

Perspectives on Investment and Dispute Resolution in Latin America

April 6, 2016



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PERSPECTIVES ON INVESTMENT AND DISPUTE RESOLUTION IN LATIN AMERICA

Welcoming Remarks

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Houston, April 6th, 2016

Session One

INTERNATIONAL INVESTMENT IN LATIN AMERICA: BRAZIL & MEXICO

Investment and Dispute Resolution in Latin America

Session Moderator:

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Guest Speakers:

Roberto Ardenghy

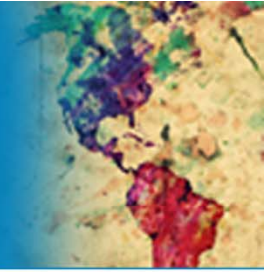
*Deputy Consul General of Brazil,
in Houston*

Edmundo Gonzalez

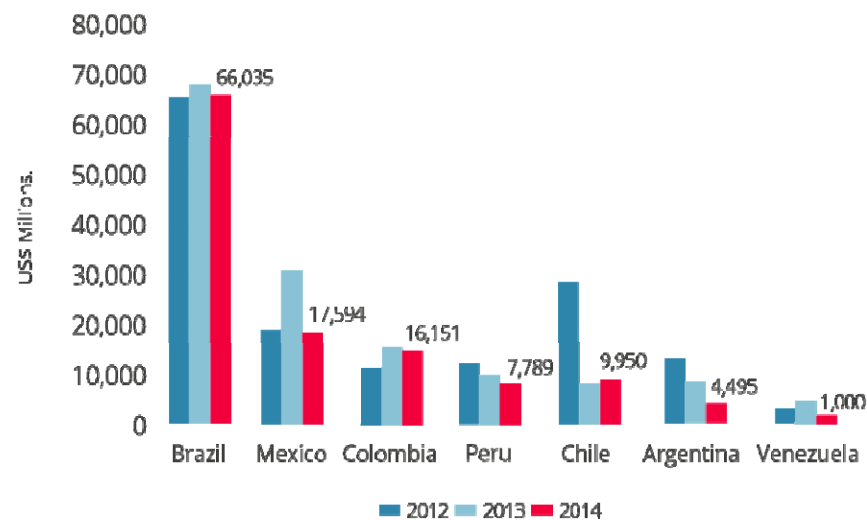
*Director of ProMexico,
in Houston*

Houston, April 6th, 2016

Latin America as a Destination of FDI



FDI in Latin America (2011 - 2014)



Source: Banco de la República de Colombia, Balance of Payments; CHPAI.

FDI inflows: top 20 host economies, 2013 and 2014

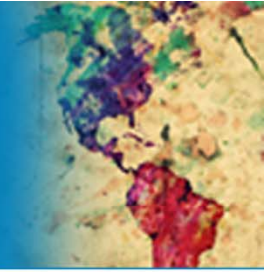
[Billions of dollars]



Source: UNCTAD, FDI/MNE database (www.unctad.org/fdistatistics).

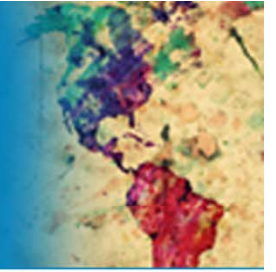
Note: Excludes Caribbean offshore financial centres.

Latin America Represents an Interesting Market



- Recent political stability
- Endemic need for infrastructure
- Abundance of natural resources
- Growth of urban population and increased market demands
- Legal stability
 - Written constitution
 - Codified systems
 - Primarily legislative: limited role of case-law (Brazil)
 - Influence of legal scholars
 - Specific courts for different fields of law, including a specific Administrative Law Jurisdiction (Brazil)

The End of the Commodities Super Cycle



- The commodities super cycle (1999-2011)
- Drop in commodities prices;
- Impact of the drop in commodities prices in Brazil and other countries in Latin America

