The tribunal therefore concluded that the claimant's expectation for stability of this regulatory framework, at the time its investments were made, could not be considered legitimate.[172]

In another Colombian IIA, its BIT with India of 2009, language on indirect expropriation not found in most treaties is present:

> "*Actions and awards by judicial bodies of a Contracting Party that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns do not constitute expropriation or nationalization*."[173]

---

[170] Footnote 19 to the Annex 8-B, Colombia-Korea FTA (2013).

[171] *Ulysseas, Inc. v. Ecuador*, UNCITRAL, Final Award (12 June 2012), § 249.

[172] *Ibid*, §§ 253-256. See also *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), § 359-361, where the tribunal states (citing *Methanex v. United States*) that legitimate expectations necessarily vary with the surrounding circumstances and that expectations of investors for the stability of environmental regulations could not be characterized legitimate expectations of stability of environmental regulations in a jurisdiction where concern for the protection of the environment and of sustainable development are high.

[173] Article 6.2(d) of the Colombia-India BIT (2009).

This particular clause has appeared in a number of subsequent Indian BITs,[174] and therefore it appears that such provision reflects Indian treaty practice, rather than any practice attributable to a Latin American State.

B. The Withdrawal Approach

The Venezuelan Foreign Investment Law of 2014 does not contain any substantive protections as such to foreign investors. Rather, what the law seems to address is the conditions that a foreign investor must fulfill in order to obtain permission to receive a "Foreign Investment Registration".[175] Such conditions are not relevant to any discussion on substantive protections, nor are they relevant to the discussion below on access to investor-State arbitration, because, as will be explained, the Law excludes such possibility.

The Bolivian Investment Promotion Law of 2014 also does not stipulate any substantive protections to be provided to foreign investors. As explained further below, the arbitration law applicable to disputes arising out of the Investment Promotion Law allows, under certain conditions, arbitration between foreign investors and the Bolivian state, for contractual or non-contractual matters.[176]

The applicable law in such arbitrations is Bolivian law only.[177] While the scope of this article is not to examine the protection afforded to investors under Bolivian national law, it can be noted that such law would permit a foreign investor to bring a claim before an arbitral tribunal (rather than Bolivian courts), for, by example, expropriation without compensation. Indeed, the Bolivian Constitution provides that expropriation can only take place for reasons of necessity and public utility, and upon prior fair compensation.[178]

The situation is different under the Ecuadorian General Organic Code of Production, Commerce and Investment of 2010, which in fact provides for some substantive protections similar to those contained in many IIAs. One such provision is Article 17:

> "*National and foreign investors; societies, companies or entities from the cooperative, popular, and supportive economy, in which these partake as well as well as their legally established investments in Ecuador, with the limitations provided by in the Constitution of the Republic, shall have equality of conditions with respect to administration operation, expansion, and transfer of their investments, and shall not be the subject of discriminatory or arbitrary measures. Foreign investors and investments shall have full protection and equal protection of the law, in such way that*

[174] See the India-Nepal BIT (2011); the India-Lithuania BIT (2011); and the India-Slovenia BIT (2011). It may be that India's inclusion of this clause is a result of its experience as respondent State in *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (30 November 2011), in which a claim was brought for expropriation by the judiciary on the basis of failure to enforce an arbitral award.

[175] Article 28: "*Entitlement of investors. The rights granted to foreign investors in this Decree with Rank, Value and Force of Law and other applicable regulations, shall have effect from the moment the Foreign Investment Registration is granted*".

[176] Chapter II Investment disputes with the State, Section I (Articles 127.I-II - 129), Section III (Articles 132 and 133) of the Bolivian Law No. 708 on Conciliation and Arbitration of 2015.

[177] Article 133.3 of the Bolivian Law No. 708 on Conciliation and Arbitration of 2015.

[178] Article 57 of the Bolivian Constitution.

