LATIN LAWYER

THE GUIDE TO ARBITRATION IN LATIN AMERICA

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CHAPTER 1

ICSID Arbitration in Latin America

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Introduction

The International Centre for Settlement of Investment Disputes (ICSID), which administers most of the world's arbitrations between states and foreign investors, gets busier every year. In 2021, ICSID registered 66 arbitrations, the most in its history and significantly more than its next-highest total, 57 arbitrations, in 2020.[2]

Nevertheless, for the first 30 years after ICSID was established in 1966,[3] ICSID was a sleepy institution, handling at most a few arbitrations a year. The first arbitration at ICSID was registered in 1972, and thereafter there were many years in which no arbitrations were registered at all. In no year prior to 1997 did ICSID register more than four arbitrations.[4] In its first 30 years of existence, ICSID only registered a total of 32 arbitrations.[5]

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2 See The ICSID Caseload Statistics, Issue 2022-1, available at: https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf. For the purposes of the statistics in this article, we count all ICSID arbitrations, including those brought under the ICSID Additional Facility Rules. To be clear, we do not include ICSID conciliation cases.

3 ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). There are currently 164 Member States (signatory and contracting states). See Database of ICSID Member States, available at: https://icsid.worldbank.org/about/member-states/database-of-member-states.

4 There were no arbitration cases registered at ICSID in 1973, 1975, 1979, 1980, 1985, 1988, 1990 and 1991. See ICSID Caseload Statistics, Issue 2022-1, supra note 2.

5 See ICSID Caseload Statistics, Issue 2022-1, supra note 2.

This began to change in the late 1990s, as ICSID registered 10 or more arbitrations per year starting in 1997, and its caseload increased significantly starting in 2000. It is not surprising that the 2000s is the decade when ICSID came into prominence. The decade before had seen a tremendous increase in global trade as globalisation became 'an all-conquering force' after the fall of the Soviet Union,[6] and privatisation became 'the global economic phenomenon of the 1990s'.[7] Bilateral investment treaties (BITs) proliferated after 1990,[8] and the World Trade Organization was founded in 1995. With increased private investments worldwide, an increase in disputes between foreign investors and states was bound to follow, and ICSID was well positioned to administer these disputes.

One of the regions that pushed ICSID into the limelight was Latin America. In the 1980s and 1990s, many Latin American countries joined the ICSID Convention after initially having viewed ICSID with great scepticism.[9] During the 1980s and 1990s, Latin American countries also entered into a significant number of BITs and to a greater or lesser extent liberalised their markets. A decade later, factors such as economic volatility and changing political tides resulted in an exponential increase in investment disputes in the region.

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6 World Economic Forum, 'A Brief History of Globalization', available at: https://www.weforum.org/agenda/2019/01/how-globalization-4-0-fits-into-the-history-of-globalization/.

7 John B Goodman and Gary W Loveman, 'Does Privatization Serve the Public Interest?' (*Harv. Bus. Rev.*, 1991), available at: https://hbr.org/1991/11/does-privatization-serve-the-public-interest.

8 See Kenneth Vandevelde, 'A Brief History of International Investment Agreements', 12 *U.C. Davis J. Int'l L. & Pol'y* 157 (2013), available at: https://jilp.law.ucdavis.edu/issues/volume-12-1/van5.pdf.

9 The World Bank resolution to approve the ICSID Convention was passed 'with 21 countries - all the Latin American countries plus the Philippines – voting against'. Andreas F Lowenfeld, 'The ICSID Convention: Origins and Transformation', 38 *Ga. J. Int'l & Comp. L.* 47, 54 (2009). This may have been 'the first time that a major resolution of the World Bank had been pressed forward with so much opposition – "El No de Tokyo" as the Latin American press called it'. id.

By the end of 2010, more than a third of ICSID's cases had originated in Latin America.[10] Moreover, by the end of 2010, the four countries with the most ICSID cases against them were in Latin America (including Argentina and Venezuela in the first and second spots, respectively).[11]

Today, the countries with the most ICSID cases against them are still Argentina (56) and Venezuela (51).[12] Between them, they account for almost 12 per cent of ICSID's historical caseload. Most of the cases against them resulted from sweeping policy changes, specifically, emergency legislation in response to a severe economic crisis in 2001 in Argentina and a policy of nationalisation in Venezuela starting in 2007. These policy changes resulted in many investment disputes arising out of the same or similar measures.

These cases are important not only because of their outsized contribution to the growth of ICSID arbitration, but because they revealed potential limitations of the ICSID system. Because each ICSID arbitration is an ad hoc proceeding related to one particular case, a series of cases with very similar facts could and did lead to inconsistent arbitral awards and annulment decisions. In response, critics of ICSID bemoaned a lack of coherence in ICSID decisions and called for an ICSID appellate system to replace or supplement the annulment system.