The Future of FDI in Latin America After End of the Commodities Super Cycle



- The Brazilian and Mexican perspectives: looking into the crystal ball

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Session Two

TAKING ADVANTAGE OF INVESTMENT TREATIES WHEN STRUCTURING FOREIGN INVESTMENTS

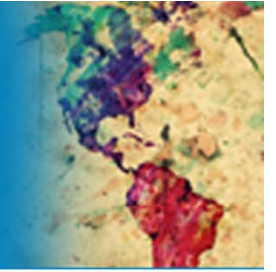
Investment and Dispute Resolution in Latin America

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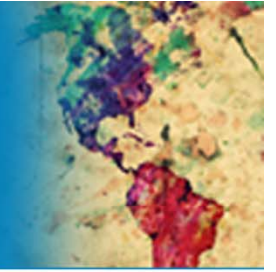
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Introduction: Investment Protection Under International Law



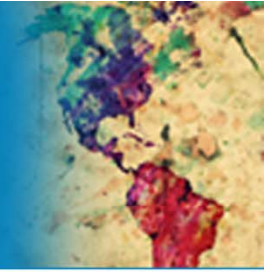
- International treaties protecting foreign investment from country-risk under international law
 - Bilateral Investment Treaties (BITs): more than 2,200 in force
 - Multilateral Investment Treaties
 - Investment Chapters in Free Trade Agreements
 - Investment Protection Laws
- Every Treaty is different. Need to check specific text

Introduction: Investment Protection Under International Law



- Benefits for the foreign investor
 - Protection under international law
 - State cannot rely on domestic law to justify its breaches
 - Application of international law standards
 - In respect of all organs and subdivisions of the State
 - Allows the investor resolving disputes in an international forum
 - Avoiding local courts
 - Irrespective of the dispute resolution mechanism contractually agreed
 - Choice between different international arbitration fora
 - ICSID
 - *Ad Hoc* under the UNCITRAL Arbitration Rules
 - Others

Introduction: Investment Protection Under International Law

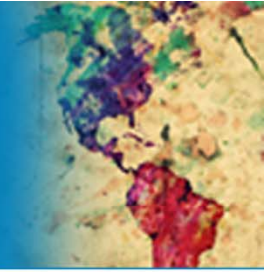


- Habitual substantive investment protections
 - Protection in respect of expropriation
 - Allowed only if it is non-discriminatory, for a public purpose, observing due process and accompanied by a prompt and adequate compensation
 - It includes indirect and de facto expropriations
 - Fair and Equitable Treatment
 - Full protection and security
 - Non discrimination
 - Free repatriation of capital

BITs and FTAs between the US and Latin American States



How to Qualify for Protection Under Treaties



- Definition of “investor” under applicable Treaty. Criteria:
 - Individuals: nationality, domicile, etc.
 - Corporations: place of incorporation, place of headquarters, place of control, etc.

- US – Ecuador BIT (1993)

(b) "company" of a party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

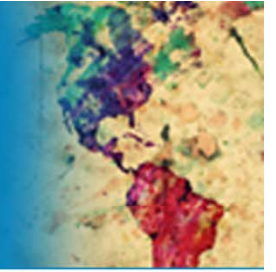
(c) "national" of a Party means a natural person who is a national of a Party under its applicable law; associate

- US – Peru FTA (2006)

enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association;

national means a natural person who has the nationality of a Party according to Annex 1.3 or a permanent resident of a Party;

How to Structure an Investment to Qualify for Protection Under Treaties



- Protecting an investment under investment treaties is as important as optimizing its tax regime
- Necessary if:
 - There is no treaty available to investor
 - No US BIT with the host country
 - No BIT between the host country and the country of vehicle for tax purposes
 - The applicable treaty offers insufficient protection
- It is possible to benefit from third-State treaties

How to Structure an Investment to Qualify for Protection Under Treaties: Example

- Investment in Paraguay
 - No BIT US – Paraguay
 - 22 BITs available
- Consider content of BITs and check tax status
- Netherlands – Paraguay BIT

