Parallel Justice

How the investment protection system undermines judicial independence in Latin America.

PSI INTERNACIONAL DE SERVICIOS PÚBLICOS

tni transnationalinstitute

Published by Public Services International (PSI) and the Transnational Institute (TNI)

transnationalinstitute

INTERNACIONAL DE
SERVICIOS PÚBLICOS

São Paulo - Amsterdam, March 2021

AUTHORS • Cecilia OLIVET and Luciana GHIOTTO

DESIGN • Mauricio TARDUCCI

ACKNOWLEDGEMENTS • We would like to thank Juan Hernández Zubizarreta, Gabriel Casnati, Jocelio Drummond, Adoración Guaman and Magdalena Bas for their valuable comments on the text, and Bettina Müller for support with the research.

We are also grateful to Friedrich-Ebert-Stiftung (FES) for the financial support provided for the publication of this report.

FRIEDRICH
EBERT
STIFTUNG

Contents

Executive Summary

One of the main arguments used to justify the creation of an investment arbitration system was that domestic courts are biased and inadequate for settling disputes between investors and states. The response to this alleged problem was to create a parallel "justice" system set up by means of a web of 300 free trade agreements and around 2,500 investment protection treaties.

These international agreements include the Investor-State Dispute Settlement mechanism (ISDS), which gives foreign investors the right to bring claims against governments before international arbitration tribunals, without needing to exhaust domestic legal remedies first.

This report presents two central arguments:

1 **International arbitration tribunals are much less impartial and independent than the court system**. Indeed, the very nature of the arbitration system makes it intrinsically biased in favour of foreign investors. The report presents evidence that:

- In contrast to judges, arbitrators do not have to comply with institutional guarantees of impartiality and independence.
- In investment arbitration there is no right to appeal, thus eliminating one of the essential checks and balances.
- The cost of arbitration in an investor-state dispute is much higher than a lawsuit in the national courts.
- The investment protection regime does not provide equal access to justice and discriminates between local and foreign investors.

2 **Investment arbitration undermines the judiciary**. Even in the best-case scenario, the investor-state dispute settlement system sidelines the domestic courts, while at its worst it undermines the decisions taken by a country's own judges. We present five scenarios and examples to illustrate this situation in Latin America:

1. Foreign investors filing complaints against states due to decisions taken by their domestic courts, as in the cases of Eco Oro versus Colombia, Infinito Gold versus Costa Rica and Kappes versus Guatemala.
2. International arbitration tribunals ordering governments to overturn the rulings of domestic courts, violating the principle of the separation of powers.
3. Foreign investors bypassing domestic courts.
4. Foreign investors using arbitration tribunals to evade liability for human rights violations and infringement of environmental and labour laws.
5. Foreign investors found guilty of crimes seeking to escape justice by making use of the investment protection regime.

To address this situation, the following **recommendations** are offered:

- Acknowledge that the domestic courts, despite their current shortcomings, are the most suitable forum for settling disputes between foreign investors and states.
- Governments should not sign new investment protection treaties that include the ISDS mechanism and should abandon existing treaties that include ISDS.
- Move forward with comprehensive audits of investment protection treaties.

Imagine that a foreign company arrives in a country promising development, and instead discharges 64 billion litres of toxic water and 650,000 barrels of crude oil into the environment,[1] causing a disaster of such magnitude that it has been compared with the Chernobyl catastrophe.[2] A group of 30,000 people affected by the pollution, including some who have fallen ill with cancer,[3] bring a claim against the company for the damage caused. At the end of a lawsuit that drags on for 20 years, the country's courts, including the top-level Constitutional Court, order the company to pay compensation to the people affected. The community seems to have won.

Then the company, seeking to evade liability, files a claim against the country arguing that it was denied justice, and demands millions of dollars in compensation. But this claim is not brought in the country's courts but before three international private arbitrators who do not meet even the minimum standards of impartiality and independence. These three lawyers, who have a pro-investor bias anyway [4], rule in favour of the company and order the state to intervene with the judiciary and prevent the sentence in favour of the affected communities from being enforced. As a result, almost ten years after it was found guilty, the company is still refusing to be held accountable for its crimes against the environment. Meanwhile, the government's executive branch, following the arbitrators' instructions, intervenes in an attempt to prevent the affected communities from receiving the compensation they deserve.

This is not an imaginary scenario. It is exactly what happened in Ecuador with the oil company Chevron and its operations in the Amazon region. The investment protection treaty signed between Ecuador and the United States made it possible for the company to access a parallel justice system known as ISDS (which stands for 'Investor-State Dispute Settlement') – a system exclusively for corporations and rich people. By using this mechanism, companies can file complaints against countries when they feel that decisions taken by governments or sentences passed by the domestic courts – including when the explicit objective is to protect people or the environment – are affecting their profits. These cases bypass the country's courts and are brought before an international tribunal of three lawyers specializing in investment disputes, who decide what is more important: private profit or the public interest.

Investment arbitration: a parallel justice system[5]

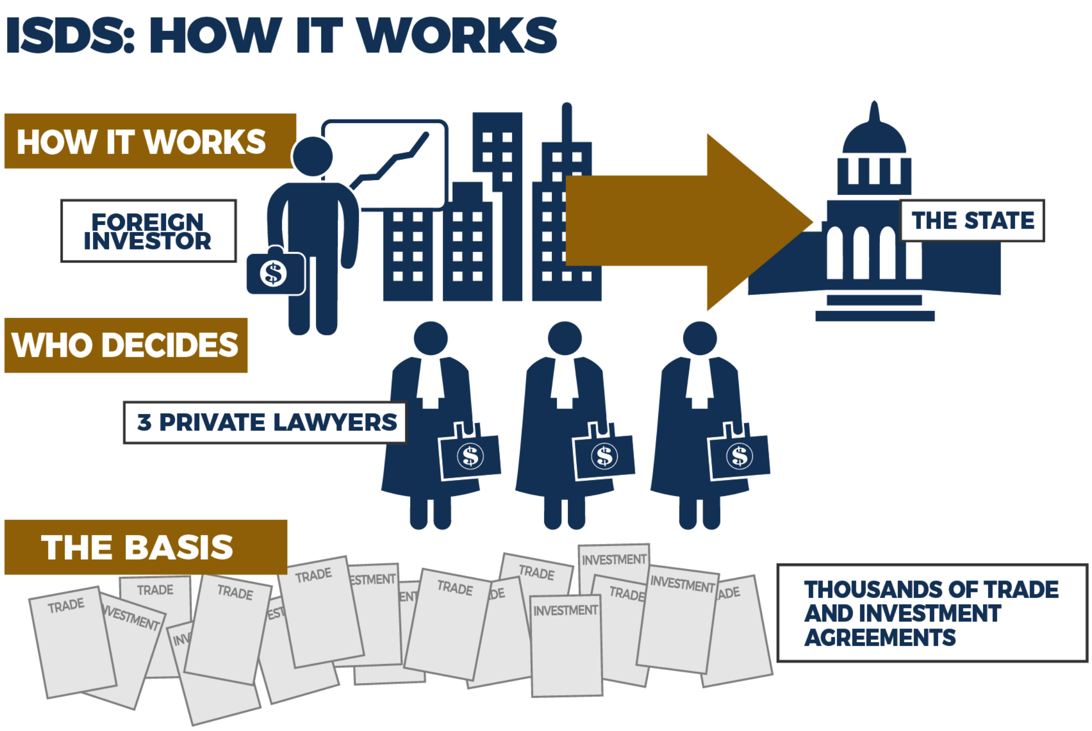
More than 1,000 international arbitration tribunals[6] issuing decisions on investors' complaints against states have cemented the privatization of justice.