In this chapter, we discuss a few cases resulting from Argentina's economic crisis and Venezuela's nationalisations to illustrate some of the issues raised by these older cases. We then discuss the legitimacy crisis ICSID faced in Latin America by 2010. We conclude by discussing the more recent ICSID landscape in Latin America. In the past few years, Peru, Colombia and Mexico have been the Latin American countries with the most cases against them. These cases differ from the older Argentine and Venezuelan cases because they are typically not the result of sweeping policy changes, but rather the result of government measures more particularly related to the circumstances of the investment at issue. These cases have resulted in fewer opportunities for inconsistent results and thus less controversy. Additionally, Latin American states have lent increased support to ICSID in recent years.

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10 ICSID does not categorise cases as originating in Latin America per se. However, by the end of 2010, 30 per cent of ICSID's cases had originated in South America and an additional 8 per cent of ICSID cases had originated in Central America and the Caribbean. See The ICSID Caseload Statistics, Issue 2011-1, available at: https://icsid.worldbank.org/sites/default/files/publications/2011-1%20English.pdf.

11 Argentina had 45 cases against it, Venezuela had 16, Ecuador had 14 and Mexico had 11. See ICSID Case Database, available at: https://icsid.worldbank.org/cases/case-database.

12 See ICSID Case Database, available at: https://icsid.worldbank.org/cases/case-database.

Argentina: diverging approaches to state of necessity

In the 1990s, Argentina privatised many of its state enterprises. As a result, a large number of foreign investors acquired concessions to provide public services in Argentina. One of the key incentives for investors was that the tariffs for these services would be calculated in US dollars, converted to Argentine pesos (which were pegged to the dollar) at the time of invoicing, and adjusted every six months according to the US Producer Price Index (PPI).[13]

Starting in 1998, Argentina suffered a severe economic crisis that resulted in a reduction in GDP, deflation and increased unemployment. The crisis worsened in 2001, and in December of that year Argentina defaulted on its sovereign debt. In early 2002, Argentina passed emergency legislation enacting a variety of measures to counter the crisis, including freezing utility tariffs, abolishing the dollar-to-peso tariff calculation, and ending the convertibility regime that had pegged the Argentine peso to the US dollar.[14]

With tariffs calculated in pesos, and the peso's value against the dollar having fallen by more than two-thirds, foreign investors faced both a substantial loss of income and US dollar denominated debt outside Argentina they could no longer pay. These investors filed numerous ICSID arbitrations against Argentina alleging various BIT violations, such as failure to accord fair and equitable treatment (FET), discrimination based on nationality, and indirect expropriation.

The CMS and LG&E awards

CMS Transmission Company (CMS) v. Argentina and *LG&E Corp. v. Argentina* were among the first ICSID cases brought against Argentina as a result of the economic crisis. The claimants, two gas transportation and distribution companies, alleged violations of the Argentina–US BIT. In both cases, in addition to its other defences, Argentina asserted that it did not breach its treaty obligations, or that, alternatively, any such breaches were excused, due to a state of necessity.

13 See Katia Fach Gomez, 'Latin America and ICSID: David versus Goliath', 17 *L. & Bus. Rev. Am.* 195, 198 (2011).

14 id.

In asserting this defence, Argentina relied both on Article XI of the BIT[15] and on customary international law as codified in Article 25 of the Articles on State Responsibility.[16]

Both tribunals found Argentina otherwise liable, but they differed in crucial ways in their approach to Argentina's necessity defence. The *CMS* tribunal first analysed Article 25 and found that Argentina could not invoke necessity as a defence for several reasons. First, while the tribunal acknowledged the crisis had been severe, it was not sufficiently so to meet the requirement under Article 25(1)(a) that an 'essential interest' was in 'grave and imminent peril'.[17] Second, the tribunal found that the policy response chosen by Argentina was not the 'only' response to the crisis it could have chosen. Other responses could have included the 'dollarization of the economy' or granting 'direct subsidies to the affected population'.[18] Because there was more than one alternative, the tribunal held that Argentina failed to meet the requirement under Article 25(1)(a) that the wrongful act be the 'only way' to safeguard the essential interest.[19] Finally, with respect to the requirement under Article 25(2)(b) that a state not contribute to the state of necessity, the tribunal observed 'that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter'.[20]

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15 Article XI of the BIT provides: 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.'

16 Article 25 of the Articles on State Responsibility provides: '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a state as a ground for precluding wrongfulness if: the international obligation in question excludes the possibility of invoking necessity; or the state has contributed to the situation of necessity.'

17 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005), Paras. 320–22.

18 id. at Para. 323.

19 id. at Paras. 323–24.