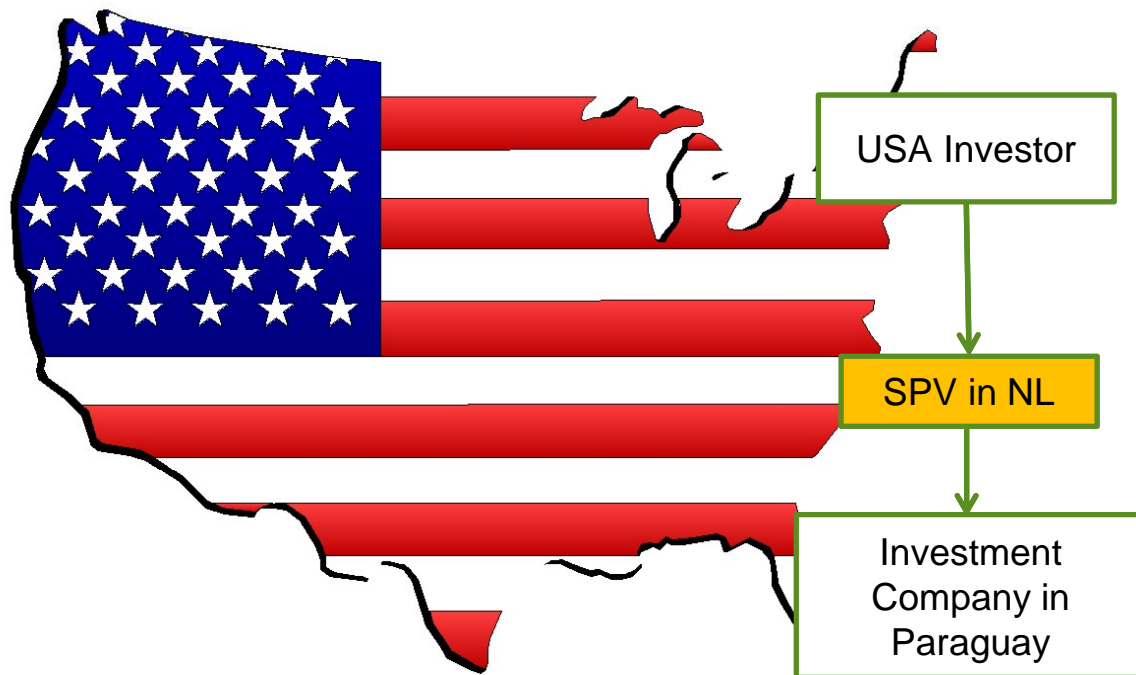
(b) the term "nationals" shall comprise with regard to either Contracting Party:

- i. natural persons having the nationality of that Contracting Party;
- ii. legal persons constituted under the law of that Contracting Party;
- iii. legal persons not constituted under the law of that Contracting