> *they shall have the same protection that Ecuadorean nationals receive within the national territory*."[179]

This article provides that investments shall not be subject to discrimination or arbitrary measures. Such obligations are contained in numerous IIAs and, as discussed above, have been considered to be elements of both the fair and equitable treatment standard and the minimum standard of treatment. The provision also provides that foreign investors shall be provided with full protection, not less than that accorded to Ecuadorean nationals. In this article we can observe that, while Ecuador has denounced the ICSID Convention and some of its BITs (with more denunciations foreshadowed), it continues to provide through national legislation (at least in theory) some of the same protections contained in those BITs to foreign investors. To this extent the Law also provides that expropriation can only occur with the goal of certain public policy objectives,[180] in a non-discriminatory manner, in accordance with the law, and upon the payment of fair and adequate compensation.[181]

5. Access to Investor-State Arbitration

A. The IIA Reform Approach

i. The Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions

This issue has been perhaps one of the most controversial and debated legal issues to have arisen out of investor-State arbitration awards, as well as one of the best examples of States amending their treaty practice as a direct reaction to decisions by arbitral tribunals. A significant number of the decisions in question have involved Latin American States or investors. The first decision of an investor-State arbitration tribunal to use a most-favored nation clause to import dispute settlement procedures from third party treaties was that in the case of *Maffezini v. Spain*, which involved the rare (at the time) situation of a Latin American investor bringing a claim against a developed State.[182] In finding that the applicable treaty's most-favored-nation clause could be used to import more favorable dispute resolution provisions from a third-party treaty (in this case the third-party treaty did not require prior submission of disputes to the national courts or an 18 month waiting period, while the Argentina-Spain BIT did), the tribunal explained that "*there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce*"[183] and that "*it can be concluded that if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle*."[184]

---

[179] Article 17 of Ecuadorian General Organic Code of Production, Commerce and Investment of 2010

[180] Specifically "*the sole purpose of executing social development plans, environmental sustainable management, and collective well being*." *Ibid*, Article 18.

[181] *Id.*

[182] *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 January 2000).

[183] *Ibid*, § 54.

[184] *Ibid*, § 56.

Numerous other tribunals, including many hearing claims against Argentina, have ruled similarly. The tribunals in *Siemens v. Argentina*,[185] *Camuzzi v. Argentina II*,[186] *National Grid v. Argentina,*[187] *Gas Natural v. Argentina*,[188] *AWG v. Argentina*,[189] *Suez, Barcelona and Interagua v. Argentina*,[190] *Impregilo v. Argentina*,[191] *HOCHTIEF v. Argentina*[192] and *Teinver v. Argentina*,[193] all allowed for the use of the most-favored-nation clause to import dispute resolution provisions from third-party treaties that did not require prior submissions of disputes to local courts and an 18 month waiting period prior to commencing arbitration.

The *Maffezini* decision resulted in a direct reaction by a number of States, including many from Latin America. The earliest known example is the following footnote in a draft of the Free Trade Agreement of the Americas (FTAA) from November 2003, which was ultimately removed:

> "*Note: One delegation proposes the following footnote to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Article and the Maffezini case. This footnote would be deleted in the final text of the Agreement: The Parties note the recent decision of the arbitral tribunal in the Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most favored nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction §§ 38-64 (January 25, 2000), reprinted in 16 ICSID Rev.-F.I.L.J. 212 (2002). By contrast, the Most-Favored-Nation Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C.2.b (Dispute Settlement between a Party and an Investor of Another Party) of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case.*"[194]

The final draft of the US-DR-CAFTA contained an interpretive footnote on the scope of most-favored-nation treatment in the investment chapter, which was retained in the official negotiation history of the Agreement[195] and reads as follows:

---

[185] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004).

[186] *Camuzzi International S.A. v. Argentine Republic [II]*, ICSID Case No. ARB/03/7, Decision on Objections to Jurisdiction (10 June 2005).

[187] *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006).

[188] *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005).

[189] *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction (3 August 2006).

[190] *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006).

[191] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011).

[192] *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011).

[193] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012).

[194] Cited in, *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012), § 301.