20 id. at Para. 329.

The *CMS* tribunal's subsequent analysis of Article XI of the BIT was heavily influenced by its prior analysis of Article 25 of the Articles on State Responsibility. The *CMS* tribunal found that, under Article XI, 'the issue [was] to establish how grave an economic crisis must be so as to qualify as an essential security interest'.[21] The tribunal also referred back to its prior determination 'that the Argentine crisis was severe but did not result in total economic and social collapse'.[22] Thus, the *CMS* tribunal interpreted Article 25 narrowly, and then interpreted Article XI of the BIT by applying the criteria of Article 25. The *CMS* tribunal awarded CMS US$133.2 million in damages.[23]

The *LG&E* tribunal arrived at a different result with respect to necessity. The tribunal first analysed Article XI, holding that customary international law applied only subsidiarily. The tribunal found that 'from 1 December 2001 until 26 April 2003, Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests.'[24] The tribunal held that the 'devastating conditions – economic, political, social – in the aggregate triggered the protections afforded under Article XI of the Treaty to maintain order and control the civil unrest'.[25]

The *LG&E* tribunal then analysed Article 25 of the Articles on State Responsibility. It found that Article 25(a)(1) was satisfied because Argentina had 'faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace'.[26] Further, it found that Argentina's response was the only way to safeguard its essential interests:

> *[A]n economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed.*[27]

21 id. at Para. 361.
22 id. at Para. 355.
23 id. at Para. 468.
24 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), Para. 226.
25 id. at Para. 237.
26 id. at Para. 257.
27 id.

Finally, with respect to Article 25(2)(b), the tribunal found that there was 'no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity'.[28]

In light of the above, the *LG&E* tribunal found that Argentina was 'exempted from liability' during the state of necessity,[29] but that Argentina became liable for damages as soon as the state of emergency ended in April 2003.[30] In a second phase, the tribunal awarded LG&E damages of US$57.4 million.[31]

Decision of the CMS annulment committee

Argentina sought annulment of the *CMS* award under Article 52 of the ICSID Convention. The grounds for annulment under Article 52 are very narrow.[32] Nevertheless, despite its narrow mandate, the annulment committee apparently believed that its role was to provide guidance for subsequent cases:

> *[T]he present arbitration was the first of a long series relating to the Argentine crisis of 2001-2002. Accordingly the Committee will seek to clarify certain points of substance on which, in its view, the Tribunal made manifest errors of law.*[33]

The annulment committee was sharply critical of the tribunal's reasoning regarding necessity.[34] First, the committee was critical of the fact that the tribunal 'assimilated the conditions necessary for the implementation of Article XI of the BIT

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28 id.

29 id. at Para. 261.

30 id. at Paras. 265–67.

31 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (25 July 2007), Paras. 107–09, 115. Although both parties initially sought to annul the LG&E award, the parties agreed on multiple suspensions and ultimately no annulment committee was formed; the case was discontinued in 2015. See *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding (20 February 2015), Paras. 3–4.

32 Under Article 52 of the ICSID Convention, the grounds for annulment are: that the Tribunal was not properly constituted; that the Tribunal has manifestly exceeded its powers; that there was corruption on the part of a member of the Tribunal; that there has been a serious departure from a fundamental rule of procedure; or that the award has failed to state the reasons on which it is based.

33 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment (25 September 2007), Para. 45.

34 The committee also annulled the tribunal's decision that Argentina had breached the BIT's umbrella clause. However, since this was not the primary source of the tribunal's liability finding, this partial annulment did not affect the substance of the award. See *CMS Gas*

to those concerning the existence of the state of necessity under customary international law'.[35] The committee stated that the two were 'substantively different' and have 'a different operation and content'.[36] The committee held that in 'simply assuming that Article XI and Article 25 are on the same footing', the tribunal had manifestly committed legal error.[37] Second, the committee found that the tribunal erred by not considering Article XI first, because the BIT was the primary source of law and if Article XI applied there would not have been any breach of the BIT. If Article XI did not apply, the committee explained, the tribunal then should have considered whether necessity under Article 25, as a subsidiary rule of international law, precluded Argentina's responsibility.[38]

The committee went on to say that these two errors 'could have had a decisive impact on the operative part of the Award' and that if the committee were 'acting as a court of appeal, it would have to reconsider the Award on this ground'.[39] Nevertheless, the committee found that its jurisdiction was limited under Article 52 of the ICSID Convention, stating that it could not 'simply substitute its own view of the law . . . for those of the Tribunal'.[40] Thus, given that the tribunal had applied Article XI, even if 'cryptically and defectively', there was no manifest excess of power.[41]

In sum, while the committee lacked the power to annul the *CMS* award, it sought to clarify manifest errors of law so that future tribunals would avoid them. The annulment committee, in effect, sided with the analytical approach of the *LG&E* award, which had been issued a year earlier, as the correct one for future tribunals to follow.

Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision on Annulment (25 September 2007), Paras. 99–100.

35 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment (25 September 2007), Para. 128.

36 id. at Paras. 130–31.

37 id. at Para. 131.

38 id. at Paras. 132–34.

39 id. at Para. 135.

40 id. at Para. 136.

41 id.

Two other tribunals had issued awards similar in reasoning and result to the *CMS* award shortly prior to the *CMS* annulment decision. In *Sempra v. Argentina* and *Enron v. Argentina*, the tribunals rejected Argentina's necessity defence under Article XI of the Argentina–US BIT and Article 25 of the Articles of State Responsibility.[42] Argentina sought annulment in both cases.

Like the *CMS* committee, both the *Sempra* and *Enron* committees observed that an annulment is narrower than an appeal and that an annulment committee cannot consider the merits of the dispute.[43] Nevertheless, these committees went further than the *CMS* committee and annulled the underlying awards. The *Sempra* committee held that the tribunal had failed to apply Article XI because the tribunal interpreted Article XI's requirements in accordance with Article 25.[44] The *Enron* committee held that the tribunal failed to properly define and apply the requirements of Article 25, specifically the requirement that the measures be the 'only way' to safeguard an essential interest and the requirement that Argentina did not contribute to the economic crisis.[45]

Venezuela: diverging approaches to nationalisation

In 2007, when the Argentina cases had begun to subside, the ICSID system faced a new wave of cases resulting from a sweeping policy change. In January 2007, after winning a second six-year term, Venezuela's then president, Hugo Chavez, began an extensive nationalisation campaign, at one point stating: 'All that was privatised, let it be nationalised.'[46] Venezuela's nationalisation of the oil and gas and mining sectors, among others, led to a large number of ICSID arbitrations against it with similar facts, some of which resulted in inconsistent decisions.

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42 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007), Paras. 355, 391; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007), Paras. 313, 342.

43 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment (29 June 2010), Para. 73 ('Annulment is distinct from an appeal. An ad hoc committee cannot substitute its own judgment on the merits for the decision of the Tribunal.'); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment (30 July 2010), Para. 63 ('[A]n ad hoc committee is thus not a court of appeal, and cannot consider the substance of the dispute').

44 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment (29 June 2010), Paras. 196–203.

45 *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment (30 July 2010), Paras. 361–95.

46 Simon Romero, 'Chávez Moves to Nationalize Two Industries' (*New York Times*, 9 January 2007), available at: https://www.nytimes.com/2007/01/09/world/americas/09venezuela.html.

Examples of such cases included *ConocoPhillips v. Venezuela* and *Venezuela Holdings v. Venezuela*, both under the Netherlands–Venezuela BIT. Article 6 of the BIT provides that nationalisation is lawful when, among other things, 'the measures are taken against just compensation' representing 'the market value of the investments'. The claimants in *ConocoPhillips* and *Venezuela Holdings* claimed that their investments in the oil sector had been unlawfully expropriated because, among other things, Venezuela had failed to provide the compensation required by the BIT.

In both cases, Venezuela had negotiated with the claimants prior to the nationalisation, but the parties had not agreed on the appropriate compensation. Importantly, Venezuela had only offered book value for the investments instead of market value. The question for the tribunals was whether Venezuela's efforts to negotiate the compensation rendered the nationalisation lawful.[47]

The practical implication of this determination was that under the BIT, compensation for a lawful nationalisation must be determined based on the market value of the investment at the time of the nationalisation. However, the BIT is silent as to the appropriate compensation in the case of an unlawful nationalisation. This would permit a tribunal, in the case of unlawful nationalisation, to award the market value at the time of the award rather than at the time of nationalisation.[48] The later valuation in these cases would lead to significantly higher compensation because it would take into account the higher oil prices after nationalisation in 2007. The *Venezuela Holdings* and *ConocoPhillips* tribunals came to opposite conclusions on whether Venezuela's nationalisation was lawful.

In *Venezuela Holdings,* the tribunal explained that the 'mere fact that an investor has not received compensation does not in itself render an expropriation unlawful'.[49] It found that Venezuela had participated in months of discussion with ExxonMobil, and that the proposals made by Venezuela were compatible with the

47 *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits (3 September 2013), Paras. 334(4), 362; *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014), Paras. 300–05.

48 *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits (3 September 2013), Para. 343.

49 *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014), Para. 301.

'just compensation required by the BIT' even though Venezuela only offered book value for the investments.[50] Accordingly, the tribunal found that the expropriation was lawful.