A web of 300 free trade agreements and around 2,500 investment protection treaties[7] include the **Investor-State Dispute Settlement (ISDS) mechanism, empowering foreign investors to bring claims against governments before international arbitration tribunals**. Corporations – mainly large transnationals – can file complaints when they believe that a state's laws and regulations or a decision by its courts infringe their rights as investors. These tribunals, notable for the effectiveness with which their awards are enforced, play an essential role in providing foreign investment with full legal security against recipient states.

It is important to bear in mind that investment protection treaties tend to give **investors greater substantive rights than those available in the national laws** of the countries signing these treaties.[8]

The web of investment protection treaties that was consolidated in the 1990s is **part of an iron chain of corporate rights (the legal architecture of impunity) that has contributed to an unstoppable advance in the rights of transnational corporations**, while at the same time social and human rights were constantly being dismantled through deregulation[9]. The result is an unprecedentedly asymmetric justice system.

This parallel "justice" system is **a one-way street: only foreign investors can initiate claims**, while workers, affected communities, national companies and even governments themselves are unable to take transnational corporations that fail to respect human rights or labour and environmental laws to arbitration.



Investment arbitration was designed to replace domestic courts that were considered biased and inadequate

"The problem with most state courts is that they are not – or at least they are not perceived to be – sufficiently neutral in resolving disputes between foreign investors and host states"
Investment dispute arbitrator Charles Brower[10]

One of the main arguments used to justify the creation of an investment protection system was the need to establish a neutral forum for the settlement of disputes as an alternative to domestic courts, as these were considered to be "inadequate", inefficient and biased against foreign investors.[11]

The arbitrators who rule on investment disputes have stoked this line of argument, which conveniently keeps them in the arbitration business. The arbitrator William Park, for example, is of the opinion that investment arbitration provides "a forum that is more neutral than host country courts, both politically and procedurally." He also argues that "the relative impartiality of international tribunals bolsters investor confidence".[12]

Even arbitrators accused of conflicts of interest tend to argue that domestic courts are not neutral, whereas international tribunals are. One example is the arbitrator Gabrielle Kaufmann-Kohler, whose lack of impartiality has been evident in numerous cases.[13] She maintains that the investor-state dispute settlement mechanism is "an instrument of good governance."[14]

Arbitrators can award companies limitless sums in compensation that must be paid by taxpayers. Investors can seek compensation not only for existing investments, but even for losses of potential future profits.. Estimates of expected future profits can stretch as far as 20 years ahead. Companies only have to convince the arbitration tribunal that legislation such as an environment law, safety regulations, or even an increase in the minimum wage infringe the ample rights that these treaties guarantee investors.

Damages awarded in the Investor-State Dispute Settlement system are "highway robbery" .
George Kahale III, international arbitration lawyer[15]

Investor-state disputes can be adjudicated in any arbitration institution that deals with them. According to figures from UNCTAD, more than 60% of disputes have been settled or are in the process of being settled by the International Centre for Settlement of Investment Disputes (ICSID) – a World Bank agency based in Washington.[16] In second place is the Permanent Court of Arbitration (PCA) based in the Netherlands.

Latin America and the Caribbean (LAC) is the region with the second highest number of cases brought under investment protection treaties in the world. Transnational corporations have used the investor-state dispute settlement mechanism to file 282 complaints against the region's governments, affecting government autonomy and the ability to develop public policies. Investors won 69% of the cases against LAC states, either by receiving an arbitral award in their favour or because they reached an agreement with the state, which usually implies compensation, in monetary or some other form. To date, countries in Latin America and the Caribbean have been ordered (or agreed) to pay US$31.7 billion to foreign investors.[17]

Comparison between investment arbitration and national court systems

ISDS "threatens to dilute constitutional protections, weaken the judicial branch, and outsource our domestic legal system to a system of private arbitration that is isolated from essential checks and balances."

220 law and economics professors in a letter addressed to the United States Congress[18]

As mentioned above, investment arbitration emerged from the argument that domestic courts are not impartial enough to settle disputes between investors and states. However, aside from the possible shortcomings of national court systems, a close analysis of the nature of investment arbitration and how it operates makes it clear that, as far as neutrality is concerned, the private arbitrators who decide on cases are in no better position than judges in domestic courts, as they work for profit and have a strong incentive to rule in favour of corporations.

There are certain key characteristics of the judiciary that determine the level of judicial independence, including "the extent of budgetary autonomy; the level of transparency and the extent of use of meritocratic criteria in the process for nominating and appointing judges; the stability of the tenure of judges; and the reach of judicial review powers." [19] The investor-state dispute settlement system does not comply with any of these requirements, and this is why its independence has been regularly questioned, especially in the last five years.[20]

"The usual safeguards of institutional independence (autonomous budget, internal organization, transparent recruitment processes, objective case assignment, a secure tenure and fixed terms) do not exist in ISDS."

United Nations Working Group on Investor-State Dispute Settlement Reform [21]

In contrast to judges, arbitrators do not have to comply with institutional guarantees of impartiality and independence[22]

Even though the renowned arbitrator Jan Paulsson insists that "the virtues of the good arbitrator are similar to those of a good judge",[23] the reality is that the independence and neutrality of the arbitrators is highly questioned.[24]

Arbitrators do not have a secure job. Instead, they are **appointed on an ad-hoc, case-by-case basis by the parties involved in the dispute. Arbitrators work for profit rather than a fixed salary**. The states and investors involved in the case pay their fees, depending on the number of hours worked. Even though the virtues of an arbitrator and a judge may be the same, "judges are institutionally insulated from the parties, and are assigned cases on a more or less random basis."[25]

"private individuals of questionable qualification, are being called upon to settle public disputes."

professors describing investment dispute arbitrators [26]

Given that only investors can initiate cases, **arbitrators have a financial incentive to interpret the clauses in investment protection treaties in a manner that favours the investor**. Academic studies have demonstrated that international arbitrators tend to arrive at excessively broad interpretations of the text of the treaties, giving priority to protecting property and the economic interests of transnational corporations rather than a state's right to regulate.[27] Giving preferential treatment to the only party that can initiate a case ensures the continuity of the system.

Arbitrators also have a financial incentive to accept that they have jurisdiction to settle a case, and thus rack up their fees. To put this another way: if arbitrators decide that they are not competent to settle the dispute, their fees will be dramatically reduced. If, on the other hand, they decide that they do have jurisdiction and see the dispute through to the end, their fees will be as much as they can possibly charge. This does not happen in a court system, where the nature of the decision (rejecting or accepting jurisdiction, rejecting or accepting the merit of a case, determining the amount of damages, etc.) has no impact on how much judges are paid, as they are on a fixed salary. This is one of the reasons – though not the only one – that explain why most arbitration tribunals accept that they have jurisdiction to settle the case. Arbitrators declined jurisdiction in only 25% of the total number of cases where the tribunal reached a final decision (114 out of 458).[28]

Arbitrators **are not prohibited from holding other paid posts, especially in the field of law. In fact, arbitrators often act as the representative of one of the parties in other arbitration cases at the same time**. When they combine their role as arbitrators with other positions, it gives rise to serious conflicts of interest. For example, if an arbitrator has a relationship with one of the parties in a dispute, it creates a conflict of party representation; or if the arbitrator has issued opinions on the subject of the dispute, it creates a conflict of matter. Several arbitrators (Thomas Buergenthal,[29] Brigitte Stern,[30] Andreas Bucher[31] and others[32]), as well as many other individuals and institutions, have expressed their concern about the fact that arbitrators frequently serve as advocates for one of the parties.

