

Current trends in international commercial arbitration in Latin America

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1 The mantra of the Latin-American hostility towards arbitration

The word “hostility” usually appears in different kinds of contributions about the vast field of Latin-American arbitration. In the best-case scenario, this word is used to indicate that the hostile attitude towards arbitration is becoming less aggressive.² However, a common assumption seems to remain, according to which some rather generalized negative feeling against arbitration either existed or still exists in Latin America. It is true that sometimes the use of the expression is probably due to a simple repetition of clichés, yet even the most conspicuous specialists, in accurate works, often refer to it.³ It makes it obvious that there is something that does not work perfectly in regard to arbitration in Latin America.

In this succinct contribution, aimed only at offering a survey of Latin-American international commercial arbitration, I will try to show that, if no nuances are introduced, the mentioned common assumption can be totally misunderstood. In my opinion, if any hostile attitude has existed, such attitude has been always confined within the context of the arbitration with state participation and it has

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² H. A. Grigera Naón, “Arbitration in Latin America: Overcoming Traditional Hostility (An Update)”, (1991), 22 *Univ. Miami Inter-Am. L. Rev.*, 203.

³ P. Lalive, “On the Reasoning of International Arbitral Awards”, (2010) 1, *Journ. of Int’l Dispute Settlement*, 55, 57; J. Kleinheisterkamp, *International Commercial Arbitration in Latin America. Regulation and Practice in the MERCOSUR and the Associated Countries* (Dobbs Ferry (NY): Oceana, 2005) 465; C. Frutos-Peterson, *L’émergence de l’arbitrage commercial international en Amérique latine: l’efficacité de son droit* (Paris, L’Harmattan) 2003.

been, in a large extent, the consequence of sensitive reasons related to sovereignty and independence. Yet, private arbitration was accepted in Latin America even before the very existence of that we know nowadays as Latin America. Many of Latin-American states included arbitration provisions in their constitutions and codes of the 19th century. By sure, those provisions were not appropriated to develop arbitration as an efficient mechanism of dispute settlement, in particular if we thing of “modern” arbitration. Nevertheless, they indicate that speaking about an initial, congenital hostility against arbitration is totally inaccurate. Arbitration was always accepted by Latin-American states. However, rules and subjacent policies, borrowed from old European conceptions on the matter, did not allow a good development of arbitration until some years ago, when the vast majority of Latin-American countries abandoned the old patterns (almost at the same time than the countries of origin of those patterns). Furthermore, it is obvious that even the arbitration with state participation (included investment arbitration) is used by Latin-American states, although its acceptation and its functioning have been a bit more complicated.

That having said, it must be underlined that Latin-American states have always been reluctant to accept their sovereignty being conditioned by external powers or decisions. Needles to say, such a reluctance, on the one hand, has never been a peculiarity of Latin-American countries⁴ and, on the other hand, Latin America history – in particular, but not only, during the last decades of the nineteenth and the first decades of the twentieth centuries generates plenty of reasons to the appearance of a suspicion about the neutrality and fairness of these powers and

⁴ Even in a country such as France, unanimously recognized as being arbitration friendly, the participation of public persons in arbitration may generate controversial judicial decisions. For example, *Tribunal des conflits*, 17 May 2010, case no. 3754, *Inserm v. Fondation Letten F. Saugstad*; see the strong critique of T. Clay, “Les contorsions byzantines du Tribunal des conflits en matière d’arbitrage”, (21/2010) *La Semaine Juridique*, 1045–49. See also M. Laazouzi, “L’impérativité, l’arbitrage international des contrats administratifs et le conflit de lois. À propos de l’arrêt du Tribunal des conflits du 17 mai 2010, *Inserm c/ Fondation Saugstad*”, (2010) *Rev. crit. DIP*, 653. An English translation is available in (2010) 25/6 *Mealey’s International Arbitration Report*, with comments of D. Bensaude and J. Kirby.

decisions. Many authors reiterate that the root of the Latin-American hostile attitude towards arbitration can be found in the strength of the Calvo Doctrine,⁵ which was adopted as a principle by most legal systems of this region. According to this widespread opinion, the Calvo Doctrine – sometimes considered together with the Drago Doctrine and often confused with the Calvo Clause – would have blocked the development of arbitration by affirming that foreign investors must submit to the courts of the host state. However, the reality is that the Calvo Doctrine appeared as an answer to the abuse of diplomatic protection and the Drago Doctrine as an answer to the use of the forceful reimbursement of state debts. That is to say that the matters directly affected by these doctrines were state contracts and public interest issues that were involved therein. Therefore, they should not be, in principle, the direct cause of some sort of reluctance *vis-à-vis* commercial arbitration or arbitration in general.

A significant amount of data confirms that, insofar as neutrality and fairness seemed to be respected, the prevailing attitude has not been significantly hostile towards arbitration from a political perspective.⁶ It has been, at least, not less favourable than the general attitude of other countries from outside the region. Most Latin-American states have purposefully submitted their disputes to international tribunals or courts whenever they have felt confident about the latter.⁷ This feeling has always failed to be held either unanimously or

⁵ Just to mention two recent articles, see N. Blackaby and S. Noury, “International Arbitration in Latin America”, in B. Fauvarque-Cosson and A. Wald (eds.), *L’arbitrage en France et en Amérique latine à l’aube du XXIe siècle* (Paris: Société de législation comparée, 2008), 283, 284, 295; and J. Astigarraga, “A Glimpse into the Cristal Ball. Latin American Arbitration Ten Years Hence”, (2010-2) 10, *Revista latinoamericana de mediación y arbitraje*, XXIII.

⁶ See H. A. Grigera Naón, “Arbitration and Latin America: Progress and Setbacks (2004 Freshfields Lecture)”, (2005-2), *Arb. Int.*, 127.

⁷ In particular, when solving inter-state disputes such as those concerning border demarcations. See references included in the article mentioned in the precedent note. See also the cases listed by C. Frutos-Peterson (note 3) who indicates the cases in which arbitration was imposed to Latin-American nations as well as some negative decisions against them.

enthusiastically whenever a state or a state-owned company has been involved in a dispute, due to the reasons mentioned above. Additionally, when the ICSID dispute-settlement mechanism really started to operate, the old ghosts raised their heads. It was at that moment – only a few years ago – when some scepticism regarding arbitration in general regained notoriety. In other words, traditional general and diffused worries regarding the activities of the states and the foreign pressures that were placed upon them started to create concrete discomfort about investment arbitration and, later, spread a degree of mistrust over arbitration as a way of solving disputes.

A completely different issue is that the existence of the closed link between arbitration and procedural law, borrowed from some old European concepts, still provokes practical difficulties when trying to solve real legal disputes in several Latin-American countries (as well as in other countries around the world).⁸ It is indeed clear that modern arbitration is at odds with (traditional) procedural law, even if, in several countries, arbitration rules are still located in general procedural legal bodies. Since modern arbitration proceedings are essentially flexible, while procedural law in many legal systems tends to be rigid and formalistic, coincidences between both systems are often little more than mere exceptions. Several legal systems have had problems in finding the right niche for arbitration within their own framework. For some, arbitration has been seen as an exception to the “natural judge” (or to the “ordinary jurisdiction”) and, for that reason, the scope of arbitration agreements had to be constructed in a restrictive manner. For others, arbitration is included in local jurisdiction and, therefore, the general rules applicable to judicial procedure (such as those dealing with available remedies) should be, in principle, applicable to arbitral procedure. Furthermore, some old technical elements have impeded the normal development of arbitration. Among

⁸ To some authors, rather than the hostility towards arbitration, the problems concern the strong tradition of local procedural rules and the lawmakers’ lack of experience of practical arbitration issues. See, ad ex., F. Mantilla Serrano, “Le traitement législatif de l’arbitrage en Amérique Latine (quelques réformes récentes)”, (2005) 3, *Revue de l’arbitrage*, 561, pp. 600–602.

them, one can mention the requirement of a “compromise” between the parties in order to validate a previous arbitral agreement (that still exists in Argentina) and the requirement of judicial recognition of the award in the country of the seat of arbitration in order to get enforcement abroad. This kind of “conceptual” hostility has shown itself to be more difficult to overcome than the previously mentioned “political” one. Perhaps the main reason for this is that arbitration (not) evolution was traditionally under the control of civil-procedure scholarship.

I should also raise another preliminary consideration. Although I have dedicated this contribution to Latin America as a whole, it is obvious that in the matter of arbitration – as is true of many other legal and non-legal fields – Latin America is anything but a homogenous concept. Even if the concept is taken in its strictest sense, relating to the twenty independent American states that are the former colonies of Spain, Portugal and France,⁹ attitudes towards arbitration differ from country to country in the same way as attitudes related to politics, economy or international relations differ, for example. Consequently, any generalizations made concerning the matter of arbitration in the region generate the unavoidable risk of mistakes and misunderstandings.