The tribunal awarded damages of US$1.4 billion based on the market value of the investments at the time of nationalisation.[51] The award was later partially annulled,[52] and the damages dramatically reduced to $179.3 million.[53] The annulment committee found that in calculating the market value of the investments, the tribunal should have taken into account Venezuelan law limiting the potential profits of the investments.[54]

Unlike the *Venezuela Holdings* tribunal, the *ConocoPhillips* tribunal held that Venezuela's nationalisation was unlawful. It found that Venezuela failed to 'negotiate in good faith for compensation for its taking of the ConocoPhillips assets . . . on the basis of market value as required by Article 6(c) of the BIT'.[55] In other words, because Venezuela did not make an effort to offer market value, the tribunal found that the nationalisation was unlawful. In the damages phase, the tribunal awarded ConocoPhillips US$8.4 billion,[56] the largest award in ICSID history.

Venezuela has sought to annul the award and the annulment decision is pending. However, the *ConocoPhillips* tribunal paid careful attention to the issue that two years earlier resulted in the partial annulment of the *Venezuela Holdings* award. The *ConocoPhillips* tribunal expressly stated that 'full compensation . . . cannot represent more than compensation of the rights and assets held by the

50 id. at Para. 305.

51 id. at Para. 404(d).

52 *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (9 March 2017), Paras. 196(3), (4).

53 *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014), Para. 404(f).

54 *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (9 March 2017), Paras. 167–187.

55 *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits (3 September 2013), Paras. 401, 404(d).

56 *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award (8 March 2019), Para. 1010.

Claimants at the relevant time' and these 'rights were based on the Association Agreements, which are governed by Venezuelan law'.[57] It remains to be seen whether the *ConocoPhillips* annulment committee will leave the award intact.

ICSID's 'legitimacy crisis' in Latin America

By 2010, when the *Sempra* and *Enron* annulment decisions were issued, some commentators asserted that ICSID was mired in a crisis of legitimacy. The inconsistencies between the awards, and between the annulment decisions, in the Argentina cases described above were fodder for that criticism. One commentator asserted that the 'very different interpretations of the law and diametrically opposite holdings' of the awards in *CMS*, *LG&E*, *Sempra* and *Enron*, despite the similar facts, evidence and arguments, was 'sufficient to call into question the legitimacy and viability of the ICSID arbitral system'.[58] Another commentator stated that 'the annulment system itself is a source of inconsistent decisions and cannot serve as a check on incoherent decisions produced at the tribunal level'.[59] The CMS annulment decision in particular was criticised for creating 'an ambiguous situation' by both upholding the underlying award and casting 'shadows of doubt on the legal validity of the original tribunal's reasoning'.[60] According to one commentator, this type of 'gratuitous' criticism could be a 'consolation prize to the losing party' that 'makes compliance with the award more difficult'.[61] Some commentators proposed that the solution was for ICSID to institute an appellate system that could substantively fix incorrect awards and bring coherence to the overall results by avoiding inconsistent annulment decisions.[62]

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57 id. at Para. 180.

58 William W Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System', 3 *Asian J. WTO & Int'l Health L. & Pol'y* 199, 221 (2008).

59 Dohyun Kim, 'The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need To Move Away From An Annulment-Based System', 86 *NYU L. Rev.* 242, 246 (2011).

60 F Baetens, 'To ICSID or not to ICSID is not the Question', in T Weiler and I Laird (eds.), *Investment Treaty Arbitration and International Law*, 5 Juris Arb. Series 215 (Juris New York 211, 2012).

61 Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope', 10 *L. & Practice of Int'l Cts. & Tribs.* 211, 213, 225 (2011).

62 William W Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System', 3 *Asian J. WTO & Int'l Health L. & Pol'y* 199, 227 (2008) (arguing that the *CMS* annulment committee decision could be read as 'a critical wake-up call to the ICSID system that poor jurisprudence and lack of appellate review authority are an unsustainable combination'); Dohyun Kim, 'The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need To Move Away From An Annulment-

Perhaps the most prominent critic was Christoph Schreuer, a leading commentator on the ICSID Convention. Schreuer decried the fact that the annulment mechanism was no longer 'an exceptional remedy for an extraordinary situation'.[63] He asserted that there had been both an increase in the number of annulment requests and an expansion in their scope.[64] According to Schreuer, Argentina in particular had 'developed the technique of attacking unfavourable awards on as many aspects at possible'.[65] Schreuer also criticised annulment committees for emphasising in almost every decision that annulment is narrower than an appeal and yet not always abiding by this 'professed self restraint . . . in the actual decisions'.[66] Schreuer noted, for example, that given recent annulment decisions 'the distinction between non-application of the proper law and its erroneous application is melting away' when the former should be a ground for annulment while the latter should not be.[67]