Even when conflicts of interest clearly exist, it is extremely difficult to get arbitrators disqualified. Lawyers specializing in investment arbitration[33] and academics[34] have published studies describing the difficulty of disqualifying arbitrators. But the most telling evidence comes from the World Bank's arbitration centre (ICSID), whose own statistics confirm that, of the 85 petitions for arbitrator disqualification registered by the centre, the request was accepted in only five cases[35]. Two reasons help to explain this situation. First, **the grounds for disqualification are extremely limited, especially in ICSID**. In the ICSID rules (Article 57), the existence of a justified doubt about the arbitrator's impartiality is not enough: disqualification is only allowed if there is *manifest lack* of the qualities of independence and impartiality. The fact that the rules mention a "manifest lack" places severe limits on the possibility of disqualification. The second – and main – obstacle preventing more instances of disqualification is the fact that those who decide on the matter are the other two arbitrators on the panel who have not been challenged. This means that it is the arbitrators themselves (who usually come from the same small group of arbitrators specializing in investor-state disputes) who decide whether their colleague is impartial or not. Asking arbitrators to decide on the impartiality of their peers creates a conflict of interest in itself, given that a) they are likely to have faced a similar challenge themselves, or are aware that they might in future, and b) today's judge may be tomorrow's accused.

There are no appeals in investment arbitration

In international arbitration cases, **the arbitrators have the last word**. Their decisions are final and cannot be challenged. In the investor-state arbitration system there is no mechanism for awards to be reviewed, and no way to appeal against the ruling.

The creation of a mechanism to appeal against the decisions of investment dispute arbitrators is one of the key proposals being discussed in the United Nations with regard to the reform of the Investor-State Dispute Settlement system.[36]

The cost of arbitration in an investor-state dispute is much higher than a lawsuit in the national courts

> ***"For the claimant-investor incurring these costs may be perfectly rational, particularly if the investment is a large one and the investor perceives that no other effective remedy is available. For the respondent State, however, these costs will normally be higher than if the dispute had been processed through its national courts only."***
> ***Academic Forum on ISDS***[37]

In an international arbitration case, the cost of the arbitrators' fees plus the expenses of the arbitration institution hearing the case is estimated to total an average of US$933,000 per case.[38] Added to this are the defence costs (lawyers and hiring of experts), which amount to an average of US$4.8 million for states and US$6 million for investors, although they may be much higher.[39]

The fees charged by the arbitrators are unquestionably a great deal higher than the salaries of even the best paid judges in Latin America. For example, the chairman of the arbitral tribunal in the Philip Morris versus Uruguay case charged US$482,887.[40] The case lasted for six years (2010-2016). A Supreme Court judge in Uruguay gets paid an estimated US$81,200 per year. This means that what the Supreme Court judge earns in six years is more or less the same as the amount paid to tribunal chairman Piero Bernardini. The difference is that for judges this is their only salary. Bernardini, in contrast, was an arbitrator in six other cases between 2010 and 2016, and charged for each of them separately. In addition to his fees for the Philip Morris case, Bernardini was paid US$407,830 in the Fraport vs The Philippines case,[41] US$240,000 in the OIEG vs Venezuela case,[42] and US$183,000 in the Gambrinus vs Venezuela case.[43]

> ***"... the high costs of ISDS paid with public funds were difficult to justify for developing States, whose financial resources were scarce. [...] such costs and awards made against those States could compete with urgent developmental needs."***
> ***Working Group III (Investor-State Dispute Settlement Reform) of the United Nations Commission on International Trade Law*** [44]

The excessive costs of this type of arbitration, especially compared with what it would cost to have similar cases heard in domestic courts, is one of the criticisms made by governments against the investor-state dispute settlement system.[45] A United Nations working group is currently discussing how to address this situation, but an analysis of the reform proposals on the table makes it clear that none of the initiatives put forward will solve the underlying problem.[46]

The investment protection regime does not provide equal access to justice and discriminates between local and foreign investors

> ***"Why should a foreign national be able to come in and not only have the rights of Americans in the American court system but have more rights than Americans have in the American court system? It strikes me as something that at least we ought to be skeptical of and analyze. So a U.S. person goes into a court system, goes through the system and they're stuck with what they get. If a foreign national can do that and then at the end of the day say 'I want three guys in London to say we're going to overrule the entire US system'."***
> ***United States Trade Representative Robert Lighthizer*** [47]

The investment arbitration system discriminates against local investors.[48] **Only foreign investors have the power to file complaints against states with international arbitration tribunals**. This marks a key difference from national court systems. One principle of the rule of law is equality before the law. This principle does not apply in the investment protection regime.

When the state adopts a measure that affects national and foreign investors equally, the local investors only have access to the domestic courts, while the foreigners can turn to investment arbitration. For example, when subsidies for renewable energies in Spain were reduced from 2008 onwards, more than 60,000 Spanish families were affected as well as large foreign investors. The small local investors turned to the national justice system. Both the Supreme Court and the Constitutional Court ruled that the subsidy cuts were legal [49] and rejected their requests for compensation.[50] In contrast, the arbitration tribunals hearing the claims brought by the foreign investors have so far ruled in favour of the investors in most of the cases, ordering the state to pay compensation amounting to billions of euros.[51]

> ***"National Treatment provisions usually provide that foreign investors will be treated no less favourably than domestic investors in like circumstances. However, in reality the investment protections available to foreign investors can often exceed those legal protections available to domestic investors, leading to reverse discrimination."***
> ***Remark made in an academic article***[52]

As long ago as 1964, 19 Latin American countries had realised that the investor-state dispute settlement regime would discriminate against national investors and favour foreign ones. Indeed, these countries opposed the creation of the World Bank's International Centre for Settlement of Investment Disputes (ICSID), arguing that "The new system that has been suggested would give the foreign investor, by virtue of the fact that he is a foreigner, the right to sue a sovereign state outside its national territory, dispensing with the courts of law. This provision is contrary to the accepted legal principles of our countries and, de facto, would confer a privilege on the foreign investor, placing the nationals of the country concerned in a position of inferiority."[53]

Five ways in which investment arbitration undermines the judiciary

> *“private investment tribunals wield enormous power – displacing local courts and making decisions about the rules that govern major portions of host country economies and, by extension, their societies.”*
> ***Sheldon Leader, Emeritus Professor of Law specializing in Human Rights*** [54]

1 • Foreign investors can file complaints against states due to decisions by domestic courts

Foreign investors may see any decision by the courts as a violation of their rights as stipulated in the investment protection treaties. There are **innumerable investor claims challenging the rulings of domestic courts. The aim of these claims is to undermine decisions by domestic courts** that seek to safeguard the public interest, and in some cases to get them annulled.

Under the investment protection system, a state can be ordered to pay millions of dollars to foreign investors due to judges’ rulings and the decisions of domestic courts (including supreme courts and constitutional courts).

> *“It is clear that an investment tribunal may examine the legality of decisions of domestic courts and that it may hold the forum State responsible for any violations of international standards committed by its courts.”*
> ***Christian Schreuer, arbitrator in investor-state dispute cases*** [55]

In Latin America, foreign investors have filed claims against the governments of Colombia, Guatemala, Costa Rica and others, after the courts in these countries banned or imposed restrictions on mining projects in the public interest (see box). But Latin America is not alone. The governments of Romania[56] and Croatia[57], for example, have experienced similar situations.

Examples of companies going to international arbitration tribunals to challenge the decisions of national courts

ECO ORO V. COLOMBIA

In February 2016, after a series of massive protests, Colombia's Constitutional Court put the final nail in the coffin of a huge gold mining project by Canadian company Eco Oro: the court decided that no extractive activities could take place in the high-mountain ecosystems known as páramos, including the Santurbán páramo where Eco Oro had its project. Less than a month later, the company filed a US$764 million claim against the government with an investment arbitration tribunal.[58] The case is ongoing.

KAPPES V. GUATEMALA

A gold mining project that had been the subject of intense protests. The Supreme Court ruled that the project could not go ahead because the indigenous people affected had not been consulted beforehand. This decision was later upheld by the Constitutional Court. But in 2018 the US corporation Kappes launched an international arbitration case against the Guatemalan government, claiming US$300 million in compensation. Kappes argued that the government had violated the investment protection treaty between the United States and Guatemala when it did not shoulder the responsibility of organizing the consultation with the community or protecting the company against popular protests.[59] A decision on the claim is pending.