2 Current legal framework

2.1 International instruments

To state that Latin-American countries have kept themselves outside of the wave of international codification of the international arbitration law is unjustified. All Latin-American states are contracting parties to the 1958 New York Convention on

⁹ Namely Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela. Often, in scholastic contributions, Caribbean states that are former British or Dutch colonies are added to this list. However, in the usual language of international organizations, whenever a common list is made, the more precise expression of “Latin-American and Caribbean” countries is used. In any case, it is well known that the concept of “Latin America” is based on historical and political considerations that justify its use and has its roots in several other points of view.

the Recognition and Enforcement of Foreign Arbitral Awards – the most important multilateral legal instrument in matters of arbitration.¹⁰ Furthermore, only two states, Cuba and Haiti, are outside of the framework of the main regional legal instrument – the 1975 Inter American Convention on International Commercial Arbitration (better known as the Panama Convention) – that was elaborated within the framework of the Organization of American States (OAS).¹¹

As we can see, individually, all Latin-American states have expressed their agreement with the basic general assumptions shared by the international community about arbitration, and, collectively, their attitude is not so different when developing regional economic-integration organizations or when aiming at constituting free-trade agreements. In particular, the promotion of arbitration as a dispute-settlement mechanism has been officially sought by the Southern Common Market (MERCOSUR),¹² the Andean Community (CAN),¹³ and the Central American

¹⁰ Honduras (2000), Brazil and the Dominican Republic (2002) and Nicaragua (2003) have been the last to join it. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

¹¹ In addition, more precisely, of its Inter-American Specialized Conference on Private International Law, designated under the Spanish acronym of CIDIP. See <http://www.oas.org/juridico/english/sigs/b-35.html>. Nevertheless, it is worth mentioning that Cuba and Haiti are the only Latin-American countries that have not ratified any CIDIP instrument. That is particularly understandable in the case of Cuba, whose OAS membership was suspended in 1962. Although the General Assembly reversed that decision in 2009, the Cuban Government has stated that Cuba is not interested in recovering its full membership to the body. There is another instrument of CIDIP applicable to arbitration (the 1979 Inter-American Convention on Extraterritorial Validity of Judgments and Arbitral Awards, in force in ten Latin-American states, <http://www.oas.org/juridico/english/sigs/b-41.html>), although its application to arbitration is avoided because of its character of *lex generalis* in respect of the other conventions (the New York and Panama Conventions).

¹² In spite of the availability of other international legal instruments – namely, the New York and Panama Conventions – Mercosouthern authorities decided in 1998 to elaborate a legal text – developed in an amazingly short time frame – the Agreement on International Commercial Arbitration. The Agreement, in force in the four member states, was adopted together with another identical instrument, which was developed in order to produce a common legal text for the Mercosouthern member states of Bolivia and Chile. This has not yet entered into force. Previously, in 1992, MERCOSUR had adopted the Las Leñas Protocol on the Judicial Co-operation in Civil, Commercial, Labor and Administrative Matters, which also

Integration System (SICA).¹⁴ Yet, neither the undoubted interest in promoting arbitration nor the adoption of some regional legal instruments concerning the matter assure, in themselves, the improvement of the conditions for arbitration development. On the contrary, notwithstanding the efforts, whenever concrete decisions and the specific instruments are not appropriated, the outcome has proven itself to be either futile or directly negative in nature.¹⁵ In addition to these institutional features that have arisen from the framework of the regional economic-integration organizations, several other specific initiatives related to arbitration are on-going.¹⁶

includes rules on the recognition and enforcement of foreign judicial decisions and arbitral awards. Fortunately, both texts do not seem to be taken into account in matter of arbitration.

¹³ The Treaty of the Court of Justice of the Andean Community contains two specific provisions (articles 38 and 39) on the “arbitral function” that may be developed in both the Andean Court of Justice and by the General Secretary of the Andean Community. Those provisions have not yet been implemented, although the Andean Community, with the support of the European Union, has been trying to make them work (http://www.comunidadandina.org/ATRC/arbitral_1.html).

¹⁴ SICA has introduced arbitration as a “modern, supple, effective” means for the settlement of disputes between member states within the text of its constitutive treaty, known as the Tegucigalpa Protocol (article 35).

¹⁵ Perhaps the clearest example of a work characterized by total futility is the 1998 Mercosouthern Agreement mentioned above. In this sense, see J. R. Albornoz, “El arbitraje en el derecho internacional privado y el MERCOSUR (con especial referencia a los acuerdos de arbitraje de 23 de julio de 1998)”, (1999) IX, *Anuario Argentino de Derecho Internacional*, 51–92; J. Kleinheisterkamp, “Conflict of Treaties on International Arbitration in the Southern Cone”, in *Liber Amicorum Jürgen Samtleben* (Montevideo: Max-Planck-Institut / FCU, 2002), pp. 695–697. Compare, however, with A. M. Perugini, “Arbitraje comercial internacional en el MERCOSUR”, in *Liber Amicorum Jürgen Samtleben*, pp. 633–637.

¹⁶ One of them is the creation of an organization called OHADAC, its main purpose seemingly based on the adoption of common rules on arbitration for several countries of the Caribbean region including Latin-American and non-Latin-American states, and even the French territories. OHADAC is the acronym of the *Organisation pour l’Harmonisation du Droit des Affaires dans le Caraïbe* and, as its name suggests, it intends to follow the experience of its African model (OHADA), notwithstanding that the latter is an inter-governmental organization. See www.ohadac.com

2.2 Domestic rules

At a domestic level, Latin-American countries have also experienced an intense modernizing impulse during the last two decades.¹⁷ Almost all the countries in the region have adopted new legal arbitration texts,¹⁸ most of them under the direct or indirect influence of the UNCITRAL Model Law on International Commercial Arbitration. Indeed, UNCITRAL recognizes, from among the states whose arbitration law is based on the Model Law, Chile (2004), Costa Rica (2011), the Dominican Republic (2008), Guatemala (1995), Honduras (2000), Mexico (1993), Nicaragua (2005), Paraguay (2002), Peru (1996, 2008) and Venezuela (1998).¹⁹ Even most of the Latin-American arbitration laws that have not “deserved” the UNCITRAL label have received a strong, though heterogeneous, influence from Model Law solutions. It means, at least from a formal perspective concerning the very domestic legal frameworks involved, that Latin-American arbitration should not be so different from the laws of Norway, Australia, California, Zambia or Azerbaijan.

In such a context, two particular national experiences have to be underlined. The first one is that of Brazil, which embodies the greatest change in the region. If there is a legal system that deserved of the epithets generally applied in matter of arbitration to Latin America as a whole, it is that of Brazil. Actually, based on sovereignty arguments, this country and especially its judges and courts were traditionally reluctant to take on developments in arbitration, which explains the

¹⁷ According to certain authors, however, this degree of modernization would clearly not be sufficient. See, for instance, F. Cantuarias Salaverry, “¿Qué tanto ha avanzado Latinoamérica en el establecimiento de una normativa amigable a la práctica del arbitraje internacional?”, (2010) 10-2, *Revista latinoamericana de mediación y arbitraje*, 59.

¹⁸ The most significant exceptions are Argentina and Uruguay, although in both countries, several drafts on the matter have been elaborated on and the adoption of a new legislation on arbitration is expected. The UNCITRAL Model Law is nevertheless invoked in Argentinean judgments such as Supreme Court, 5 April, 2005, *Bear Service SA v. Cervecería Modelo SA de CV*. See below, n. 44.

¹⁹ See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

fact that the 1996 Arbitration Act²⁰ was frozen for five years before its practical implementation.²¹ Nevertheless, once this legal obstacle was removed, the development of arbitration in Brazil has not ceased to astonish both local actors and foreign observers. The number of institutions, academic programs, publications and international events related to arbitration has been growing since then.²² The confidence in – and the familiarity with – arbitration in Brazilian businesses is today much broader than it used to be. The Brazilian judiciary has had to learn to cope with international arbitration because the real levels of activity in this field experienced strong growth. Nevertheless, it has been doing well. An important catalyst for the change of attitude was the shift, by means of Constitutional Amendment 45/2005, in terms of competence, to the recognition of foreign decisions from the *Supremo Tribunal Federal* (STF, the highest Brazilian court, charged with the constitutional control of the rules) to the *Superior Tribunal de Justiça* (STJ). The case law has confirmed the initial impression of scholars, according to which, since the STJ is both more specialized and more progressive than the STF, its case law could improve international cooperation in Brazil.²³

²⁰ Act n° 9.307, 23 September 1996.

²¹ The concrete reason was the alleged contradiction between certain provisions of the Arbitration Act with the constitutional rule that grants the right of access to the judicial courts. The constitutional question was submitted to the *Supremo Tribunal Federal* in a case dealing with the enforcement of an award issued in Spain. After a long discussion, the court, in a majority decision, upheld the constitutionality of contested provisions, in SEC (*Sentença Estrangeira Contestada*) n° 5.206, 12 December 2001. See M. A. Muriel, “A arbitragem frente ao judiciário brasileiro”, (2004) *Revista Brasileira de Arbitragem* 27.

²² A. Wald, “L’évolution récente de l’arbitrage en Amérique latine”, in B. Fauvarque-Cosson and A. Wald (eds.), *L’arbitrage en France et en Amérique latine à l’aube du XXIe siècle* (Paris: Société de législation comparée, 2008) 217, 226.