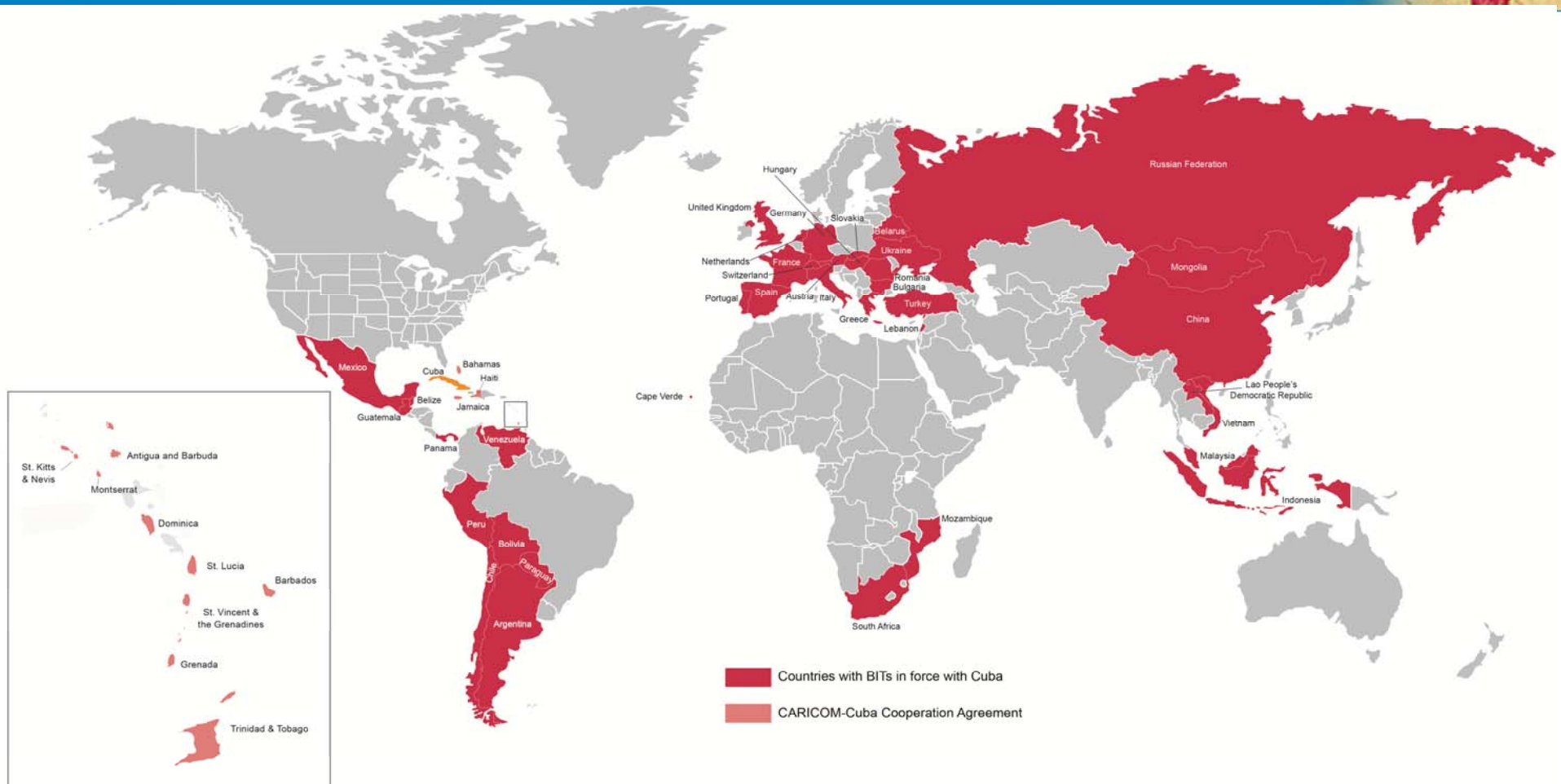
Party but controlled, direct I y or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above.



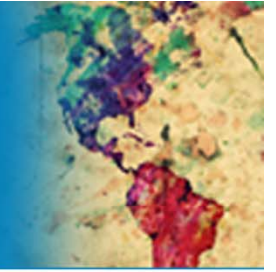
How to Structure an Investment to Qualify for Protection Under Treaties: Example



Investment Protection Treaties to Which Cuba is a Party

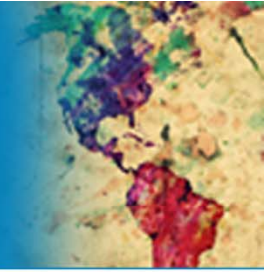


Restructuring of an Investment



- It is possible to restructure an investment after it is established, to benefit from treaty
- Comply with definition of “investor” under treaty chosen
 - Requirement of “doing substantial business”
 - Denial of benefits clauses
- Importance of “timing” of the restructuring
 - Before the dispute (Mobil v. Venezuela (2010); Phoenix v. Czech Republic (2009))
 - Before the dispute “looms” (René Rose Levy and Gremcitel v. Peru (2015))

What is a Protected Investment?