[195] Andrea K. Bjorklund and August Reinisch, *Investment Law and Soft Law*, Cheltenham (2012), pp. 265-266

"The Parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most-favored-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures... By contrast, the Most-Favored-Nation Treatment Article of this Agreement expressly limited its scope to matters 'with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.' The parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that in the Mafezzini case."[196]

Notably, while a number of arbitral tribunals, including those involving claims brought against Latin American States[197], have ruled that the most-favored-nation clause is not capable of importing dispute resolution provisions, the State practice described above came before the first investor-State tribunal decision that directly ruled against the findings of the *Mafezzini* tribunal.[198] Of course, the position taken on the issue by States is not particularly surprising given that the most-favored-nation clause and the *ejusdem generis* principle long pre-date investor-State arbitration. It is, however, different from the approach taken with respect to other substantive protections discussed above. Reform to IIA provisions setting these substantive protections (such as fair and equitable treatment) have generally not come as a reaction to one particular decision, but have occurred after the content of the standard has been subject to significant debate amongst investor-State tribunals.

Another example of treaty practice dealing with this issue, this time after decisions had been rendered by arbitral tribunals rejecting the *Mafezzini* approach, came from Argentina and Panama, who, after the above mentioned decision on jurisdiction in *Siemens v. Argentina*, exchanged diplomatic notes containing an "interpretative declaration" on the most-favored-nation clause in the their 2006 BIT. These notes declared that the most-favored-nation clause did not extend to dispute resolution clauses, and that this had always been their intention.[199]

Many of the new generation IIAs of Latin American States reflect this rejection of the *Mafezzini* and subsequent decisions. While no decision itself is invoked as in the above-mentioned State practice, it is often explicitly stated that the most-favored-nation clause does not apply to dispute resolution provisions. A number of different formulations are used to achieve this objective. One example is found in the most-favored-nation provision of the investment chapter in the Guatemala-Peru FTA (2011):

"*For greater certainty, the treatment with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments referred to in paragraphs 1 and 2 does not include dispute settlement mechanisms, such as those referred to in Section*

---

[196] See Draft CAFTA Treaty, *available at* http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/Chap10_e.pdf (last accessed on 26 August 2015).

[197] See, for example, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008); *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012).

[198] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (29 November 2004).

[199] *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006), § 85.

B, that are provided for in international treaties, including commercial or investment agreements."[200]

Another approach, an example of which is found in the investment chapter of the Chile-Costa Rica-Peru FTA (2011), explicitly provides for the exclusion of "procedures" or "procedural matters" from the scope of the most-favored-nation clause, in addition to dispute resolution provisions:

> "*The Parties agree that the scope of application of Art. 9.3 includes the matters related to the establishment, acquisition, expansion, administration, operation, sale or other disposition in relation to the investment and, therefore, shall not apply to procedural matters, including mechanisms of dispute settlement mechanisms such as those provided for in Section B of this Chapter.*"[201]

A third variation of such clauses is to also specifically provide that the most-favored-nation clause does not apply to definitions, such as investor and investment. An example of such a provision can be found in recent Colombian IIAs. One example is the Colombia-France BIT:

> "*For greater clarity, most favored nation treatment to be granted in similar situations and referred to in this Agreement, does not extend to Article 1* [which contains the treaty's definitions, including of investor and investment] *nor to the dispute resolution mechanisms, such as those contained in Articles 15* [investor-State] *and 17* [Contracting Parties] *of this Agreement, provided for in international treaties or international investment agreements*."[202]

This issue was dealt with by the tribunal in the *Société General v. Dominican Republic*[203] case, which rejected the attempt of the investor to use the applicable treaty's most-favored-nation clause to expand the scope of protected investments by importing broader definition from a third-party treaty. It is possible to imagine that such types of claims and findings could be taken into account by the treaty drafters, especially those from nations such as Colombia, which, as noted above has stated that it carefully considers investor-State arbitral awards when drafting treaties.[204]

---

[200] Article 12.3.3 of the Guatemala-Peru FTA (2011) (unofficial translation). See also Article 3, Colombia-Peru BIT (2007); Footnote 6 to Article 10.5, Protocol Pacific Alliance (2014); Article 14.4.3, Colombia-Panama FTA (2013); Article 12.3.3 Colombia-Costa Rica FTA (2013); Annex 9.3, Chile-Colombia FTA (2006); Article 12.3.3, Costa Rica-Peru FTA (2011); Article 10.4.3, Mexico-Panama FTA (2014); Article 11.5.2, Mexico-Central America FTA (2011); Article 12.3, Panama-Peru FTA (2011).