²³ See L. Gama Jr., “La reconnaissance des sentences arbitrales étrangères au Brésil: évolutions récentes”, (2005) 16/1, *Bull. CCI*, pp. 72–73 (“the STJ is better suited to civil and commercial matters than the Supreme Court (whose chief role is to ensure that the Federal Constitution is respected) and more progressive in its decision-making”). See also R. A. Gaspar, *Reconhecimento de Sentenças Arbitrais Estrangeiras no Brasil* (Sao Paulo: Atlas, 2009), p. 59, pp. 266–267. Nonetheless, it seems that the reform would have been even more important if the shift had not been from the STF to the STJ, but to the judges

Judicial decisions both at federal²⁴ and state level²⁵ clearly show strong support for arbitration.²⁶

The other relevant national feature is the emergence of a Peruvian *avantgardisme*. In 1996, Peru had adopted an Arbitration Act inspired by the 1985 Model Law and its functioning was generally recognized by practitioners and scholars as quite satisfactory. However, in 2008, Peru enacted a new Arbitration Act,²⁷ which, besides taking into account the amendments introduced into the UNCITRAL Model Law in 2006, contains interesting going-forward provisions, several of them already present in the former Act.²⁸ The treatment of the application for setting aside the award adopted by the arbitral tribunal is perhaps the one that best summarizes the spirit of Peruvian arbitration law since the Act of 1996. Firstly, the right to apply for setting aside may be excluded or limited by the parties, provided that none of

in the first instance. See P. Loula, “Breves reflexões sobre repercussão da Reforma do Judiciário (Emenda Constitucional nº 45/04) no Direito Internacional Privado”, in *O Direito Internacional Contemporâneo. Estudos em homenagem ao Professor Jacob Dolinger* (Rio de Janeiro: Renovar, 2006), p. 793 (“it would have been a great service to the country, and helped to make its international relations easier”).

²⁴ See, early after the shift, STJ, *Bouvery International S/A v. Irmãos Pereira - Comercial e Exportadora Ltda*, Case nº SEC 887/EX, 15 February 2006; STJ, *Union Européenne de Gymnastique - UEG v. Multipole Distribuidora de Filmes Ltda*, Case nº SEC 874/EX, 19 April 2006.

²⁵ See, among many others, the recent decisions of the *Tribunais de Justiça* (State appeals courts) of Bahia, 4th Civil Chamber, *FAT FerroAtlântica SL v. Zeus Mineração Ltda*, nº 0002546-67.2010.805.0000-0, 6 April 2010; of Rio de Janeiro, Civil Appeal, *Durval Biancalana da Silva e outros v. DTP Participações e Investimentos S/A e outros*, nº 0063229-77.2010.8.19.0001, 12 May 2010; of Sao Paulo, 5th Public Law Chamber (anti-arbitration measure demanded by Companhia do Metropolitano de São Paulo – Metrô regarding an ICC Arbitral Tribunal -nº 15.283/JRF-), nº 990.10.284191-0, 28 July 2010; of Rio de Janeiro, 20th Civil Chamber, *Litel Participações SA v. Eletron SA*, nº 0029077-06.2010.8.19.0000, 4 August 2010.

²⁶ A similar impression may be found in A. Wald, “Brazil”, (2011) *The Arbitration Review of the Americas* (<http://www.globalarbitrationreview.com/reviews/32/sections/115/chapters/1203/brazil/>).

²⁷ Legislative Decree nº 1071, 28 June 2008.

²⁸ F. Cantuarias Salaverry and R. Caivano, “La Nueva Ley de Arbitraje Peruana: Un nuevo salto a la modernidad”, (2008) 7, *Revista Peruana de Arbitraje*, 3.

them has a direct connection with Peru.²⁹ Secondly, the application does not suspend the enforcement of the award; however, under request from one of the parties, the court may suspend the enforcement by ordering the provision of an appropriate bank security.³⁰ It may be said that the main characteristic of this Act is the clear restriction to the intervention of judicial courts in arbitral proceedings, as a general assumption, except when such intervention is established by the Act³¹ and, in particular, when one of the parties submits an application for setting aside the award (and this with the restriction mentioned above).³² Consistently, according to the Act, all legal references to judges in their role of settling a dispute or taking a decision are deemed to be referred also to arbitrators, provided that an arbitral agreement has been concluded and that the matter is "arbitrable".³³ All in all, what needs to be pointed out regarding the 2006 Peruvian Arbitration Act is its open call for localizing arbitration proceedings in Peru.

2.3 Latin-American case law on arbitration

By enacting new arbitration acts and ratifying standard instruments, states are sending out clear favourable signals regarding arbitration. However, the reception of these signals is not homogeneous and their implementation often provokes contradictions. In countries with a separation of powers, it is common that the judicial power does not keep pace with the legislative or the executive powers. In some cases, it creates bolder solutions but, in other cases, it slows the

²⁹ Art. 63(8) expressly mentions, as a possible connection to Peru: nationality, domicile, habitual residence or principal activity. The other Latin-American legislation that had adopted this solution was the 1999 Panamanian Arbitration Act, art. 36. Nevertheless, the Supreme Court of Justice declared the unconstitutionality of this provision.

³⁰ Art. 66.

³¹ Art. 3(1).

³² Art. 3(4).

³³ Fourth complementary provision. In other words, generally speaking, arbitrators' competences are put on the same level as judges' competences, including that of the enforcement of the award (Art. 66).

developments achieved through the approval of new legal texts or the incorporation of international agreements. The paradigmatic example of this may be considered as the Brazilian Arbitration Act of 1996, which was delayed for five long years in the Supreme Federal Court because of a troublesome discussion relating to its constitutionality.³⁴ Another kind of dichotomy between arbitration rules and judicial practice related to arbitration may be found in the experiences of other Latin-American countries.³⁵ Without any doubt, both contradictions and paradoxical decisions are linked to the proliferation of arbitral controversies on investment issues and state contracts – a matter prone to attracting political, rather than legal arguments. In fact, almost all “famous” cases considered as anti-arbitration ones (*Termorio*³⁶ in Colombia, *Cope*³⁷ in Brazil, *Cartellone*³⁸ and *Yaciretá*³⁹ in Argentina) dealt with state contracts.

Having said that, a glance at the recent case law of state courts in Latin America shows, on one hand, that arbitration has become a real – and, in many cases, the

³⁴ See above notes 19–20 and accompanying text.

³⁵ See C. L. Uribe-Bernate, “La práctica del arbitraje internacional en Colombia”, in *Liber Amicorum Jürgen Samtleben* (Montevideo: FCU / Max-Planck-Institut, 2002), 701, 717 (“it is really worrying ... to realize that the traditional territorialism of judicial authorities is not avoidable by means of legislation or the ratification of international treaties”).

³⁶ Consejo de Estado, Administrative Ch., 3rd section, 1 August 2002, *Electrificadora del Atlántico SAESP v. Termorio SAESP*.

³⁷ Tribunal of Justice of Parana State, 15 March 2004, *Companhia Paranaense de Energia (Copel) v. UEG Araucária Ltda.*

³⁸ Supreme Court of Justice, 1 June 2004, *José Cartellone Construcciones Civiles SA v. Hidronor SA*, (see D. A. Casella, “El control judicial de los laudos arbitrales en el derecho argentino”, (2005) 3, *DeCITA*, 462). It was a case concerning internal arbitration.

³⁹ National Judge of First Instance in Administrative Federal Matters n° 3, 27 September 2004, *Entidad Binacional Yaciretá (EBY) v. Eriday y otros*, (2005-A) *La Ley* 27, note A. Bianchi (even more controversial was another decision in the same dispute adopted by the Judge n° 1 of the same jurisdiction, on 18 April 2005, (2005-C) *La Ley* 651, note A.H.M. Corti).

preferred – way to solve legal disputes and, on the other hand, that judicial courts are increasingly supporting its development, sometimes in contradiction to legal reforms aimed at establishing more control over arbitration.⁴⁰ Even without doing an exhaustive analysis of court decisions, it is easy to see the clear pro-arbitration trend in the region. Of course, bad, wrong and even unintelligible judicial decisions on arbitral matters arise from time to time and not only in cases concerning states or state-owned companies. Nevertheless, those types of decisions are not an exclusive oddity of Latin-American courts.

It can be said that the case law in Argentina, globally considered and insofar as only private parties are involved, is nowadays fairly favourable to arbitration. This impression is not affected by the fact that some judicial decisions in matter of arbitration in which the courts misapply the appropriated rules, namely those of New York and Panama Conventions, could be reported. Thus, without even mentioning these conventions, in *Reef Exploration*, the National Commercial Court of Appeal admitted the enforcement of an award that originated in the United States despite the previous existence of an anti-arbitration injunction issued by an Argentinean court.⁴¹ On several occasions, Argentinean courts have dismissed applications for setting aside that invoked mistakes in the reasoning of the award,

⁴⁰ It is the case in El Salvador, where Art. 66-A of the 2002 Mediation, Conciliation and Arbitration Act, introduced by Legislative Decree n° 141 of 1 October 2009, according to which either party has the right to appeal the arbitral award on the merits before a court of appeals, was disqualified as unconstitutional by the First Court of Appeals of the First Section of the Center (Civil Ch. 20 July 2010, 1-APL-2010). The ground of this decision was article 23 of the Salvadorian Constitution, which establishes the right to settle civil or commercial disputes by arbitration. The same court (26 July 2010, 2-APL-2010) said that by means of that provision the constitution recognizes the right to settle disputes without state intervention. Both decisions have been submitted to the Supreme Court for the final say on the matter.