- Different definitions, depending on the treaty
- Generally, quite broad
- Requirement of a certain “duration”
- US – Argentina BIT (1991)

a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

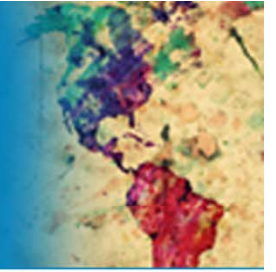
(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value and directly related to an investment;

(iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law;

Other Considerations



- Legality of the investment under the laws of the host State
 - Inceysa Vallisoletana v. El Salvador (2006)
 - Fraport v. Philippines (2007)
- Risk of losing protection if there is a restructuring during life of the investment
- Fork-in-the-road clauses in investment protection treaties

Session Three

ROUND TABLE DISCUSSION

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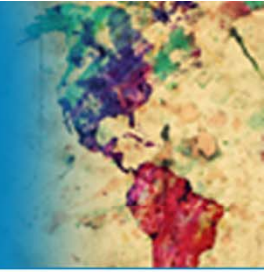


GUEST SPEAKER BIOS



Roberto Ardenghy

Consulate-General of Brazil in Houston
Deputy Consul General
Head of the Trade Promotion Bureau



Roberto joined the Consulate-General of Brazil in Houston, Texas, in August 2012, as Deputy Consul General and Head of the Trade Bureau. He currently holds a position of Minister of the diplomatic career at the Brazilian Foreign Affairs

As a diplomat, he has spent most of his career working with various government agencies in Brasilia and in different Embassies abroad, including Havana-Cuba, Washington DC and Buenos Aires-Argentina.

He has also extensive experience in the oil & gas industry, in both government and private sectors. He held different responsibilities at the National Petroleum Agency (Brazilian oil & gas regulator), such as Chief of Staff, President of the Ethics Committee and Superintend of Supply Chain.

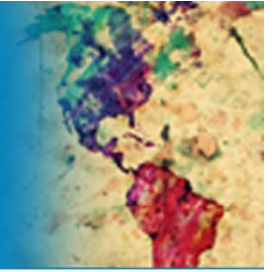
From 2007 to 2011 he was the Director for Corporate Affairs at BG Group in Brazil. His responsibilities include government affairs, communication (external and internal) and relationship with affected communities. During this period, he engaged regularly with Petrobras and other stakeholders for the development of new oil & gas projects in Brazil, especially in the pre-salt area.

In addition, he was an active Member of the Exploration and Production Committee of the Brazilian Petroleum Institute - IBP and board member of the American Chamber of Commerce (AMCHAM) in Rio de Janeiro, where he headed the Energy Committee. He was also Professor of International Law and Oil and Gas regulation at the University Candido Mendes, in Rio de Janeiro.

Roberto holds a Bachelor's Degree in Law from the Federal University of Santa Maria. He has also earned post-degrees in diplomacy and international relations from Rio Branco Institute (Brazilian diplomatic academy) and in petroleum and natural gas from COPPE-Federal University of Rio de Janeiro.

Edmundo Gonzalez

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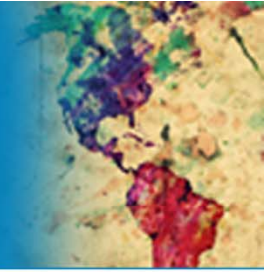
Edmundo Gonzalez is the Director of ProMexico in Houston, the Mexican government agency for trade and investment promotion. Previously, since 2010, he was Promexico's Northeast Regional Director, where he led the organization efforts and strategies to boost exports and investment attraction in that region. Previously, from 2008 to 2009, he served as Director of Promexico's Office in NYC by providing assistance to US companies looking to do business in Mexico, as well as developing export opportunities for Mexican companies. Prior to this position, he worked at Bancomext, Mexico's Export Development Bank, as New York Financial Representative, as well as in different positions in investment banking and international finance involved mainly in export and project finance transactions for more than 15 years. Mr. Gonzalez is an Industrial Engineer from the Monterrey Institute of Technology and studied an M.B.A. at the Instituto Tecnológico Autónomo de México (ITAM). In his long career in international business development, as well as in banking and finance, has provided assistance and advisory to a large number of companies in pursuing and developing international projects.

MAYER BROWN BIOS





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Gustavo Fernandes is a partner in the Rio de Janeiro office of Tauil & Chequer Advogados in association with Mayer Brown, where he focuses his practice on litigation and arbitration.

Gustavo has more than 17 years of experience in litigation and transactional matters, with a focus on all areas of arbitration, civil, commercial and constitutional litigation. He has represented seven of the ten largest companies in Brazil. Gustavo has particular experience in construction, energy and mining-related arbitrations in which he is nationally known for his exceptional capabilities.