INFINITO GOLD V. COSTA RICA

In 2011, the Supreme Court of Justice in Costa Rica ruled that the Canadian company Infinito's mining concession was illegal, following a 2002 decision to halt open cast gold mining projects. This ruling led to the project being cancelled. In 2014, the company claimed US$321 million from Costa Rica,[60] arguing that the decision of the Costa Rican court is tantamount to an expropriation of investment under the bilateral investment protection treaty between Costa Rica and Canada.[61] The case is ongoing.

In all these cases, the decisions taken by the domestic courts in response to petitions by the country's people benefited the local population and the environment, but negatively affected the profits of foreign investors. Making use of investment protection treaties, the corporations concerned were able to ask three lawyers, contracted by the hour, to review the decisions taken by a sovereign nation's judges.

> *"The arbitrator, furthermore, is 'omnipotent.' 'She becomes someone with greater authority than the most excellent trial judge, or the most eminent intermediate court of appeal. Her award is as final as a judgment of the supreme court of the nation'."*
>
> ***Jan Paulsson, renowned investment dispute arbitrator***[62]

Arbitrators do indeed feel omnipotent.[63] Without being challenged in any way, arbitration tribunals accept jurisdiction over cases in which a lawsuit is ongoing or when a national court has already taken a final decision. The arbitrators arrive at their own decision based solely on the text of bilateral investment treaties (BITs), ignoring any court cases underway and the rulings of national courts.

2 • Arbitration tribunals can order the annulment of rulings by domestic courts

In 2014, John Roberts, Chief Justice of the Supreme Court of the United States, warned that ISDS arbitration panels have the alarming power to review a nation's laws and "effectively annul the authoritative acts of its legislature, executive, and judiciary".[64] Arbitration tribunals do indeed have the capacity to ignore national court rulings and even ask for them to be changed.

In the Chevron vs Ecuador case,[65] for example, the three individuals chosen as private arbitrators ordered the Ecuadorian government to overturn the historic ruling by a national court issued after 20 years of litigation in the case known as "Lago Agrio" against the oil company Chevron.[66] The Provincial Court of Sucumbíos sentenced Chevron to pay US$9.5 billion to the communities affected by oil spills in Ecuador's Amazon region during the company's operations there (1964-1992). This sentence was upheld by all the relevant higher courts, finally reaching the Constitutional Court in 2018.[67] However, the arbitrators demanded that the state should intervene and block the enforcement of the Lago Agrio sentence, both in Ecuador and abroad, by any means necessary.[68] This case clearly demonstrates how an arbitral tribunal can overrule the jurisdiction of a national court system. By demanding the suspension of the Lago Agrio case, the arbitral tribunal usurped the prerogatives of Ecuador's judiciary, as set out in the country's Constitution. The tribunal invested itself with the authority to order the state to violate its own constitutional structure in order to impede the enforcement of a sentence contrary to the interests of the claimant company, thus infringing the principles of the rule of law. When international arbitrators, as in the Chevron case, instruct the executive branch of government to disobey and overturn decisions taken by the judiciary, they are automatically undermining the principle of the separation of powers – the cornerstone of the rule of law.

It is ironic that some defend investment arbitration by arguing that it promotes the rule of law, when in reality the arbitrators are able to issue awards that cause the breaking of the rule of law.

3 • Foreign investors are able to bypass domestic courts

By signing investment protection treaties, states cede their jurisdiction and foreign companies and investors become the subjects of international law. This gives them the power to bring claims against states at the international level – a prerogative previously held only by states. For Latin American countries, the extension of jurisdiction implies abandoning the Calvo Doctrine, which has been upheld in the region since the nineteenth century.[69] This doctrine holds that foreigners are obliged to abide by national laws and the decisions of national judges, implying that local remedies must be exhausted before a case can be taken to the international level. This principle is part of customary international law as defined by the International Court of Justice.[70]

Most BITs and chapters on investment in trade agreements do not require local legal remedies to be exhausted before the foreign investor can resort to an arbitral tribunal. The United Nations has mapped 2,576 investment protection treaties worldwide and found that only 3.4% of them require investors to exhaust local remedies before filing complaints in international tribunals.[71]

This contrasts with the human rights system, where the general rule is that local legal remedies must be exhausted first.[72] For example, in contrast to the investment protection regime, "the inter-American human rights protection system is subsidiary in nature, meaning that it only starts to operate after all local jurisdictional resources have been used without having obtained a remedy for the alleged violation".[73]

The requirement to exhaust local legal remedies first appears in very few treaties, especially in the so-called "new generation" ones. In some of the treaties negotiated most recently, certain clauses have started to be modified due to the strong criticism levelled at the investment protection system as a whole. For example, the model BIT adopted by the South African Development Community (SADC) in 2012 includes "elaborate language requiring exhaustion of local administrative remedies and pursuit of local remedies for a reasonable period of time."[74]In reality, the vast majority of treaties are silent on the applicability of the exhaustion of local remedies rule.[75] In such cases, arbitration tribunals have acted on the assumption that treaties that do not explicitly specify this obligation are actually suggesting that states have renounced the applicability of this rule. This overturns the customary international assumption that this principle applies except in cases where it is expressly renounced.

> ***"equality between foreign investors and local citizens has been 'involuntarily' accepted by international arbitration tribunals, which have in any case destroyed the Argentinian internationalist's theoretical and legal arguments."***
>
> ***Academic telling the story of the Calvo Doctrine.***[76]

Consequently, states who wish to ensure that the exhaustion of local legal remedies rule is upheld must indicate this expressly and unequivocally in treaties, for example by declaring that the investor "must" exhaust local remedies before initiating an international arbitration case.

4 • Foreign investors can evade liability for human rights violations and infringement of environmental and labour laws thanks to arbitration tribunals

Numerous foreign investors have been found guilty by national or constitutional courts of harming the environment or violating human rights or environmental and labour laws.[77] Nevertheless, foreign investors have sought to evade liability for this by resorting to international arbitration.

One notorious case of an investor attempting to evade liability for environmental damage and human rights violations is the US mining company Doe Run in Peru.[78] Several Peruvian courts, inter-American courts, and even a US court were involved in finding this company guilty of harming the environment.[79] Doe Run, however, filed a complaint with the World Bank's arbitration centre, seeking to evade liability as well as asking for US$800 million in compensation. [80] The arbitrators dismissed the case on a technicality,[81] but they left the door open for the company to file another claim. The government of Peru had to pay the US$8.3 million cost of defending itself,[82] but that is not all. Since 2018, it has been battling a new claim filed by Renco, which continues to present itself as the victim of a great injustice despite being found guilty of pollution on a massive scale.[83]

5 • Foreign investors found guilty of crimes can avoid punishment thanks to the investment protection regime

It is not unusual to hear stories of foreign companies – or their executives – being accused in a domestic court of illegal activities, including money laundering, embezzlement, share price manipulation, bribery, corruption, war profiteering and fraud. What hardly anyone knows is that many of these companies and individuals accused – or even found guilty – of crimes make use of the investment protection system to try to evade punishment.

In a 2016 report, a journalist who had investigated the subject for a year found at least 35 cases of companies or executives being prosecuted for criminal activities who turned to investment arbitration to protect themselves.[84] The report emphasizes that some of the accused successfully managed to shake off criminal investigations. For example, the Arab businessman Hussain Sajwani dropped the claim against Egypt he had brought to ICSID (the World Bank's arbitration centre) in exchange for the Egyptian justice system suspending his five-year prison sentence for corruption.[85]

Latin America is no stranger to claims brought by investors accused of corruption. For example, the government of Honduras is fighting a claim filed with ICSID[86] by a Panama-registered company owned by the Rosenthals, one of the wealthiest and most influential families in Honduras.[87] Several members of the family involved in the claimant company were convicted of laundering money from drug trafficking by a court in the United States.[88]

In another case, a Dutch investor filed a complaint against Panama[89] after the government had ordered his brokerage firm Panama Wall Street to be shut down and its assets liquidated after finding widespread financial irregularities.[90]

In investment arbitration, the fact that there is a situation of corruption involving the claimant is not considered grounds for dismissing the claim.