⁴¹ National Commercial Court of Appeals, Ch. D, 5 November 2002, *Reef Exploration Inc. v. Compañía General de Combustibles*, (2003-E) *La Ley* 937; (2003-III) *Jurisprudencia Argentina* 90, note R. J. Caivano and R. A. Bianchi; (2004-1) *DeCITA* 344, note M. B. Noodt Taquela. Both conventions are in force in both Argentina and the United States.

because such an incursion would jeopardize the very nature of arbitration.⁴² The Supreme Court has also showed its support for arbitration. Even in 2004, the year in which two well-known controversial decisions were adopted,⁴³ the Supreme Court accepted, in *Gojman v. Gomer*,⁴⁴ the validity of an arbitration agreement that was included in a labour contract that had been “internationalized” due to the entry of new partners in the defendant company. Actually, the respect for provisions that were freely chosen by the parties has been admissible for a long time in Argentina; in particular, those agreements that derogate Argentinean jurisdiction in favour of courts or arbitral tribunals whose activities are developed abroad,⁴⁵ whose exceptions shall be narrowly interpreted.

In Colombia, there is also a general attitude of respect towards foreign decisions. Thus, the Supreme Court of Justice⁴⁶ has elaborated a notion of public policy as an obstacle to the enforcement of foreign decisions, underlining its exceptional character and stating that not all Colombian mandatory provisions must be applied, but only those representing fundamental principles; that the recognition of foreign judgments does not imply the revision of their merit; that the notion of *ordre public* must be defined in reference to international principles as a requirement of a globalized world; that the *ordre public* notion must not be defensive, nor destructive, but dynamic, tolerant and constructive; and that Colombian citizens

⁴² See, for example, National Commercial Court of Appeals, Ch. E., 19 April 2005, *Patrón Costas, Marcelo D. y otros v. International Outdoor Advertising Holdings Co y otro s/ queja*, LexisNexis 35001884.

⁴³ See above, notes 38 and 39 (both cases related to state-owned companies).

⁴⁴ Supreme Court, 11 May 2004, *Gojman, Mario Daniel v. Gomer SACI*.

⁴⁵ For instance, Supreme Court, 5 April 2005, *Bear Service SA v. Cerveceria Modelo SA de CV*. See (2006) 5/6 *DeCITA* 431 (note J. C. Rivera, 422). A paragraph of this judgment is particularly relevant because it expressly invokes article 16 of the UNCITRAL Model Law on International Commercial Arbitration as an “internationally recognized rule” even in a country that has not followed the Model Law.

⁴⁶ Supreme Court of Justice, Civil Ch., 6 August 2004, n° 77, *García Fernandes Internacional Importação e Exportação SA v. Prodeco - Productos de Colombia* (application for the enforcement of a Portuguese judgment).

should not use this subterfuge to escape from the fulfilment of obligations that they accepted abroad.⁴⁷ This decision was challenged on due-process grounds, and the Constitutional Court, by refusing this pretension, has confirmed the notion elaborated on by the Supreme Court, adding that: "it is obvious for this Court that it would not be admissible that the Supreme Court (...) may extend its competence to revise whether the substantive rules of Colombian private law are identical to the rules of another state".⁴⁸ Within the concrete matter of arbitration, the strict attitude of judicial courts concerning requests for setting aside deserves to be mentioned.⁴⁹

A similar line of reasoning may be found in an interesting Chilean judgment adopted by the Court of Appeals of Santiago.⁵⁰ The court refused the application for setting aside an award, affirming, on one hand, that the intervention of judicial courts whenever an arbitral agreement exists shall be exceptional and, on the other hand, that the notion of public policy shall be constructed in a narrow manner. Shortly afterwards, the Chilean Supreme Court⁵¹ accepted the exequatur of an arbitral award issued in New York, pointing out that, in spite of the defendant's opposition, the purpose of the exequatur does not consist in the revision of the merits. According to the court, although the defendant was invoking the violation of due process, the very aim of the defendant's application was the

⁴⁷ See the comment of J. A. Silva, (2005) *Revista mexicana de derecho internacional privado*, 81.

⁴⁸ Colombian Constitutional Court, n° T-557, 26 May 2005. The Constitutional Court points out that the sole relevant difference between foreign and national law is that which essentially affects the national legal order.

⁴⁹ See recently the Superior District Court of Bogotá, 10 March 2010, *Industria y Distribuidora Indistri SA v. SAP Andina y Del Caribe CA*, n° 20100015000.

⁵⁰ *Corte de Apelaciones de Santiago*, 27 December 2007, *Publicis Groupe Holdings B.V. v. Árbitro Manuel José Vial Vial*. In its decision of 23 July 2010 (*Rol* 2363/2010), the same court stated that an award can only be attacked by an application for setting aside.

⁵¹ Corte Suprema, 8 September 2009, *Comverse Inc. v. American Telecommunication Inc. Chile SA* (ATI Chile).

revision of the merits and of the evidence weighting, which are both excluded from the procedure of *exequatur*.⁵²

In Mexico, the favourable attitude of judicial courts *vis-à-vis* arbitration has been underlined for many years.⁵³ This trend has been confirmed by their most recent decisions. In particular, some decisions of high Mexican courts⁵⁴ as well as *tesis* issued by the Supreme Court⁵⁵ have limited the scope of the application for setting aside and clarified its very definition.

Last but not least, Venezuelan tribunals have also merged into the same stream. Even if some differences remain between the two main chambers of the *Tribunal Supremo de Justicia*, the support for arbitration has been strongly confirmed by the Constitutional Chamber, which has, in addition, the last word on the matter.⁵⁶ Indeed, while the Political-Administrative Chamber has occasionally showed some reluctance to validate arbitral agreements by taking advantage of flaws or of a lack of precision in their drafting,⁵⁷ the Constitutional Chamber has insisted on the total

⁵² On these decisions, see D. Jiménez Figueres and J. Klein Kranenberg, "Recent International Arbitration Developments in the Chilean Courts", (March 2010) 15-1, *Arbitration News*, 161.

⁵³ See J. A. Silva, "Algunas resoluciones judiciales de los tribunales mexicanos en torno al reconocimiento de un laudo arbitral", (2004) 2, *DeCITA*, 375, 394 ("in Mexico, for a long time, judicial courts have correctly admitted international commercial awards (...) judicial decisions have been not only favourable to arbitration; they have also fulfilled international commitments").

⁵⁴ Tribunal Colegiado, 11 June 2008, *Infored, SA de CV y José Elías Gutiérrez Vivó v. Grupo Radio Centro, SA*.

⁵⁵ *Tesis* n° CLXXIII/2009, *Amparo en revisión* 131/2009, 27 May 2009; n° I.7° C.126, *Amparo en revisión* 23/2009, 12 March 2009; n° I.3° C.729, *Amparo en revisión* 274/2008, 4 December 2008.

⁵⁶ The Constitutional Chamber of the Supreme Court has the power to review, due to violation of the Constitution, not only the final decisions of inferior courts but also of the other chambers of the Supreme Court (cf. art. 355 Constitution and art. 25 of *Ley Orgánica del Tribunal Supremo de Justicia*). This last-instance notion was expressly noted by the Constitutional Court in its decision of 17 October 2008, n° 1.541/08.

⁵⁷ Ad ex., 28 April 2010, *DIMAPECA v. Servicios Halliburton de Venezuela SA*, n° 331/2010.

legitimacy of arbitration as a mechanism for dispute resolution. Thus, this Chamber has refocused on the existence of the fundamental right to arbitration inserted in an efficient notion of the right to access to justice⁵⁸ and holds that any legal rule or judicial interpretation that goes against the constitutional mandate of the promotion and development of arbitration (and other non-judicial means to solve disputes: article 258 of the Venezuelan Constitution) shall be deemed as unconstitutional.⁵⁹ Quite recently, the Constitutional Chamber, in a remarkable erudite decision, has supported the competence–competence principle and strongly rebutted the arguments previously given in the case by the Political-Administrative Chamber.⁶⁰

3 The impact of investment arbitration

3.1 The singularities of arbitration with state participation

States and public powers have been realizing for many years that arbitration does not have a negligible catalytic effect on commercial activity. As a result, the promotion of this dispute-settlement mechanism has become a suitable countering policy. Companies feel more and more comfortable within arbitration (and, therefore, allegedly outside the scope of the jurisdiction) and the states seem to offer them a favourable framework for arbitration development. At the same time, though it may appear as contradictory, states establish the conditions and parameters to control the regularity of arbitral proceedings and decisions. In fact,

⁵⁸ *Tribunal Supremo de Justicia*, Constitutional Ch., 28 February 2008, n° 192/2008.