[201] Article 12.3.3 of the Investment Chapter (Chapter 12) of the Costa-Rica-Peru FTA (2011) (unofficial translation). See also Annex 9.3, Costa Rica-Peru FTA (2011); Article 6.4, Singapore-Colombia BIT (2013); Article 3, Mexico-Singapore TBI (2009).

[202] Article 5.4 of the Colombia-France BIT (2014) (unofficial translation). See also Article 10.5.3 of the Colombia-Israel FTA (2013).

[203] Société *Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republ*ic, UNCITRAL, Preliminary Objections to Jurisdiction (19 September 2008), § 41.

[204] World Investment Forum 2014, Colombia's Chief Negotiator of IIAs Statement, IIA Conference "Reforming the International Investment Agreements Regime" of October 16th, 2014, available at: http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Vargas-Saldarriaga.pdf (last visited 9 September 2015)

B. The Withdrawal Approach

The withdrawal of Venezuela, Bolivia and Ecuador from the ICSID Convention and (to varying extents) investment treaties has clearly affected the access of foreign investors to investor-State arbitration as a means of settling disputes with these States.

In the case of Venezuela, as explained above, the Venezuelan Foreign Investment Law of 2014 precludes international arbitration and provides that all "*[f]oreign investments will be subject to the jurisdiction of the courts of the Republic, in accordance with the provisions of the Constitution of the Bolivarian Republic of Venezuela and other laws*."[205]

However, as also explained above, while Venezuela has denounced the ICSID Convention and its BIT with the Netherlands, it has not terminated other BITs. It is interesting to note that Venezuela ratified three new BITs (with Belarus (2008), Russia (2009) and Vietnam (2009)) after it denounced the Netherlands BIT.[206] All of these treaties provide for UNCITRAL arbitration. This could be seen as an indication that Venezuela's actions are designed towards limiting the access of investors to disputes with it under ICSID in general and to all investors under certain IIAs, but that it does not, as a matter of principle, seek to exclude investor-State arbitration altogether.

Bolivia, as explained above, provides in its Law on Conciliation and Arbitration of 2015 for the possibility of arbitration between foreign investors and the State through a "Special Regime of Arbitration".[207] Article 133 of that law envisages that arbitrations concerning "foreign" or "mixed" investments will be submitted to arbitration under the rules agreed between the parties, and failing such agreement, the rules to be applied will be those of a to-be-created regional investor-State arbitration dispute settlement mechanism. It would appear that this is a clear reference to the proposed UNASUR arbitration mechanism (discussed further below). It should be noted that while the Law states that such arbitrations can be contractual or non-contractual, and that they may take place outside Bolivia, they shall be subject to Bolivian law and jurisdiction. Therefore, in order to qualify to bring a claim against Bolivia pursuant to this law, an investor would either have to be party to a contract with the Bolivian state[208] or bring a claim solely on the basis of Bolivian law. As shown above, it is conceivable that these provisions would allow a foreign investor to bring a claim against the State for direct expropriation without compensation. One hurdle, however, would be to establish that the investor's investment met the definition of investment under the Bolivian Investment Promotion Law of 2014, which as explained above, stipulates that an "*[i]nvestment is every contribution aimed at the permanent development of the economic activities and the generation of income that contributes to the economic and social development of the country*."[209] Meeting this definition is a necessary precondition to the application of the provisions of the Bolivian Law on Conciliation and Arbitration of 2015.[210]

---

[205] Article 5 of the Venezuelan Foreign Investment Law of 2014.

[206] *Op.cit*. Rodrigo Polanco Lazo, p. 21.

[207] Article 127 of the Bolivian Law on Conciliation and Arbitration of 2015.

[208] *Ibid*, Article 127: "*The rules of this Chapter shall apply to disputes of a legal or contractual relationship, when the State is a party to such disputes and they arise or are related to an investment established in the No. 516 of April 4, 2014, Investment Promotion Act*." (Unofficial translation).

[209] *Ibid*, Article 4.

[210] *Ibid*, Article 127.