Why should national courts be the ones to decide on disputes between foreign investors and states?

"There is no compelling reason why review of an investor's claims against a state cannot be undertaken by the institutions of the state in question."
Government of South Africa [91]

Foreign investors always have the possibility of turning to the justice system in the country where they are operating, just as local investors do. Despite the loud voices portraying national courts as unsuitable for settling investor-state disputes, in reality most domestic court systems are perfectly capable of dealing with any complaints by foreign investors transparently and impartially, in the same way that they settle disputes with local investors.

To defend the suitability of the domestic courts for settling disputes between foreign investors and the state is not to ignore the fact that justice administration in Latin America has failings that need to be addressed. It is also true that the situation of the judiciary is not the same in every country in the region, and in many cases the judiciary answers to powerful national elites. Nevertheless, as experts on the subject have noted, "the weaknesses of some courts are not a justification for dismissing all courts."[92] Indeed, the evidence shows that the fact that disputes between investors and states are not settled in the local justice system erodes the quality of the domestic courts, by removing an incentive for improving their independence and effectiveness.[93]

One immediate advantage of having disputes settled in domestic courts is that, in contrast to arbitration tribunals, they would take into account national laws as well as other relevant international treaties on human rights, labour or environmental issues when deciding on the case. Investment arbitration tribunals, on the other hand, tend only to consider the wording of the relevant investment protection treaty, and thus give priority to protecting foreign investment in cases where it collides with protecting society's other rights, such as the right to health or a healthy environment. Bruno Simma, judge at the International Court of Justice, has observed that giving due consideration to economic and social rights is the exception, not the rule, in investor-state dispute arbitration.[94]

"The treaties do not replace weak courts with strong ones. Instead, they replace them with arbitrators who are not independent and impartial, fair, and open in the manner of any court worthy of the name."
Academics specializing in investment arbitration [95]

Two examples of countries where foreign investors are only able to turn to the domestic courts to resolve any conflict are Brazil and South Africa. In both cases, the fact that foreign investors do not have access to a parallel justice system like investment arbitration has left the flow of foreign investment into these countries entirely unaffected.

In the case of South Africa, after completing the cancellation of all its investment protection treaties, since 2015 the country has implemented the rule that investors' disputes with the state must be settled in the national justice system.[96] Despite this change, the evidence shows that there has been no reduction in flows of investment into the country – on the contrary, they have increased.[97] By making these changes, South Africa recovered its power to settle any legal conflicts that arise with foreign investors in its own courts – a power that had previously been ceded to international institutions through the extension of jurisdiction – with no adverse consequences.

"The question is whether ISDS mechanisms are desirable or necessary in the first place. Countries must not rush into assuming that ISDS policies must be a part of their investment agreements."
Government of South Africa [98]

Brazil has always remained outside the investor-state dispute settlement regime. Even though foreign investors can only resort to the domestic courts, they are continuing to invest in the Brazilian economy. In fact, Brazil is the main destination for foreign investment in Latin America.[99]

Over the last decade, growing criticism of the investor-state dispute settlement regime has led states to start to look for ways to reform the system and take back their sovereignty over the jurisdiction ceded in the past to the benefit of corporations.

In Latin America, states have expressed their resistance in different ways. Bolivia, Ecuador and Venezuela, for example, began by withdrawing from ICSID and renouncing the Washington Convention. These countries accompanied that decision by cancelling some or all of their BITs. Although investors already installed in the country can continue to bring claims under the treaty while it remains in force, new investors coming into the country are only able to take disputes to the domestic courts.

What can we expect from the discussions about reforming the ISDS system in the United Nations?

In response to international criticisms of ISDS, the United Nations Commission on International Trade Law (UNCITRAL) launched a working group[100] to look at the problems involved in the ISDS system, consider whether reform was desirable and, if so, what the reform should consist of.

These discussions by the working group could have been an opportunity to reform this harmful system, but so far the opinion of those who want to safeguard the investor-state dispute settlement regime have prevailed. The issues being discussed have been narrowed down to such an extent that there is no room for contemplating far-reaching reforms.[101] As a result, the reforms under discussion at UNCITRAL seek to maintain the status quo or propose timid and/or irrelevant measures that do nothing to rectify the fundamental deficiencies in ISDS.

For example, the European Union is trying to convince UNCITRAL member states to adopt its proposal for setting up a Multilateral Investment Court (MIC). If the proposal for the MIC model is successful, it will strengthen the ISDS system and make genuine reform more difficult in the future.[102]

Conclusions

Even though the investment protection regime is clearly a threat to judicial independence, it is rare for members of the judiciary to criticize this parallel justice system.[103]

There are at least **5 key reasons** why the judicial branch in Latin America would be justified in challenging the existence of the international arbitration regime:

1

Investment arbitration was designed to replace domestic courts that were considered biased and inadequate for settling disputes between investors and states. However, the arbitration tribunals that replaced these courts do not comply with the basic institutional guarantees of judicial impartiality and independence. Indeed, there is solid evidence and a growing consensus that arbitrators in investment disputes are biased in favour of the investor.

2

The decisions of domestic courts, including supreme courts and constitutional courts, can be undermined and even annulled when foreign investors bring claims against states before international arbitration tribunals. Foreign investors take refuge in the investment protection regime to attack the decisions taken by the judiciary. International arbitrators have even ordered governments to violate the principle of the separation of powers and overturn court rulings.

3

The investment protection system has been used as a shield by foreign investors accused of corruption, criminal acts, human rights violations and infringement of labour and environmental laws. Arbitration tribunals have helped investors avoid being held accountable by a country's own justice system.

4

The domestic courts are the most suitable forum for settling potential conflicts between foreign investors and states. As the experience of South Africa, Brazil and other countries shows, even when investors can only resort to the domestic courts, they will not stop investing.

5

The proposals for reforming the investment protection system currently being negotiated in the United Nations are merely cosmetic and will not solve the system's failings.

The best way to strengthen the judicial system in Latin American countries, rather than undermining it, would be to:

- **Stop negotiating, signing and/or ratifying** any new agreement that includes the ISDS mechanism
- **Terminate existing agreements** that include the ISDS mechanism
- Conduct **comprehensive, audit-style reviews** of existing agreements that include the ISDS mechanism to determine whether they achieve their stated objectives.

References

1 • Unión de Afectados y Afectadas por las Operaciones Petroleras de Texaco (UDAPT) (2018), **http://www.udapt.org/la-contaminacion-de-chevron-texaco/**

2 • Alec Baldwin e Paul Paz y Miño (2020) Chevron is refusing to pay for the Amazon Chernobyl, The Guardian, 17 September, **https://www.theguardian.com/commentisfree/2020/sep/17/chevron-amazon-oil-toxic-waste-dump-ecuador-boycott**

3 • San Sebastián et al (2020) Exposures and cancer incidence near oil fields in the Amazon basin of Ecuador, Occupational and Environmental Medicine Journal, **https://oem.bmj.com/content/58/8/517**

4 • Pia Eberhardt and Cecilia Olivet (2012) Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom, Transnational institute and Corporate Europe Observatory **https://www.tni.org/en/briefing/profiting-injustice**

5 • For a more detailed explanation of how the investor-state dispute settlement system works, including the chronology of an investment arbitration process, see **https://10isdsstories.org/es/intro-isds/**

6 • UNCTAD (2020) Investment Policy Hub - Investment Dispute Settlement Navigator, **https://investmentpolicy.unctad.org/investment-dispute-settlement**

7 • UNCTAD (2020) Investment Policy Hub - International Investment Agreements Navigator, **https://investmentpolicy.unctad.org/international-investment-agreements**

8 • L Johnson y O Volkov (2013) Investor-state contracts, host-state "commitments" and the myth of stability in international law. Am Rev Int Arbitr 24(3):361–415 and Kleinheisterkamp J (2012) Investment protection and EU law: the intra- and extra-EU dimension of the Energy Charter Treaty. J Int Econ Law 15(1):85–109.