⁵⁹ *Tribunal Supremo de Justicia*, Constitutional Ch., 17 October 2008, n° 1.541/08.

⁶⁰ *Tribunal Supremo de Justicia*, Constitutional Chamber, 3 November 2010, n° 1067/2010, reversing the judgment of the Political-Administrative Chamber, 21 May 2009, n° 687. It is worth mentioning the Constitutional Chamber's order to publish its decision in the *Gaceta Oficial*, stating that this judgment “fixes the binding interpretation about the arbitration system and the lack of jurisdiction of the organs of the [Venezuelan] judiciary power.” Nevertheless, the decision has been criticised because it went beyond of the very subject matter at stake. See P. Saghy, “Resumen de sentencias del año 2010”, www.macleoddixon.com/documents/Revista_Judicial_de_arbitraje_interno_2010.pdf.

there is no contradiction: the promotion of a mechanism that is, by definition, fast, specialized and efficient, does not necessarily lead to the total withdrawal of the state functions related to the promotion of justice.

This is the reason behind the observation that states continue to be firmly attached to their double role as both promoters of arbitration and the guardians of its smooth running. However, what has notably changed in a short period of time is the consideration of the role of the state in the governance of international private relationships⁶¹ and, in a broader sense, the scope of the state-law-making power to deal with the operation of the market. Privatization and liberalization, as composing phenomena of globalization, have reached not only into the economy, but also into the law and, regarding some matters, in an astonishing way. The concrete reflection of these phenomena in private law is the enlargement of the margins of party autonomy. In other words, states' powers are supra-limited by international commitments and infra-limited by the freedom recognized as belonging to individuals and legal entities.

In that context, the above-mentioned common state attitudes have been present in Latin America for decades. The first one – the broad promotion of arbitration – is clearly perceptible when examining the legal framework created by Latin-American states at both the international and domestic level, as we have already shown. The second one – some kind of reticence concerning arbitration with state participation – can be analysed through the emergence of investment arbitration and the problems that are associated with it. Even though we know that not all state participation in the field of arbitration concerns cases of investment arbitration, from the point of view of the state attitude in Latin America, the distinction becomes generally superfluous.

Whenever a state takes part in arbitral proceedings, several aspects of the arbitration change. The very idea that a state may withdraw the submission of its

⁶¹ Ver Ph. Leboulanger, "Rapport introductif (Les États dans le contentieux économique international)", (2003) 3, *Rev. arb.*, 618.

own judicial apparatus seemed practically unacceptable not so long ago.⁶² Today, when that withdrawal has become the rule and arbitration with state participation is multiplying exponentially hand in hand with the multitude of bilateral and multilateral investment treaties and the massive acceptance of the ICSID system,⁶³ there is no room for doubt. Even states that stepped away from the ICSID system are looking for alternative arbitral institutions. This is the case in Ecuador, a country that is trying to lay down an investment arbitration system within the framework of the Union of South-American Nations (UNASUR).⁶⁴ That means that there is distrust in ICSID, but not in arbitration.⁶⁵

However, despite such an overwhelming acceptance of state submission to arbitration, relationships between states and private legal entities still constitute a controversial matter for many legal systems.⁶⁶ That is particularly true for relationships based on investment treaties, but the situation is often not less controversial when a state initially enters into a simple commercial contract with a foreign company. When a dispute arises within a mixed relationship, can the dispute-settlement mechanism – in most cases arbitration – be identical to

⁶² According to B. Oppetit, “Les États et l’arbitrage international: esquisse de systématisation” (1985) 4, *Rev. arb.*, pp. 493–494, that idea was traditionally deemed to be in principle “unusual” and even “inconceivable and unlawful”.

⁶³ We talk about “acceptance” in terms of the number of contracting states (146 nowadays), without prejudice to the criticisms that have been made in regard to its functioning.

⁶⁴ See below, at 3.3.

⁶⁵ In any event, perceptions about investment arbitration are not unanimous (in and out Latin America) and they can change dramatically. See, for example, J. E. Alvarez, “The Public International Law Regime Governing International Investment”, (2009) 344, *Recueil des Cours*, pp. 193 ff.

⁶⁶ On the impossibility for the state in Colombia to submit to arbitration certain acts concerning state contracts, see E. Silva-Romero, “La distinción entre ‘Estado’ y ‘Administración’ y el arbitraje resultante de ‘contratos de Estado’”, (2004) 1 *Revista Brasileira de Arbitragem*, pp. 53-56. See also, in Brazil, the contradictions concerning this matter in J. B. Lee and C. M. Valença Filho, “Brazil’s New Public-Private Partnership Law: One Step Forward, Two Steps Back”, (2005) 22-5, *Journal of International Arbitration*, 419.

arbitration between private parties? Apparently, it cannot.⁶⁷ Theoretically, the traditional distinction – well developed in relation to state immunity⁶⁸ – between state activities *iure imperii* and *iure gestionis*⁶⁹ could lead to the assumption that whenever the state steps down to the level of private parties by developing any activity *iure gestionis* it should pay the price and lose its prerogatives. In practice, however, the essential differences between the state and private entities remain untouchable. Thus, the state may always have its *imperium* at hand, specifically by invoking immunity,⁷⁰ by applying its law-making power⁷¹ or by realizing procedural acts aimed at interfering in the normal development of arbitral proceedings.⁷²

3.2 The investment arbitration irruption – Early cases and problematic issues

⁶⁷ In particular, it is obvious that investment disputes are different to any other commercial disputes, notwithstanding the application of the same rules in some cases. Concerning some reasons for this statement, see J. D. M. Lew, L. A. Mistelis and S. M. Kröll, *Comparative International Commercial Arbitration*, (The Hague: Kluwer, 2003), p. 763 ff.

⁶⁸ See P. Trooboff, “Foreign State Immunity: Emerging Consensus on Principles”, (1986-V) 200, *Recueil des Cours*, 298.

⁶⁹ H. A. Grigera Naón, “Les contrats d’État : quelques réflexions”, (2003) 3, *Rev. arb.*, 667, explains how this distinction, well grounded in Latin-American countries, is distorted by the strong irruption of the investment arbitration.

⁷⁰ See D. P. Fernández Arroyo, “La ejecución del laudo arbitral proferido contra el Estado”, (2004) 2, *DeCITA*, 164.

⁷¹ See I. Hautot, “Les difficultés spécifiques dues à l’intervention d’États ou de personnes publiques dans l’arbitrage commercial international”, in *L’intervention de l’État ou d’une firme étatique dans l’arbitrage commercial international* (Bruxelles: Kluwer and Story Scientia, 1993), pp. 3–5. Cf. P. Mayer, “La neutralisation du pouvoir normatif de l’État en matière de contrats d’État”, (1986), *Journ. dr. int.*, 5.

⁷² See B. Hanotiau, “Quand l’arbitrage s’en va-t-en guerre: les perturbations par l’État de la procédure arbitrale”, (2003) 3, *Rev. arb.*, 805; E. Kleiman, “Les incidences politiques de la souveraineté sur l’arbitrage: les perturbations de la procédure arbitrale”, (2003) 3, *Rev. arb.*, 827.

Investment arbitration has experienced a singular evolution during the last few years. A large number of the relevant components of this evolution have arisen from cases dealing with Latin-American countries, with more than a half of ICSID pending cases involving countries of this region as defendants.⁷³ In consequence, most objections against both investment law and its implementation by means of investment dispute-resolution systems have been raised either in those countries or in respect of these cases.⁷⁴ The same can be said for the refutations of these objections.

Within this general objective situation, it is not very difficult to identify some particular questions that have had a clear influence on the development of the discussions about the current investment regulations. Thus, cases such as *Santa Elena* in Costa Rica (1996/2000),⁷⁵ *Metalclad* in Mexico (1997/2000),⁷⁶ *Agua del Tunari* in Bolivia (2002/2006),⁷⁷ the deep Argentinean crisis (2001...) – which made this state become a kind of universal defendant in international-investment dispute-resolution system – or the latest developments in the *Ecuador v. Chevron* saga have provided some of the most significant subject areas for use in the analysis concerning investment regulations. Consequently, the discussions that have arisen all over the world about investment law are more the consequence of the pro and contra points of the functioning of existing rules, rather than a mere theoretical exercise based on ideological prejudices.

⁷³ Argentina is still the leader in terms of the number of cases put before the ICSID, yet Venezuela seems to be working hard to dispute this “honour”.

⁷⁴ For example, the well-known Philippe Sands’ criticism on current investment law is mainly constructed in respect of Latin-American cases. See P. Sands, “A Safer World, for Investors”, in *Lawless World* (London: Penguin, 2006), pp. 117-142.

⁷⁵ *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case n° ARB/96/1.

⁷⁶ *Metalclad Corporation v. Estados Unidos Mexicanos*, ICSID Case n° ARB(AF)/97/01.

⁷⁷ *Agua del Tunari SA v. The Republic of Bolivia*, ICSID Case n° ARB/03/2.