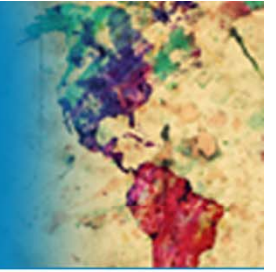


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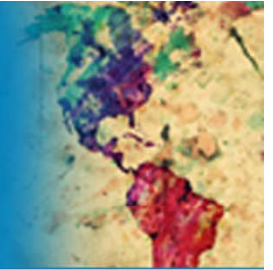
Alejandro López Ortiz is a partner in Mayer Brown's Paris office and a member of the International Arbitration group. He represents companies and States in commercial and investment arbitrations in complex disputes involving engineering and construction projects, energy, telecommunications, mergers and acquisitions, commercial contracts and financial transactions. He has acted as counsel before the major international arbitration institutions such as the ICC, LCIA, ICSID, ICDR, SIAC, the Madrid Court of Arbitration and the Court of the Hungarian Chamber of Commerce, among others, and in *ad hoc* arbitrations under the UNCITRAL Rules. Qualified as a lawyer in Spain and France, Alejandro has been recognized by Who's Who Legal as a leading arbitration practitioner.

According to *Chambers*, he is “*brilliant: very accurate and has a lot of experience in arbitration proceedings*” (2014) and has been described as “*one of the best arbitrators in Spain*” (2012) and having a “*mighty technical knowledge in the arbitration area. His understanding of the energy sector is also appreciated by clients*” (2013).

He speaks Spanish, English and French, and understands Portuguese.



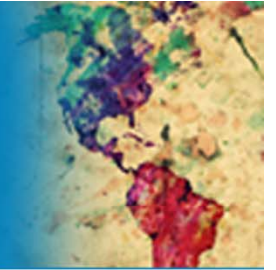
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Mike Lennon is a partner and member of Mayer Brown's Litigation & Dispute Resolution and International Arbitration practices. He is an experienced arbitration practitioner and trial lawyer with an outstanding track record for handling a wide variety of arbitration and litigation matters, particularly in the energy and natural resource sectors. Mike has tried numerous cases before arbitral tribunals, courts, and juries, as well as handling enforcement, annulment and appellate proceedings arising from his matters. His energy and natural resources experience covers a wide range of matters, including disputes involving production sharing agreements, licenses, concessions and other host state agreements, oil and gas royalty disputes, pricing and other disputes under short and long-term commodity agreements, disputes arising out of joint operating and joint venture agreements, and other arbitration and litigation matters arising out of commercial disputes in the energy and natural resources sectors. He has been recognized in Chambers UK (2009-10), Chambers USA (2011-2014), Chambers Global (2013), Legal500 UK (2009-10), Legal500 USA (2012-2014), Legal500 Latin America (2013). According to Chambers, *"Michael Lennon is highly respected as 'the consummate professional – he's always reachable, very patient and understanding, full of good ideas and knows exactly how to handle all the parties on a case.' He offers particular expertise in disputes involving the energy sector...."* (2013) and *"Interviewees consider Michael Lennon of Mayer Brown LLP to be 'a great adviser and strategist,' with a particular focus on oil and gas matters."* (2014)



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Soledad O'Donnell is a senior associate in the Litigation & Dispute Resolution group, where she focuses primarily on International Arbitration disputes in Latin America, and is a member of the firm's International Arbitration Coordinating Committee. Prior to joining Mayer Brown in 2012, Soledad served as a Law Clerk for the Honorable Richard C. Tallman, United States Court of Appeals for the Ninth Circuit, and worked for several years as a Litigation associate for a Chicago-based international law firm. Prior to law school, Soledad was a paralegal for the Antitrust Division of the United States Department of Justice. Soledad is a Center for Conflict Resolution Certified Mediator and is a native Spanish speaker.

Soledad received her JD from Northwestern University School of Law and her BA in political science, magna cum laude, from the University of Notre Dame. Soledad is admitted to practice in the state of Illinois.

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