9 • Juan Hernández Zubizarreta, Erika González y Pedro Ramiro (2019) Revista de Economía Crítica, nº28, segundo semestre, **http://www.revistaeconomiacritica.org/sites/default/files/JuanHernandez-ErikaGonzalez-PedroRamiro_Arquitectura-legal-de-la-impunidad.pdf**

10 • C. Brower, y S. Schill (2009) 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?', Chicago Journal of International Law, p. 479. **https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1489&context=cjil**

11 • Gabrielle Kauffman-Kohler and Michele Potestá (2020) Investor-State Dispute Settlement and National Courts, European Yearbook of International Economic Law, **https://link.springer.com/book/10.1007%2F978-3-030-44164-7**, p. 20.

12 • W. Park and G. Alvarez (2003) The New Face of Investment Arbitration: NAFTA Chapter 11, The Yale Journal of International Law, vol. 28, p. 370. **https://digitalcommons.law.yale.edu/yjil/vol28/iss2/9/**

13 • In 2004, Gabrielle Kaufmann-Köhler Kohler was appointed as an arbitrator by the water company Vivendi and the gas and electricity supplier EDF in two different cases against Argentina. Two years later, in 2006, Kaufmann-Kohler was elected to the board of the Swiss bank UBS, which happened to be Vivendi's largest individual shareholder and also holds shares in EDF. Kauffman-Kohler stated that she had no knowledge of these connections. Argentina questioned her impartiality in the case against it. Despite the evidence, the other two arbitrators in the case refused Argentina's request for her to be disqualified. For details see: Suez, Sociedad General de Aguas de Barcelona and Vivendi Universal vs. Argentina (2008) decision on a second proposal for the disqualification of a member of the arbitral tribunal, **https://www.italaw.com/sites/default/files/case-documents/ita0812.pdf**

14 • Gabrielle Kaufmann-Kohler (2004) "Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences" in IAI Series on International Arbitration No. 1, Annulment of ICSID Awards 189, Gaillard and Banifatemi (eds.), p. 18. Original Quote: Investment arbitration "While it affords investors proper access to justice, it is at the same time an instrument of good governance."

15 • George Kahale III (2020) Damages in ISDS: just compensation or highway robbery?, Online Seminar organized by the Columbia Center on Sustainable Development (CCSI), 2 de November, **http://ccsi.columbia.edu/files/2020/11/Transcript-DAMAGES-IN-ISDS-Nov-2-2020.pdf**

16 • UNCTAD records 630 investor-state claims filed with ICSID out of a total of 1023 known claims worldwide, **https://investmentpolicy.unctad.org/investment-dispute-settlement**

17 • Transnational Institute (2019) Database of ISDS cases against Latin America and the Caribbean – data current as of December 2019, **https://isds-americalatina.org/**

18 • Tribe, Stiglitz, Sachs et al (2016) 220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals that Include Investor-State Dispute Settlement (ISDS), **https://www.citizen.org/wp-content/uploads/isds-law-economics-professors-letter-sept-2016.pdf**

19 • Inter-American Development Bank (2006) The Politics of Policies: Economic and Social Progress in Latin America: 2006 Report, **https://publications.iadb.org/en/publication/16950/politics-policies-economic-and-social-progress-latin-america-2006-report** p.85

20 • Global letter on ISDS reform at UNCITRAL's 2018 discussions **http://www.world-psi.org/en/letter-more-300-civil-society-organizations-73-countries-urge-fundamental-reform-uncitrals-investor**; More than 220 Law and Economics Professors come out against the Investor-State Dispute Settlement regime in 2017 **https://ciarglobal.com/profesores-estadounidenses-de-economia-y-derecho-en-contra-del-arbitraje-de-inversiones/** ; More than 800,000 people in Europe rejected the ISDS system in 2019, **https://stopisds.org** ; The German Magistrates Association issued a statement in 2016 against the proposal to include ISDS in the European Union's Transatlantic Trade and Investment Partnership (TTIP) with the United States **https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf**

21 • UNCITRAL (2018) Possible reform of investor-State dispute settlement (ISDS), October, **https://undocs.org/en/A/CN.9/WG.III/WP.151**, paragraph 76.

22 • Gus Van Harten (2010) "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law" en Schill (ed), International Investment Law and Comparative Public Law, Oxford University Press.

23 • Quoted in David Schneiderman: "Investment arbitration as constitutional law: constitutional analogies, linkages, and absences", en **https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3299921** p.1

24 • UNCITRAL (2018) Possible reform of investor-State dispute settlement (ISDS), October, **https://undocs.org/en/A/CN.9/WG.III/WP.151 y https://undocs.org/en/A/CN.9/WG.III/WP.152**

25 • Maria Nicole Cleis (2017) "Independence and Impartiality in the ICSID Convention and Arbitration Rules", Nijhoff International Investment Law Series, Brill/Nijhoff, **https://brill.com/view/book/9789004341487/B9789004341487_002.xml** Section 2.2

26 • Nicolette Butler y Surya Subedi (2017) The future of international regulation. Towards a World Investment Organization?, Netherlands International, Law Review, Number 64, pages 43–72, **https://link.springer.com/article/10.1007/s40802-017-0082-5#Sec2**

27 • Van Harten, Gus (2012) Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration, Osgoode Hall Law Journal, **http://ssrn.com/abstract=2149207**

28 • UNCTAD (2020) Investment Policy Hub - Investment Dispute Settlement Navigator, **https://investmentpolicy.unctad.org/investment-dispute-settlement**

29 • Peterson, Luke Eric (2012) Former ICJ Judge reaffirms view that sitting arbitrators should not serve as advocates in investment treaty arbitrations, Investment Arbitration Reporter (IAReporter), 16 February, **https://www.iareporter.com/articles/former-icj-judge-reaffirms-view-that-sitting-arbitrators-should-not-serve-as-advocates-in-investment-treaty-arbitrations/**

30 • Ross, Alison (2010) Brigitte in Brazil, Global Arbitration Review, Volume 5 - Issue 3, 5 July, **https://globalarbitrationreview.com/brigitte-in-brazil**

31 • Kyriaki Karadelis (2009) Should arbitrators refrain from speaking in public?, Global Arbitration Review, 21 December **https://globalarbitrationreview.com/should-arbitrators-refrain-from-speaking-in-public**

32 • Vivendi vs Argentina, Annulment Decision: **http://ita.law.uvic.ca/documents/VivendiSecondAnnulmentDecision.pdf**

33 • Karel Daele (2012) Challenge and Disqualification of Arbitrators in International Arbitration, Kluwer Law International.

34 • Chiara Giorgetti (2018) "Selecting and Removing Arbitrators in International Investment Arbitration". Brill Research Perspectives in International Investment Law and Arbitration. 2. 1-93; Fach Gómez, Katia (2019) "The Duty of Disclosure and Conflicts of Interest in Investment Arbitration Disputes." In Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas, 79–121. Cham: Springer International Publishing. **https://doi.org/10.1007/978-3-319-98128-4_3.**

35 • ICSID (2020) Decisions on Disqualification, **https://icsid.worldbank.org/cases/content/tables-of-decisions/disqualification**

36 • UNCITRAL (2020) Appellate mechanism and enforcement issues, **https://undocs.org/en/A/CN.9/WG.III/WP.202**

37 · Academic Forum on ISDS, Working Group I (2019) Excessive Costs & Insufficient Recoverability of Cost Awards, **https://www.cids.ch/images/Documents/Academic-Forum/1_Costs_-_WG1.pdf** (p4)

38 · Matthew Hodgson y Alistair Campbell (2017) Damages and Costs in Investment Treaty Arbitration Revisited, Allen & Overy, 14 December, **http://www.allenovery.com/SiteCollectionDocuments/14-12-17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf**

39 · Ibid.