Latin-American case law has made its contribution to the framing of some practical issues, such as:

- a) *Scope of the state's consent to arbitration.* The attitude of different states in Latin America to include in the investment contract a clause referring to the jurisdiction of their national tribunal,⁷⁸ where these states were parties to an investment treaty providing for an arbitration agreement, has originated theoretical discussions concerning the distinction between a treaty claim and a contract claim.⁷⁹
- b) *Affecting public interest.* The influence of public interest on issues such as those involved in public health or environmental protection has exacerbated several discussions. On one hand, these questions raised the problem of transparency in international arbitration, which has gained enormous significance.⁸⁰ On the other hand, foreign investments are also seen as concerning the very delicate issue of the state's sovereignty, particularly the power of the state to enact rules that can have an impact on the current investments in the state and the effects of the exercise of the law-making power of the state on the investor's assets.
- c) *Nomination and challenge of arbitrators.* Founded or unfounded suspicions based on the repetition of certain names in different arbitral tribunals as well as the ability of these actors to change roles (that some people who act every now and then as arbitrators have done), where they are counsels (or experts) for quite similar

⁷⁸ For instance, *Azurix Corp. v. Argentina Republic*, ICSID n° ARB/01/12.

⁷⁹ B. M. Cremades and D.J.A. Cairns, "La seguridad jurídica de las inversiones extranjeras: la protección contractual y de los tratados", (2004) 2, *DeCITA*, 231; F. Orrego Vicuña, "De los contratos y tratados en el mercado global", (2005) 3, *DeCITA*, 18; J. Crawford, "Treaty and Contract in Investment Arbitration", (2008) 24-3, *Arbitration International*, 351.

⁸⁰ See notes 95–97 below and accompanying text.

cases or for cases involving the same parties, have provoked a number of discussions related to conflicts of interest, and to the impartiality and/or independence of arbitrators.⁸¹

- d) *Problems caused by indirect expropriation measures (regulatory takings)*. Since *Metalclad*, the discussion about the scope of the notion of expropriation has been a permanent issue in arbitral proceedings as well as in the drafting of new bilateral investment treaties.⁸²
- e) *The very concept of investor*. The notion of the investor has also been raised several times; in particular, in cases in which the claims were presented by minority shareholders, while the main shareholders entered into negotiations with the host state.⁸³
- f) *Contradictory arbitral awards*. The disparity of conclusions about identical facts reached by different arbitral tribunals,⁸⁴ in addition to

⁸¹ See N. M. Perrone, “La recusación de los árbitros en casos de inversiones extranjeras. A propósito de la solicitud argentina interpuesta ante tribunales nacionales respecto de Rigo Sureda”, (2008) 9, *DeCITA*, 342. Among several examples in ICSID arbitration, see the recent decision of the *Ad hoc* Committee on the second annulment proceeding of *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case n° ARB/97/3.

⁸² According to the definition of expropriation given by the arbitral tribunal in *Metalclad* (para. 103), the concept includes “not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state”.

⁸³ That was the situation in several actions brought against Argentina by, for example, CMS (case n° ARB/01/8; Techint and TGN, main shareholders), Enron (case n° ARB/01/3; Petrobras and TGS, main shareholders), and LG&E (case n° ARB/02/01; Gas BAN and Gas Natural SDG, main shareholders).

⁸⁴ Perhaps the more mentioned situation is that of the state of necessity invoked by Argentina in several cases. Where some tribunals (CMS, Enron, Sempra – case n° ARB/02/16 –) did not find enough arguments to accept the justification of the state of necessity, others clearly found them (LG&E, Continental – case n° ARB/03/9 –, annulment of Sempra). See A. Alvarez-Jiménez, “Foreign Investment Protection and Regulatory Failures as States’ Contribution to the State of Necessity under Customary International Law –

sharp criticism, has become an important contribution to the rekindling of the debate on whether or not precedents are necessary in investment arbitration.⁸⁵

3.3 Reactions and current evolution

Notwithstanding the significance of all these practical issues, perhaps a more fundamental question concerns the relevance of the investment protective rules for the attraction of foreign investors. In other words, is the adoption by states of a high standard of protection of foreign investments attractive for foreign investors? Alternatively, even more concretely, this fundamental question asked by the current law on foreign investment might be expressed in the following way: is the need (or the will) to attract foreign investors a direct cause of the participation of host states in the Washington Convention, and in bilateral or multilateral investment treaties?

First of all, it seems quite obvious that states sign investment treaties in order to attract investors. One of their most important aspects is the waiver of states to seize their national courts. Nevertheless, the example of Brazil, which hosts most foreign investments in Latin America, in spite of its reluctance to make investment-arbitration commitments,⁸⁶ tends to prove the contrary. In reality, the contradiction is only apparent. It is true that states tend to think that the conclusion of an

A New Approach Based on the Complexity of Argentina's 2001 Crisis", (2010) 27, *Journal of International Arbitration*, 141.

⁸⁵ See, in general, E. Gaillard and Y. Banifatemi, *Precedent in Arbitration* (New York: Juris, 2008).

⁸⁶ Brazil has neither ratified the 1965 Washington Convention creating the ICSID nor any of the bilateral investment treaties (BITs) it concluded, and has strongly refused the investment chapter of the Draft Treaty of the Free Trade Area of the Americas (FTAA/ALCA). However, given the growing relevance of Brazilian investments in other countries, the business sector is asking if such a politic is fully convenient for Brazil. J. Kalicki and S. Medeiros, "Investment Arbitration in Brazil: Revisiting Brazil's Traditional Reluctance Towards ICSID, BITs and Investor-State Arbitration", (2008) 24–3, *Arbitration International*, 423.

investment treaty will give it an image of security and trust. However, to be part of an investment treaty does not mean that the state has gone the whole mile. Treaties are not the only reason why foreign companies invest. If a state has good opportunities for investors to be able to make profitable deals, it is likely that it will attract investors, even though it is not a party to an investment treaty, or even if that state has showed restrictive behaviour in respect to foreign investors. If we view the problem from the alternate angle, the existence of a treaty does not guarantee investments and the absence of a treaty does not eliminate any possibility of receiving them.⁸⁷

Criticism against the so-called new investment-arbitration law has been disseminated all over Latin America. At the root of this criticism is the dozens of investment arbitrations against Latin-American countries that have been initiated since 1996, as well as the large percentage of awards that have been favourable to investors, in particular, during the early years of the current century. Nevertheless, the concrete attitudes of the states are heterogeneous. For some, there is no exact criticism, but rather an expression of traditional mistrust. It was shown in the above-mentioned case of Brazil.⁸⁸ However, quite similar rules that were refused by Brazil in the framework of FTTA/ALCA negotiations have been accepted by other Latin-American states in the context of their free-trade agreements concluded with developed countries – to be precise, the United States.⁸⁹ A clearly

⁸⁷ That having been said, one must recognise that states do not always act in a coherent way. Some sign and ratify treaties but refuse them as soon as they could serve as a legal basis for a claim from an investor. In this sense, one might think that it is more coherent and preferable for a state not to sign any treaties and remain outside of the system of investment protection, or for a state to denounce the treaties that it has concluded, instead of being a party to one treaty and not complying with it.

⁸⁸ The other Latin-American countries that have never ratified the ICSID Convention (Cuba, Mexico and the Dominican Republic) are parties in many BITs and/or in FTAs containing investment-arbitration provisions.

⁸⁹ Among the most recent, it is worth mentioning those between the United States and Peru and between the United States and the Central-American states and the Dominican Republic (CAFTA-DR).

different attitude is held by both Bolivia and Ecuador, countries that have decided to denunciate the ICSID Convention,⁹⁰ adopted specific constitutional provisions to limit or prohibit arbitration over disputes with state participation⁹¹ and opened the door to denouncing or renegotiating bilateral investment treaties that are in force.⁹² Finally, the vast majority of Latin-American states continue to participate in the international-investment system even though some of them openly criticize its functioning. In a parallel way, member states of UNASUR, under an Ecuadorian initiative, are looking for the creation of a sub-regional arbitral-investment system as a way to escape from the worldwide (or *worldbankwide*) system.

Actions and reactions within the very field of mixed arbitration are not surprising, taking into consideration the sensitive interests that are at stake whenever a state takes part in an international dispute against a foreign private individual or entity. One can agree or be critical of the state's actions, but generally speaking, state attitudes of that kind are not beyond all expectations. The considerable impact that these features of arbitration with the involvement of Latin-American states have had on the arbitration between private parties, in particular in those countries that

⁹⁰ Both denunciations were made in accordance with article 71 of the ICSID Convention; they took effect, for Bolivia, on 3 November 2007 and, for Ecuador, on 7 January 2010.

⁹¹ Art. 422 of the Ecuadorean Constitution (2008) avoids the conclusion of treaties submitting that state to international arbitration institutions dealing with any "contractual or commercial" dispute in which the state participates, except for arbitrations conducted in Latin-American arbitral institutions and for disputes related to the external debt; nevertheless, article 190, paragraph 2 admits the submission to arbitration in the law of state contracts under the authorization of the public attorney and the legal conditions required (see Judgment of Constitutional Court of 13 March 2009, n° 0001-09-SIC-CC, which upheld an arbitration-in-equity clause in a contract between Ecuador and the Inter-American Development Bank, notwithstanding the opposition of the public attorney; the Court considers that the restriction of article 190, paragraph 2 does not apply to a case exclusively governed by article 422, paragraph 3, dealing with the external debt). The restriction to arbitration made by article 366 of the Bolivian Constitution (2009) refers specifically to foreign companies operating in Bolivia in the hydrocarbon sector.