Also notable is the broad category of matters excluded from conciliation and arbitration by Article 4 of the Law on Conciliation and Arbitration. Such matters include licenses; registration and authorizations for the use of natural resources in all their states; taxes and royalties; questions on which a final judicial decision has been pronounced, except for the issues arising out of their execution; and questions concerning State functions.[211]

While the Ecuadorian Code of Production, Commerce and Investment provides for the possibility of international arbitration, there also appear to be serious limits to its availability to foreign investors. Article 27 of that Law provides that arbitration clauses may be included in investment contracts between the government and foreign investors.[212] In addition to this, Article 27 provides that:

> *"The controversies between a foreign investor and the Ecuadorean State, which had been pursued and exhausted through administrative routes, shall try to be resolved in an amicable manner, with direct dialogue within a period of sixty (60) days. If a direct solution between the parties is not arrived at, there shall be a compulsory mediation instance within the three (3) following months from the inception of the formal beginning of direct negotiations. If after this mediation instance the controversy still exists, the conflict may be subjected to national or international arbitration, in accordance to the valid treaties, of which Ecuador is a party. The decisions of this Arbitration Tribunal shall be of law, the applicable legislature shall be the Ecuadorean one, and the binding judgment in arbitration, shall be definitive and binding to all parties*"[213]

First, there is a requirement to exhaust all administrative remedies, which could well amount to a significant weight upon a foreign investor prior to gaining access to arbitration. Second, and most importantly, the provision provides that international arbitration is to be conducted in accordance with "the valid treaties". Assuming that this is referring to Ecuador's IIAs, it is likely that a significant number of them would no longer be considered as "valid", and this number could well rise in the future. As explained above, in 2010 the Ecuadorian government commenced the process of internally denouncing all of its remaining BITs, with a number of these now terminated.

It should also be noted that the Working Group on Responsible Investment Dispute Settlement of the Union of South American Nations ("UNASUR") has reportedly agreed upon a constitutive treaty that will aim to create a Latin American dispute resolution centre for investment disputes.[214] Interestingly, this group includes both the countries adopting the "withdrawal approach" (Venezuela, Ecuador and Bolivia), as well as certain "reform approach" States such as Colombia and Peru. The major driver of this initiative has been Ecuador, which first proposed the idea of a UNASUR arbitration centre in 2009, was appointed as chair of the UNASUR Working Group on Investment Dispute Settlement, and

[211] *Ibid*, Article 4.

[212] Article 27 of Ecuadorian General Organic Code of Production, Commerce and Investment of 2010. (English Translation of such law contained on the WIPO website). Accessible at http://www.wipo.int/edocs/lexdocs/laws/en/ec/ec050en.pdf (last visited 10 September 2015).

[213] *Id.*

[214] Call for papers, Journal of World Investment & Trade, Special Issue on The Latin American Challenge to the Current System of Investor-State Dispute Settlement, Edited by Dr Katia Fach and Dr Catharine Titi (2015).

reportedly submitted a proposal for the creation of a regional mechanism allowing for investor-State arbitration in 2011.[215]

Details of the concrete form that such a dispute resolution mechanism would take are sparse, and analysis has tended to focus on Ecuador's proposal for the arbitration centre's dispute settlement system of 2011.[216] While Ecuador's proposal was endorsed by ALBA members (including Venezuela and Bolivia), it was rejected by other members of UNASUR, such as Colombia, Peru and Chile.[217] There is hence no guarantee that any final mechanism adopted by the Working Group would resemble Ecuador's earlier proposal. In any event, it is worth highlighting the fact that such proposal contained a number of factors that would restrict or complicate access to investor-State arbitration by foreign investors. For example, the proposal limits jurisdiction by stating that disputes concerning the legitimacy of internal laws and those relating to the energy sector are excluded, and provides that State parties can require the exhaustion of local remedies.[218]

In addition, Ecuador's proposal allows for investor-State dispute settlement when provided for in contractual provisions or an international instrument.[219] As stated above, with respect to both Bolivia and Ecuador at least, it appears that the international instruments to which they are party that provide for investor-State arbitration either have or will be denounced. Therefore, for foreign investors to benefit from investor-State arbitration against the "withdrawal" States through this proposed new mechanism (other than on a contractual basis), they will need to wait for new treaties to be negotiated with the investor's home States.