In the late 2000s, ICSID also faced populist criticism from some Latin American states that questioned ICSID's legitimacy for political reasons. In 2007, Bolivia became the first state ever to withdraw from the ICSID Convention.[68] Bolivia's then president, Evo Morales, stated that ICSID was 'an absolutely

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Based System', 86 *NYU L. Rev.* 242, 247 (2011) (to address the problem of inconsistency, 'the ICSID arbitration mechanism must include a permanent appeals mechanism that allows for systemic and official substantive review'); Christina Knahr, 'Annulment and Its Role in the Context of Conflicting Awards', in Michael Waibel et al. (eds.), *The Backlash Against Investment Arbitration* 151, 163 (2010 Kluwer Law International) ('While annulment is certainly a valuable instrument to check a tribunal's actions in certain respects, due to its limited scope of application, it does not seem to be an appropriate tool to solve the problem of conflicting dispute settlement outcomes').

63 Sebastian Perry, 'Is ICSID losing its appeal… again?' (GAR, 2011) (reporting on Schreuer's comments at a conference), available at: https://globalarbitrationreview.com/article/icsid-losing-its-appeal-again.

64 Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope', 10 *L. & Practice of Int'l Cts. & Tribs.* 211, 213, 214 (2011) .

65 id. at 213. At a conference, Schreuer said more colourfully that Argentina had engaged in 'area bombardment' and 'shrapnel tactics' to criticize every aspect of an underlying award. Sebastian Perry, 'Is ICSID losing its appeal… again?' (GAR, 2011), available at: https://globalarbitrationreview.com/article/icsid-losing-its-appeal-again.

66 Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope', 10 *L. & Practice of Int'l Cts. & Tribs.* 211, 213, 216 (2011).

67 id. at 216–17.

68 Denunciation Of ICSID Convention Bolivia (ICSID, World Bank, 2022), available at: https://icsid.worldbank.org/news-and-events/news-releases/denunciation-icsid-convention.

unbalanced tribunal that always takes the side of the transnational corporations'.[69] In 2009, Ecuador also withdrew from the ICSID Convention.[70] Ecuador's then president, Rafael Correa, asserted that international dispute resolution centres, 'always decide in favor of big capital and not in favor of the truth'[71] and highlighted as an example the 'award just rendered by ICSID, regarding the claims of the oil company Occidental'.[72]

In 2012, Venezuela joined Bolivia and Ecuador in withdrawing from the ICSID Convention.[73] By that time, 36 ICSID cases had been filed against Venezuela.[74] Venezuela stated that leaving ICSID was necessary 'to protect the right of the Venezuelan people to decide the strategic directions of the economic and social life of the nation'.[75] Venezuela also incorrectly accused ICSID tribunals of having 'ruled 232 times in favor of transnational interests, in the 234 cases it has heard throughout its history'.[76]

Unhappiness with ICSID in Latin America was not limited to the countries that denounced ICSID. Around this time, for example, the Member States of the Union of South American Nations (UNASUR) discussed creating a South American centre for the settlement of investment disputes as an alternative to ICSID.[77] In 2012, UNASUR completed an initial draft covenant to establish the

69 Bolivia Inicia Campaña Internacional Contra El CIADI: Renegociará 24 tratados de protección a las inversiones (Uruguay.attac.org, 2007), available at: http://www.uruguay.attac.org/Documentos/varios/ciadi.htm.

70 Denunciation Of ICSID Convention Ecuador (ICSID, World Bank, 2022), available at: https://icsid.worldbank.org/news-and-events/news-releases/denunciation-icsid-convention-ecuador.

71 Ecuador Propone A Unasur La Creación De Instancias De Arbitraje Regional (Presidencia de la República del Ecuador), available at: https://www.presidencia.gob.ec/ecuador-propone-a-unasur-la-creacion-de-instancias-de-arbitraje-regional/.

72 id.

73 Venezuela Submits A Notice Under Article 71 Of The ICSID Convention (ICSID, World Bank, 2012), available at: https://icsid.worldbank.org/news-and-events/news-releases/venezuela-submits-notice-under-article-71-icsid-convention.

74 UNCTAD Investment Policy Hub, Venezuela, Investment Dispute Settlement Navigator, available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/228/venezuela-bolivarian-republic-of/respondent.

75 Venezuela Formaliza Salida Del Convenio De Ciadi (El Tiempo, 2012), available at: https://www.eltiempo.com/archivo/documento/DR-33738.

76 Venezuela Ratifica Su Salida Del Tribunal De Controversias Del Banco Mundial (El Día, 2012), available at: https://www.eldia.es/venezuela/2012-01-26/2-Venezuela-ratifica-salida-tribunal-controversias-Banco-Mundial.htm.