⁹² The last option was also envisaged by Venezuela. E. Gaillard, "Trends anti-arbitration in Latin America", (2008), *New York Law Journal*, 239–108 (also published in Spanish: "Tendencias anti-arbitraje en América Latina", (2009) 10, *DeCITA*, 311).

have been involved in rather bitter situations, is nevertheless regrettable. Perhaps some of these negative consequences are due to a feeling of powerlessness in the relevant states (or, more precisely, of some civil servants) that have tried to justify their mistakes and misconduct by covering them up with a supposed plot by arbitrators and arbitral institutions. Nevertheless, it is fair to recognize, at the same time, that some decisions and attitudes of arbitral tribunals and of the ICSID itself could have given the impression (for more than a decade) of underestimating states' rights and powers.⁹³ That impression (and everybody knows that appearances, deceptive as they can be, are highly significant in arbitration) has provoked a sort of distrust effect *vis-à-vis* arbitration in general, which has manifested in non-specialized legal scholarship and – what is far worse – some judicial decisions.

All in all, that pervasive effect is not as strong as it could be perceived at the beginning of the present century.⁹⁴ Some years later, it can be said that – as a general rule – the distrust towards arbitration and the correlative reinforcing of state powers were somehow confined within the framework of arbitration involving state participation. Even in this field, the movement towards transparency should lead to the elimination of suspicions as well as to an improvement in the systems for adjudicating investor–state disputes. In line with this, the reform of the ICSID Arbitration Rules in 2006,⁹⁵ the drafts adopted by new investment-arbitration rules

⁹³ See G. K. Foster, “Recent Setbacks for Foreign Investors in Latin America and What They Mean for the Future of Investment Treaty Arbitration in the Region”, (2006) 1, *Latin American Arbitration Review*, 15, 17.

⁹⁴ It must be underlined that, notwithstanding the intention of some members of the Argentinean Government in that critical moment (see H. D. Rosatti, “Los tratados bilaterales de inversión, el arbitraje internacional obligatorio y el sistema constitucional argentino”, (2003-F), *La Ley*, 1283), this country sidestepped the temptation to denunciate the Washington Convention.

⁹⁵ The core of the reform dealt, on the one hand, with transparency issues (*amicus curiae* participation –Rule 37, open hearings – Rule 32, and the publication of the awards –Rule 48) and, on the other hand, with the reinforcing of arbitrator independence (Rule 6).

in free-trade agreements⁹⁶ and the current work on this matter accomplished by the UNCITRAL Working Group on Arbitration⁹⁷ are all sending good signals in terms of avoiding any negative impact on private arbitration. Conversely, the issuing of several arbitral decisions favourable to states in the last few years (a consequence of the transparency wave?) could help to mitigate the reluctance still maintained by some of them in terms of arbitration.⁹⁸

4 Some particular issues

In order to complete this survey about the current trends of arbitration in Latin America, at least three singular issues should be pointed out: the growth of Latin-American participation in the “market” of international commercial arbitration, the constitutionalization of arbitration and the place attributed to arbitration by domestic legal orders.

4.1 Increasing Latin-American participation in international commercial arbitration

⁹⁶ Among new free-trade agreements with a high standard of transparency, the CAFTA–DR (Art. 10(21)) deserves to be mentioned.

⁹⁷ The Working Group on Arbitration and Conciliation (WG II) of UNCITRAL, after finishing the reform of the UNCITRAL Arbitration Rules is elaborating on a legal standard on transparency in treaty-based investor–state arbitration. See http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html. Although neither the form nor the content of the instrument have yet been defined, the work in progress has drawn the attention of states, arbitral institutions, businesses and academics, who participate hugely in the discussions. Latin-American states, that usually are not very active in UNCITRAL working groups, are now showing a strong interest in this matter.

⁹⁸ According to the UNCTAD's report on investor–state dispute-settlement reported cases, published on 1 March 2011, in 2010 it rendered twenty awards, five decisions on liability, and 11 decisions on jurisdiction, as well as 11 other decisions on interim measures, discontinuance of proceedings and costs. Of the 20 awards, 14 were in favour of the state and five were in favour of the investor, and in one case, the parties adopted a settlement agreement. See, in particular, *Sempra v. Argentina*, Decision on Annulment, 29 June 2010, and *Enron v. Argentina*, Ad hoc Committee, Decision on Annulment, 30 July 2010.

The adoption of – broadly speaking – good arbitration acts⁹⁹ and the ratification of international instruments on the matter,¹⁰⁰ on one hand, and the above-mentioned judicial trends,¹⁰¹ on the other hand, reflect the current legal status of arbitration in Latin America. However, it does not necessarily indicate the real perception of this status by the business community. The question then is whether or not the deep modification of the legal framework has stimulated more confidence in arbitration and, more concretely, an increasing number of arbitration proceedings in the region.

The answer is a resounding “yes”. In several Latin-American countries, the number of cases submitted to arbitration has experienced a remarkable increase. Thus, the main Peruvian arbitral institution, according to the statistics shown on its website, has gone from just two cases in 1993 to 1798 cases in 2010.¹⁰² The increase in the number of arbitration proceedings is also substantial in other countries such as Brazil, Chile and Mexico. Equally, the multiplication of arbitral institutions¹⁰³ would indicate the existence of a favourable ambiance in professional and academic circles. Books dealing with “Latin-American arbitration”¹⁰⁴ and specialized periodicals devoted to arbitration seem to multiply. As a matter of fact, arbitration is becoming a real option for Latin-American parties, as reflected in the statistics of the ICC. It is interesting to note that during the last decade, more than 10% of all

⁹⁹ See above, 3.2.

¹⁰⁰ See above, 3.1.

¹⁰¹ See above, 3.3.

¹⁰² http://200.37.9.27/CCL/ccl_arbitraje/es/ccl_estadisticas.aspx. The amounts involved in these disputes are also experiencing similar growth, from US\$ 232,000 in 1993 to 2,287,000,000 in 2010.

¹⁰³ In part, owing to the sponsoring of international agencies such as the Inter-American Development Bank. See, P. E. Mason and M. G. F. dos Santos, “New Keys to Arbitration in Latin-America”, (2008) 25-1, *Journal of International Arbitration*, 31, 41–42.

¹⁰⁴ The fact that sometimes those books are not written by specialists but rather by opportunists shows the expectations generated by arbitration in this region.

cases registered in the Arbitration Court of the ICC involve parties from Latin America and the Caribbean. It is equally astonishing that Argentina, Mexico and Brazil are among the 12 states that offer most arbitrators within that Court.¹⁰⁵ It is true that in most of the cases submitted to ICC arbitration in which a party is from Latin America the seat of the arbitration has been located out of the region. However, the location of these cases in some Latin-American countries is no longer a rare exception. On the contrary, nowadays several “big” disputes between Latin-American parties are being solved by arbitral tribunals seated in Latin-American towns, often under the auspices of worldwide arbitral institutions.¹⁰⁶

4.2 Constitutionalization of arbitration

The comprehension of the word “constitutionalization” within the framework of Latin-American arbitration is twofold. At first, given the fact that some contemporaneous constitutions have expressly included a sort of fundamental right to arbitration that goes hand in hand with the duty of public power to promote arbitration,¹⁰⁷ one might think that arbitration is fully supported.¹⁰⁸ However, in the end, this very characterization opens doors to a particular kind of attack against arbitral awards founded in the supposed violation of constitutional principles.¹⁰⁹

¹⁰⁵ See “Statistical Report”, (2011) 22-1, *ICC International Court of Arbitration Bulletin*.

¹⁰⁶ Several years ago, a prominent Latin-American arbitrator based in Paris was already proposing the location of commercial arbitrations without state participation in towns such as Mexico DF, Bogota, Sao Paulo and Montevideo. E. Silva Romero, “América Latina como sede de arbitrajes comerciales internacionales. La experiencia de la Corte Internacional de Arbitraje de la CCI”, (2004) 2, *DeCITA*, 217.

¹⁰⁷ See, i.e., article 258 of the Venezuelan Constitution and Judgment of the Supreme Tribunal of Justice, Constitutional Chamber, n° 1541, 17 October 2008; and article 116 of the Colombian Constitution.

¹⁰⁸ Thus, in El Salvador, article 23 of the Constitution, which establishes the right to settle civil or commercial disputes by arbitration, has been invoked by the First Court of Appeals of the First Section of the Center (Civil Ch. 20 July 2010, 1-APL-2010; 26 July 2010, 2-APL-2010) to declare unconstitutional the rule that authorizes an appeal against arbitral awards. See above note 40.