40 · Philip Morris versus Uruguay (ICSID Case No. ARB/10/7) **https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf**

41 · Fraport AG Frankfurt Airport Services Worldwide versus The Philippines (ICSID Case No. ARB/11/12) **https://www.italaw.com/sites/default/files/case-documents/italaw4114.pdf**

42 · Annulment proceeding between Bolivarian Republic of Venezuela and OI European Group B.V. (ICSID Case ARB/11/25) **https://www.italaw.com/sites/default/files/case-documents/italaw10151.pdf**

43 · Gambrinus Corporation versus Bolivarian Republic of Venezuela **https://www.italaw.com/sites/default/files/case-documents/italaw9343.pdf**

44 · United Nations Commission on International Trade Law (2017) Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session, **https://undocs.org/en/A/CN.9/930/Rev.1** p7, par 40.

45 · United Nations Commission on International Trade Law (2018) Possible reform of investor-State dispute settlement (ISDS) – cost and duration, October, **https://undocs.org/en/A/CN.9/WG.III/WP.153**

46 · Kinda Mohamadieh (2019) The Future of Investor-State Dispute Settlement Deliberated at UNCITRAL: Unveiling a Dichotomy between Reforming and Consolidating the Current Regime, Investment Policy Brief n°16, South Centre, **https://www.southcentre.int/wp-content/uploads/2019/03/IPB16_The-Future-of-ISDS-Deliberated-at-UNCITRAL_EN.pdf**

47 · Robert Lighthizer (2018) Brady-Lighthizer ISDS Exchange, **https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-exchange.html**.

48 · Christian Riffel (2019) Does investor-state dispute settlement discriminate against nationals?, German Law Journal (2020), 21, pp. 197–222, **https://www.cambridge.org/core/services/aop-cambridge-core/content/view/10333482B31A23B7D11812E9AAF3DC7D/S2071832220000103a.pdf/does_investorstate_dispute_settlement_discriminate_against_nationals.pdf**

49 · Tribunal Supremo Madrid (2014) Sentencia STS 1/2014, 13 January, **http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=6931591&links=FOTOVOLTAICOS&optimize=20140117&publicinterface=true**

50 · Rosario Bonifasi (2020) Podemos llegar a una situación de colapso si no se electrifica la economía, La Información, 27 July, **https://www.lainformacion.com/empresas/anpier-productores-fotovoltaicos-electrificacion-economia/2811320/**; Santiago Carcar (2019) Las elecciones acercan una solución para los 60.000 inversores en huertos solares, La Información, 30 April, **https://www.lainformacion.com/espana/elecciones-solucion-60-000-inversores-huertos-solares/6498712**

51 · José Antonio Blanco (2018) La distinta aplicación del Derecho interno e internacional ante las reclamaciones del sector de las renovables por la reforma eléctrica, CCS Abogados, 2 October, **https://www.ccsabogados.com/la-distinta-aplicacion-del-derecho-interno-e-internacional-ante-las-reclamaciones-del-sector-de-las-renovables-por-la-reforma-electrica/**

52 · Nicolette Butler y Surya Subedi (2017) The future of international regulation. Towards a World Investment Organization?, Netherlands International, Law Review, Number 64, pp. 43–72, **https://link.springer.com/article/10.1007/s40802-017-0082-5**

53 · Quoted in Robin Broad (2015) Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes: A Case Study of a Global Mining Corporation Suing El Salvador, University of Pennsylvania Journal of International Law, 2015 Forthcoming, School of International Service Research Paper No. 2015-3, **https://ssrn.com/abstract=2585107** (p. 4).

54 · Quoted in N. Butler y S. Subedi (2017) The Future of International Investment Regulation: Towards a World Investment Organisation?. Neth Int Law Rev 64, 43–72. **https://doi.org/10.1007/s40802-017-0082-5**

55 · Christian Schreuer (2011) Interaction of International Tribunals and Domestic Courts in Investment Law, **https://www.univie.ac.at/intlaw/wordpress/pdf/interactions_int_tribunals_domestic.pdf** p90

56 · Corporate Europe Observatory, Friends of the Earth, Transnational Institute (2019) Suing to force through a toxic goldmine: Gabriel Resources vs Romania, Red Carpet Courts, **https://10isdsstories.org/cases/case1/**

57 · Corporate Europe Observatory, Friends of the Earth, Transnational Institute (2019) Bypassing courts and local democracy to build a gated community for the rich: Razvoj Golf & Elitech vs Croatia, Red Carpet Courts, **https://10isdsstories.org/cases/case3/**

58 · Corporate Europe Observatory, Friends of the Earth, Transnational Institute (2019) Golden profits undermine people's right to clean water: Eco Oro vs Colombia, Red Carpet Courts, **https://10isdsstories.org/cases/case10/**; Eco Oro vs Colombia - REQUEST FOR ARBITRATION, 8 December 2016, **https://www.italaw.com/sites/default/files/case-documents/italaw9443.pdf**

59 · Kappes y Kappes versus Guatemala (ICSID Case No. ARB/18/), **https://www.italaw.com/sites/default/files/case-documents/italaw10806.pdf** ; Luis Solano, Ellen Moore, y Jen Moore (2020) Mining Injustice Through International Arbitration, Institute for Policy Studies and Earthworks, **https://www.earthworks.org/cms/assets/uploads/2020/08/ENG-Guatemala-Mining-Injustice-Report.pdf**

60 · Pablo Rojas (2017) Industrias Infinito pide 321 millones a Costa Rica por fallida mina en Crucitas, CRHoy, 7 April, **https://www.crhoy.com/nacionales/industrias-infinito-pide-321-millones-a-costa-rica-por-fallida-mina-en-crucitas/**

61 · Infinito vs Costa Rica (2014) Request for arbitration, **https://www.italaw.com/sites/default/files/case-documents/italaw3118.pdf**

62 · David Schneiderman (2018) Investment arbitration as constitutional law: constitutional analogies, linkages, and absences. Thomas Schultz and Frederico Ortino (eds.), Oxford Handbook of International Arbitration (Forthcoming), **https://ssrn.com/abstract=3299921** , p1.

63 · David Schneiderman: "Investment arbitration as constitutional law: constitutional analogies, linkages, and absences", **https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3299921** p1.

64 · C. J. Roberts (2014) Supreme Court of the United States: BGgroup plc v. Republic of Argentina **https://www.supremecourt.gov/opinions/13pdf/12-138_97be.pdf** p.10.

65 · Chevron Corporation and Texaco Corporation versus Ecuador, PCA Case N° 2009/23, **https://www.italaw.com/cases/257**

66 · Chevron Corporation and Texaco Corporation versus Ecuador (2018) Second Partial Award, 30 August, **https://www.italaw.com/sites/default/files/case-documents/italaw9934.pdf**

67 · Corte Constitucional del Ecuador (2018) Sentencia N.230-18-SEP-CC, 27 June, **https://www.derechoaldia.com/attachments/article/1013/SENTENCIA-CC-CHEVRON.pdf**

68 · Chevron/Texaco vs Ecuador (2018) Second Partial Award on Track II, PCA CASE NO. 2009-23, 30 August, **https://www.italaw.com/sites/default/files/case-documents/italaw9934.pdf**

69 · Francesco Tamburini (2002) Historia y destino de la "Doctrina Calvo": ¿actualidad u obsolescencia del pensamiento de Carlos Calvo?, Revista de Estudios Histórico-Jurídicos n°24, Valparaíso, **https://scielo.conicyt.cl/scielo.php?pid=s0716-54552002002400005&script=sci_arttext**

70 · Sergio Puig (2013) "Investor-State tribunals and constitutional courts: the Mexican sweeteners saga", Mexican Law Review, Volumen V, Número 2, **https://doi.org/10.1016/S1870-0578(16)30024-5**