77 The UNASUR members comprised Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Guyana, Paraguay, Peru, Surinam, Uruguay and Venezuela.

centre.[78] Though the centre never came to fruition,[79] by 2012, between the populist criticism of Latin American states and the technical criticism of commentators, ICSID arbitration in Latin America had reached a low ebb.

ICSID in Latin America after the Argentine and Venezuelan cases

In the 10 years since, however, the perception of ICSID in Latin America has improved. To start, ICSID cases arising from Venezuela's nationalisations have subsided. Indeed, since 2015, the Latin American countries with the most ICSID cases against them have been Peru (25), Colombia (18) and Mexico (17).[80] These cases have been for the most part due to particularised government measures, and not sweeping policy changes, which reduces the opportunities for evident contradictions in ICSID awards and annulment committee decisions.

One exception to this trend may be three ICSID arbitrations against Colombia brought under the Canada–Colombia Free Trade Agreement (FTA). These cases arise from a Colombian Constitutional Court ruling that annulled an exception in a statute banning mining in the environmentally protected Páramo region in Colombia.[81] The exception would have permitted existing investors to continue their operations.[82] In the wake of the Constitutional Court ruling, three Canadian mining companies brought ICSID claims alleging, *inter alia*, breach of the minimum standard of treatment and expropriation. The FTA contains an environmental carve-out stating that nothing in the agreement shall prevent a party from adopting measures 'to protect human, animal or plant life or health'.[83]

In the first of these three cases, *Eco v. Colombia*, the tribunal held that Colombia had breached the minimum standard of treatment. It also held that the environmental carve out did not foreclose compensation. While the carve-out ensures that 'the State is not precluded from adopting or enforcing' environmental measures, it does not 'permit[] such action to be taken without the payment

78 Katia Fach Gomez and Catharine Titi, El Centro de Solución de Controversias en Materia de Inversiones de UNASUR: Comentarios Sobre el Borrador de Acuerdo Constitutivo (International Institute for Sustainable Development, 2016), available at: ww.iisd.org/itn/es/2016/08/10/unasur-centre-for-the-settlement-of-investment-disputes-comments-on-the-draft-constitutive-agreement-katia-fach-gomez-catharine-titi/.

79 Of note, before giving up on the project, the Member States did debate the merits of appeal versus annulment and the creation of a permanent tribunal to decide on annulment requests. id.

80 See ICSID Case Database, available at: https://icsid.worldbank.org/cases/case-database.

81 See Judgment of 16 February 2016, C-035/16, at 136, Colombia Constitutional Court.

82 id. at 126.

83 Canada–Colombia FTA, Art. 2201(3).

of compensation'.[84] The other two cases have yet to be decided and there is a possibility of inconsistent results. Specifically with respect to the environmental carve-out, we note that Canada's non-disputing party submission stated that no compensation was due if a state measure met the requirements of the carve-out.[85] It is possible that a future award will give more weight to a similar submission from Canada.

In addition to having fewer cases that are prone to criticism on the basis of inconsistent outcomes, ICSID's fortunes have improved in Latin America due to the support of Latin American states.

First, Colombia more fully committed to ICSID between 2005 and 2015, when it entered into 13 new BITs and eight new FTAs that provide for ICSID arbitration and that permit claims based on FET breaches.[86] Prior to 2005, Colombia had only entered into six BITs. Moreover, the FTAs it had entered into prior to 2005 did not include FET provisions.[87] Colombia's recent agreements providing for ICSID arbitration and containing FET provisions have resulted in more ICSID arbitrations against it. All 18 ICSID arbitrations against Colombia were registered after 2015, and all but one of these cases were brought under BITs or FTAs executed by Colombia in 2005 or later.

Second, Mexico joined ICSID in 2018, which provided another vote of confidence for ICSID.[88] Before the ICSID Convention came into force for Mexico, cases against it administered by ICSID were governed by the ICSID Additional

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84 *Eco Oro v. Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), Para. 829.

85 id. at Paras. 373–78.

86 See Colombia–Spain BIT (2005), Art. 2; Colombia–Switzerland BIT (2006), Art. 4.; Colombia–Peru BIT (2007), Art. 4; China–Colombia BIT (2008), Art. 2; BLEU (Belgium-Luxembourg Economic Union)–Colombia BIT (2009), Art. III; Colombia–India BIT (2009), Art. 3; Colombia–United Kingdom BIT (2010), Art. II; Colombia–Republic of Korea BIT (2010), Art. 2; Colombia–Japan BIT (2011) Art. 4; Colombia–Singapore BIT (2013), Art. 4; Colombia–France BIT (2014), Art. 4; Colombia–Turkey BIT (2014), Art. 4; Colombia–United States TPA (2006), Art. 10.5; Chile–Colombia FTA (2006), Art. 9.4; Canada–Colombia FTA (2008), Art. 805; Colombia–Ecuador–EU–Peru Trade Agreement (2012), Art. 110, Colombia–Korea, Republic of FTA (2013), Art. 8.5; Colombia–Costa Rica FTA (2013), Art. 12.4, Colombia–Panama FTA (2013), Art. 14.5, Colombia–Israel FTA (2013), Art. 10.3; Pacific Alliance Additional Protocol (2014), Art. 10.6.