¹⁰⁹ E. Silva Romero, “A propos de l’inexorable collision de philosophies dans la constitutionnalisation de l’arbitrage internationale en Amérique latine”, in B. Fauvarque-Cosson and A. Wald (eds.), *L’arbitrage en*

Indeed, it is on this stream of constitutionalization that awards adopted by arbitral tribunals seated in Latin-American countries have been challenged by the means of different kinds of extraordinary judicial remedies. An interesting issue is to reach an understanding as to whether these remedies were directly raised against the award or only against the judicial decision related to the setting aside or to the enforcement of the award. In Mexico, for instance, the singular remedy known as *amparo* can be used to challenge judicial decisions related to the award, but not against the award itself.¹¹⁰ In Peru, although the Constitutional Court had authorized the *amparo* for use against arbitral awards, the Superior Court of Justice of Lima, by applying a notion introduced in the Arbitration Act of 2008, affirmed that this remedy may not serve to review the same arguments previously invoked in a set-aside proceeding.¹¹¹ In Venezuela, the Supreme Tribunal of Justice has admitted the *amparo constitucional* even against foreign awards.¹¹² Of course, we can reduce all these issues to a discussion between old conceptions about the

France et en Amérique latine à l'aube du XXIe siècle (Paris: Société de législation comparée, 2008), p. 269 (underlining the contradiction between the distributive justice of constitutional courts and the corrective justice of arbitral tribunals as well as between the parochial character of constitutions and the typical universalism of international arbitration). See also E. Hernández-Bretón, "El arbitraje y las normas constitucionales en Venezuela: lo malo, lo feo y lo bueno", (2010) 149, *Boletín de la Academia de Ciencias Políticas y Sociales*, 391.

¹¹⁰ L. Pereznieta Castro and J. A. Graham, *Tratado de arbitraje comercial internacional mexicano* (Mexico: Limusa, 2008), pp. 191–195, 212–215, 223–227. In *Banamex v. Corporación Transnacional de Inversiones SA de CV*, 17 February 2004, the court (Décimo Tribunal Colegiado en Materia Civil del Primer Circuito) refused the application of *amparo* made by the arbitrators against the judgment that had annulled the award, due to the arbitrators' lack of *locus standi* (the losing party had sued the arbitrators at the same time that it applied for setting aside the award).

¹¹¹ Superior Court of Justice of Lima, *Peru Holding de Turismo SAA*, 30 December 2008. In this case, the *amparo* was brought against the arbitrators and the Center of Conciliation and National and International Arbitration of the Chamber of Commerce of Lima.

¹¹² See judgments of the Supreme Tribunal of Justice, Constitutional Ch., of 16 October 2001 (*VTV*) and 14 February 2007 (*Todo Sabor CA*). R. Escobar Alvarado, "Recursos contra laudos arbitrales dictados en el extranjero", in *Derecho procesal civil internacional. In memoriam Tatiana B. de Maekelt* (Caracas: Academia de Ciencias Políticas y Sociales, 2010), p. 783, pp. 800–803.

legal order and a “new” legal pluralism and say that international commercial arbitration cannot be subjected to any national constitution.¹¹³ The problem will be to convince some courts of such sophisticated arguments.¹¹⁴

4.3 The place of arbitration in the jurisdictional context

Legislative and judicial progress in matters that strictly concern arbitration can barely overcome some traditional procedural conceptions. In fact, perhaps the most important issue within the Latin-American domestic legal systems is the generalized conception of the arbitrator as a component of the local judiciary. The meaning of this fundamental assumption is that by selecting the seat of arbitration the parties are not only choosing a geographical place, but also the jurisdictional framework in which the activity of the arbitral tribunal will be developed. As a result, that activity will be submitted to the control of the highest judicial authorities of the state of the seat and the arbitral tribunal will have to apply some procedural (and even substantial) rules of this state. Certainly, this conception is not a particularity of Latin-American states.¹¹⁵

To a certain extent, such a conception would be an obstacle to the normal application of the competence–competence principle. Indeed, the consideration of the arbitral tribunal as an organ of the judicial body of the state highlights (for instance) that whenever the competence of an arbitral tribunal is challenged before a judicial court that is deemed to be competent by the applicant, the

¹¹³ A. de Jesús O., “La autonomía del arbitraje comercial internacional a la hora de la constitucionalización del arbitraje en América Latina”, (2008/2009) 3, *Lima Arbitration*, 151.

¹¹⁴ A totally different matter concerns the possibility of an arbitral tribunal solving a question of constitutionality (of course, in a country where there is a non-concentrated system of constitutional review). In Argentina, some courts – misapplying the very precedents of the Supreme Court of Justice – have denied this possibility. See the critique by J. C. Rivera, “Cuestiones constitucionales en el arbitraje”, (2009) 11, *DeCITA*, 296.

¹¹⁵ See E. Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (Leiden/Boston: Académie de droit international de La Haye, 2008), pp. 34–46.

“conflict” between that court and the arbitral tribunal can only be solved by a superior judicial court.¹¹⁶ The procedure for deciding upon that conflict may be long and tortuous and it is likely to encourage procedural strategies aimed at eternizing arbitral proceedings.¹¹⁷ The result can be even worse for the arbitration if it is taken as a mere exception to the judicial jurisdiction (which would appear as the *ordinary* or *natural* jurisdiction). Of course, this would not be possible where the notion of the arbitration as an autonomous mechanism to settle disputes is deeply rooted and where a simple rule such as that contained in article 16(3) of the UNCITRAL Model Law¹¹⁸ is in force, provided that that rule is correctly applied by the courts.¹¹⁹

5 Concluding remarks

Once the general view of the features and trends in Latin-American international commercial arbitration were presented, three specific key statements needed to be taken into account:

5.1 Strong diversity

¹¹⁶ Thus, in Argentina, the Supreme Court of Justice, 1 November 1988, *La Nación SA v. La Razón SA*, and 10 November 1988, *Nidera SA v. Rodríguez Alvarez de Canale, Elena* (note R. Caivano, (1990-A), *La Ley*, 419); in Brazil, the Superior Tribunal of Justice, Competence conflict nº 111.230, 1 July 2010.

¹¹⁷ H. A. Grigera Naón, “Arbitration and Latin America: Progress and Setbacks (2004 Freshfields Lecture)”, pp. 155–156.

¹¹⁸ According to this rule, if the arbitral tribunal affirms its own competence as a preliminary question, either party may challenge that decision before a court but “the arbitral tribunal may continue the arbitral proceedings and make and award”.

¹¹⁹ This not always was the case in Mexico, for example. See F. González Cossío, “*Kompetenz-kompetenz* a la mexicana: crónica de una muerte anunciada” (<http://www.camex.com.mx/fgc.pdf>), and Supreme Court of Justice, 1st Ch., *Contradiction of thesis 51/2005ps*, 1 September 2006. However, the recent reform of the Mexican arbitration law (published on *Diario Oficial de la Federación*, January 27, 2011) clearly shows that the Mexican legislator has decided to finish that situation.

In spite of several common features, it is hard to find a single attitude, even a single trend, in Latin-American commercial arbitration. As often happens with the definition of political and economic positions at a national level, the development of the legal systems depends on many specific factors that are rarely combined in the same way in two different countries. As far as international commercial arbitration is concerned, if any trend is to be identified from the legislative activity of Latin-American states, from the political decisions of their governments and from judicial decisions, it is that arbitration has become a generally accepted method of settlement for international commercial disputes. That is perhaps the single common trend in the current field of commercial arbitration in Latin America. This general acceptance of arbitration does not exclude the existence of exceptions and contradictions, even in the bosom of the same court. Furthermore, the rhythm to implement that common assumption differs from country to country and, due to the effect of external factors, from time to time.

5.2 Need for a pedagogical effort

The expansion of arbitration in Latin America has generated a significant critical mass of professionals who are highly educated and often well trained in the matter as well as a diffusion of the advantages of arbitration among the business community. Good arbitral institutions have been created and are functioning throughout Latin America; in some countries, the number of cases (more domestic than international) has considerably increased. The big issue continues to be the education of judges in the interpretation and the application of international instruments and new domestic mechanisms.¹²⁰ Every official program to promote and develop arbitration in the region should take this element as its top priority.

5.3 Isolation and management of the impact on investment arbitration

The debate (and the backlash) originated within the context of investment arbitration – for instance, around the legitimacy of arbitrators in coping with some

¹²⁰ J. A. Moreno Rodríguez, *Contratación y arbitraje* (Asunción: CEDEP, 2010), p. 280.

public interest issues – and when considered as a whole, it has been rather positive. It has stimulated the improvements in the investment law, the balancing of the rights and duties of investors and states and the professionalization of the states' attorneys. The negative aspect was related to the impact of the first decade of investment-arbitration cases involving Latin-American states on international commercial arbitration in general. Perhaps the original sin was the generalization of the application of rules and mechanisms that had been developed for commercial cases to a substantially different reality. Now, the pendulum seems to be closer to the centre in terms of investment arbitration – in particular, because of the proliferation of transparency standards. Commercial arbitration is differentiating from its complicated cousin. Accordingly, on balance – excluding mixed arbitration – attitudes against arbitration, in general, are today fewer and less influential than legislative, judicial and private pro-arbitration manifestations.

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