71 · Only 88 of the 2,576 investment protection treaties mapped by UNCTAD are identified with the category "local remedies first", **https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping**

72 · Juan Hernandez Zubizarreta and Pedro Ramiro (2015) Contra la lex mercatoria. propuesta y alternativas para desmantelar el poder de las empresas transnacionales. Icaria, Madrid; Martin Dietrich Brauch (2017) Exhaustion of Local Remedies in International Investment Law, IISD, **https://www.iisd.org/system/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf**

73 · Héctor Faundez Ledesma (2010) El agotamiento de los recursos internos en el sistema interamericano de protección de los derechos humanos, **https://www.iidh.ed.cr/multic/UserFiles/Biblioteca/IIDH/2_2010/XXVCurso_Inter_en_Derechos_Humanos_Discursos_ponencias/17.%20HFaundez_doc.pdf**

74 · Martin Dietrich Brauch (2017) Exhaustion of Local Remedies in International Investment Law, IISD, **https://www.iisd.org/system/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf**

75 · Martin Dietrich Brauch (2017) Exhaustion of Local Remedies in International Investment Law, IISD, **https://www.iisd.org/system/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf** ; Héctor Faundez Ledesma (2010) "El agotamiento de los recursos internos en el sistema interamericano de protección de los derechos humanos", **https://www.iidh.ed.cr/multic/UserFiles/Biblioteca/IIDH/2_2010/XXVCurso_Inter_en_Derechos_Humanos_Discursos_ponencias/17.%20HFaundez_doc.pdf**

76 · Francesco Tamburini (2002) Historia y destino de la "Doctrina Calvo": ¿actualidad u obsolescencia del pensamiento de Carlos Calvo?, Revista de Estudios Histórico-Jurídicos n°24, Valparaíso, **https://scielo.conicyt.cl/scielo.php?pid=s0716-54552002002400005&script=sci_arttext** Original quote: "la igualdad entre inversores extranjeros y ciudadanos locales, ha sido 'involuntariamente' aceptada por la institucionalización de los arbitrajes internacionales, los cuales de cualquier forma han destruido el apartado teórico-jurídico del internacionalista argentino"

77 · Adoración Guamán (2015) TTIP. O assalto das multinacionais à democracia. Akal, Madrid

78 · Andrew Martin (2013) Coup d'Etat to Trade Seen in Billionaire Toxic Lead Fight, Bloomberg, 10 May, **https://www.bloomberg.com/news/articles/2013-05-09/rennert-800-million-toxic-lead-fight-roils-global-trade**; UNCTAD, Investment Policy Hub, **https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/417/renco-v-peru-i-**

79 · FIDH (2013) Complejo metalúrgico de la Oroya: donde la inversión se protege por encima de los derechos humanos, **https://www.fidh.org/IMG/pdf/informe_la_oroya.pdf** ; REDGE-Perú (2012) Antecedentes de DOE RUN: Incumplimiento de obligaciones ambientales y graves impactos en la salud de la población de La Oroya, **http://www.redge.org.pe/sites/default/files/alerta_urgente_13_Antecedentes%20DOE%20RUN.pdf**

80 · Renco Group versus the Republic of Peru, **https://www.italaw.com/sites/default/files/case-documents/italaw1396.pdf** (parágrafos 72-73)

81 · Renco Group versus the Republic of Peru, UNCT/13/1, **https://www.italaw.com/sites/default/files/case-documents/italaw7435.pdf**

82 · Renco Group versus the Republic of Peru, Laudo final, UNCT/13/1, **https://www.italaw.com/sites/default/files/case-documents/italaw7745.pdf**

83 · Renco Group versus the Republic of Peru (2020) UNCTAD Policy Hub, **https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1017/renco-v-peru-ii-**

84 · Chris Hamby (2016) Inside The Global "Club" That Helps Executives Escape Their Crimes, BuzzFeed News, 28 August, **https://www.buzzfeednews.com/article/chrishamby/super-court**

85 · Ayman Sharaf (2013) Emirati tycoon's jail term suspended, Gulf News, 4 June, **https://gulfnews.com/world/mena/emirati-tycoons-jail-term-suspended-1.1192806**

86 · inversiones Continental v. Honduras (2020) UNCATD Investment Policy Hub, **https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/921/inversiones-continental-v-honduras**

87 · BBC Mundo (2015) La caída de los Rosenthal, el poderoso clan hondureño acusado de lavado de dinero y narcotráfico, 14 October, **https://www.bbc.com/mundo/noticias/2015/10/151014_honduras_rosenthal_clan_historia_narcotrafico_aw**

88 · Reuters (2017) Honduran politician sentenced to three years in U.S. for money laundering, 15 December, **https://www.reuters.com/article/us-usa-honduras-moneylaundering-idUSKBN1E92Z4**

89 · Buse v. Panama (2020) UNCTAD Investment Policy Hub, **https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/799/buse-v-panama**

90 · CIAR Global (2017) Tribunal del arbitraje Bernard Buse contra Panamá por liquidación de casa de valores, 11 October, **https://ciarglobal.com/tribunal-del-arbitraje-bernard-buse-contra-panama-por-liquidacion-de-casa-de-valores/**

91 · South African Department of Trade and Industry (2009) Government Position Paper on Bilateral Investment Treaty Policy Framework Review (Pretoria, June), p. 45, **http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/091006bit1.doc**

92 · Gus Van Harten, Jane Kelsey y David Schneiderman (2019) Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter, Osgoode Hall Law School of York University, **https://digitalcommons.osgoode.yorku.ca/all_papers/328** p9

93 · Tom Ginsburg (2005) International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance, International Review of Law and Economics, Volume 25, Issue 1, **https://doi.org/10.1016/j.irle.2004.06.002**; Jonathan Bonnitcha (2019) The Impact of Investment Treaties on Domestic Governance in Myanmar, 8 November, **https://ssrn.com/abstract=3644056**

94 · Sebastian Perry (2011) Arbitrators and human rights, Global Arbitration Review, 13 June, **https://globalarbitrationreview.com/arbitrators-and-human-rights**

95 · Gus Van Harten, Jane Kelsey y David Schneiderman (2019) Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter, Osgoode Hall Law School of York University, **https://digitalcommons.osgoode.yorku.ca/all_papers/328** p9

96 · Government of South Africa (2015) Protection of Investment Act 22, **https://www.gov.za/documents/protection-investment-act-22-2015-15-dec-2015-0000**

97 · Public Citizen (2018) Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows" **https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_0.pdf**

98 · United Nations Commission on International Trade Law (2019) "Possible reform of Investor-State dispute settlement ISDS). Submission from the Government of South Africa", July, **https://undocs.org/en/A/CN.9/WG.III/WP.176** p. 7.

99 · ECLAC (2019) Foreign Direct Investment in Latin America and the Caribbean, **https://repositorio.cepal.org/bitstream/handle/11362/44698/S1900447_en.pdf**

100 · United Nations Commission on International Trade Law (2021) Working Group III: Investor-State Dispute Settlement Reform, **https://uncitral.un.org/en/working_groups/3/investor-state**

101 · Kinda Mohamadieh (2019) The Future of Investor-State Dispute Settlement Deliberated at UNCITRAL: Unveiling a Dichotomy between Reforming and Consolidating the Current Regime, Investment Policy Brief n°16, South Centre, **https://www.southcentre.int/wp-content/uploads/2019/03/IPB16_The-Future-of-ISDS-Deliberated-at-UNCITRAL_EN.pdf**

102 · Fabian Flues (2018) The Multilateral Investment Court locking in ISDS, Friends of the Earth Europe, **http://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2017/mic_10_reasons_factsheet_full_v6.pdf**

103 · Investment Treaty News (2016) Germany's judges and public prosecutors reject proposed investment court system in TTIP, **https://www.iisd.org/itn/en/2016/02/29/germanys-judges-and-public-prosecutors-reject-proposed-investment-court-system-in-ttip/**