5. Conclusion

While the issue of influencing factors on Latin American States recent practice has been examined above, another question remains: what will be the practical consequences? This question can be raised from the perspective of both the foreign investor and the host State.

With respect to the reform of previous models of IIAs that characterises the "reform approach", it seems to be largely a case of wait and see. New generation IIAs have not yet produced any consistent body of case law and so at this point one can only hypothesize as to how these new or updated treaty clauses will be interpreted by investor-State arbitral tribunals. It does seem, however, that some subjects are likely to be largely settled by new generation IIAs. It is difficult to imagine, for example, that an investor bringing a claim under one of the above discussed new generation Latin American IIAs will convince a tribunal that it is able to import dispute resolution provisions via a most-favored nation clause, or that the assumption of risk is not a requirement for its investments to qualify as protected. With respect to claims for breaches of fair and equitable treatment and indirect expropriation, it is less clear to what extent the changes to those treaty provisions will have a significant impact, especially in light of some ambiguous language that could be open to interpretation. While it is the case that such new generation treaty language will make it more difficult for a tribunal

[215] *Op.cit.* Rodrigo Polanco Lazo, pp. 41-42.

[216] Kendall Grant, The ICSID Under Siege: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration, Osgoode Legal Studies Research Paper Series (2015), pp. 25 *et seq*.

[217] *Op.cit.* Rodrigo Polanco Lazo, P. 46.

[218] *Ibid*., p. 42.

[219] Silvia Karina Fiezzoni, The Challenge of UNASUR Member Countries to Replace ICSID Arbitration, *Beijing Law Review* (2011), p. 140.

to admit a claim on an overly broad interpretation of fair and equitable treatment or indirect expropriation, as discussed above, it is perfectly reasonable to consider that an investor-State arbitral tribunal sitting today on the basis of a traditional treaty would impose similar restrictions on such clauses as those set out in the new IIAs.

The changes introduced by the "withdrawal approach" also provide clarity on certain questions, while others remain unclear. It is clear for example that (subject to application of the sunset clause) foreign investors will no longer be able to bring claims against these states pursuant to the ICSID Convention. It is also clear that, generally, access to investor-State arbitration with these States has been substantially restricted. Other questions arise as to the extent that the "withdrawal approach" can be equated with a return to the Calvo Doctrine. As stated above, with respect to Venezuela, on the face of its Foreign Investment Law of 2014 and withdrawal from the ICSID Convention, that would appear to be the case. The fact that it has (relatively) recently signed BITs with (selected) States providing for UNCITRAL arbitration would seem to indicate that, for now at least, a complete revival of the Calvo Doctrine is not foreshadowed.

With respect to Ecuador, which is leading the drive to establish a new regional mechanism for investor-State arbitration, and Bolivia, which provides for the possibility of investor-State arbitration under this future mechanism in its new Conciliation and Arbitration Law, it would seem the goal is not a return to the Calvo Doctrine, but to transform the investor-State arbitration system. In this respect, the divergent approaches of "withdrawal" and "reform" begin to realign to some extent. The main difference may be that those in the "reform" group are of the view that the existing framework can be rehabilitated, while those in the "withdrawal" group believe that what is required is a "*destroy-and rebuild strategy towards international investment law*."[220]

It is possible that the presence of both adopters of the "withdrawal" and "reform" approaches within UNASUR will lead to a realignment of the diverging approaches. Should the new generation IIAs not result in a reduction in the number of decisions (and eventually claims) that Latin American States feel are too broad, inconsistent, or encroach too heavily upon their sovereign prerogatives, it may be that the "reform" approach States decide that the system does indeed need to be "destroyed and rebuilt" and that UNASUR is the organization to lead the way on such an endeavour. On the other hand, if the "reform" approach is perceived to be a success, momentum towards radical change via UNASUR could be slowed, or limited to the types of changes to the system already envisaged by new generation IIAs.

[220] Karsten Nowrot, International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism, Institute of Economic Law Transnational Economic Law Research Center (TELC) School of Law Martin Luther University Halle-Wittenberg (2010). See specifically Section A, "Introduction: Ecuador's Destroy-and Rebuild Strategy Towards International Investment Law."