87 See UNCTAD Investment Policy Hub, Colombia, International Investment Agreements Navigator, available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/45/colombia,

88 Mexico Ratifies The ICSID Convention (ICSID, World Bank, 2018), available at: https://icsid.worldbank.org/news-and-events/news-releases/mexico-ratifies-icsid-convention.

Facility Rules, and the majority arose under the North American Free Trade Agreement (NAFTA). Eventually, cases under NAFTA will cease as investors only have a three-year window from the expiration of NAFTA to file legacy cases. ICSID cases involving Mexico in the future will thus depend on its BITs and other agreements that provide for ICSID arbitration.[89]

Finally, Argentina never denounced the ICSID Convention, despite rumours that it would,[90] and Ecuador has recently rejoined ICSID. In 2021, the newly-elected president of Ecuador 're-ratified' the ICSID Convention, arguing that this step will 'allow Ecuador to meet new business partners and strengthen relations with those with whom it already has alliances as the agreement encourages the attraction of responsible investors who are committed to contributing to the country's development'.[91] As discussed earlier, the discussions by UNASUR Member States to create an alternative to ICSID did not flourish, and UNASUR itself disbanded by 2019.

Conclusion

The growth of ICSID arbitration owes much to investment disputes originating in Latin America, and in Argentina and Venezuela in particular. Sweeping policy changes in these two countries resulted in a large number of ICSID cases. This is a pattern that may repeat itself in Latin America and other regions. We note, for example, that Spain is now the country with the third-most ICSID cases against it,[92] and these cases have arisen almost exclusively from Spain's reforms to the renewable energy sector.[93]

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89 Mexico has 32 BITs that are in force, 29 of which provided for ICSID arbitration. See UNCTAD Investment Policy Hub, Mexico, International Investment Agreements Navigator, available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/136/mexico.

90 Daniel E González and others, 'If Argentina Withdraws From The ICSID Convention: Implications For Foreign Investors' (Lexology, 2013), available at: https://www.lexology.com/library/detail.aspx?g=080c79bc-cce7-485f-97aa-27a5b2bdec5c.

91 Alexandra Valencia, 'Ecuador Apunta A Regresar Al Tribunal Arbitral Del Banco Mundial Para Atraer Inversión' (*Reuters*, 2022), available at: https://www.reuters.com/article/economia-ecuador-ciadi-idESKCN2DX2ES.

92 Spain currently has 43 ICSID arbitrations. See ICSID Case Database, available at: https://icsid.worldbank.org/cases/case-database.

93 See Dorina C Suciu, Los Arbitrajes De Energías Renovables Contra España A La Luz De La Sentencia Del Tribunal De Justicia De La Unión Europea En El Asunto Achmea, 37 Revista Electrónica de Estudios Internacionales 1, 4–5 (2019), available at: https://dialnet.unirioja.es/servlet/articulo?codigo=6959566.

As discussed above, cases arising from across-the-board policy changes pose a challenge to the ICSID system and, indeed, contributed to a legitimacy crisis for ICSID in Latin America. However, with the Argentina and Venezuela cases receding, ICSID's fortunes in Latin America have improved. Indeed, Colombia, Ecuador and Mexico have all made recent commitments to the ICSID system.

Of course, the political landscape in Latin America can shift quickly. Between 2021 and 2022, presidential and legislative elections favouring populist agendas have taken place in Chile, Colombia, Peru and Honduras. Additionally, in Mexico, President Manuel López Obrador attempted to introduce drastic changes to the electricity regulation[94] and recently reformed the lithium mining sector.[95] It is possible that these or other political changes will lead to the type of sweeping policy changes that result in many factually similar ICSID cases. If that is the case, ICSID will be kept busy and could face renewed controversy.

94 See Drazen Jorgic and Dave Graham, 'Mexican President's Contentious Electricity Overhaul Defeated In Congress' (*Reuters*, 2022), available at: https://www.reuters.com/world/americas/mexican-lawmakers-vote-presidents-contentious-electricity-overhaul-2022-04-17/.

95 On 17 April 2022, López Obrador submitted an initiative to modify Mexico's Mining Law to Congress that was approved by the Mexican congress. The amendments entered into force on 21 April 2022 and, among other measures, prohibit granting concessions and licences to explore and produce lithium in Mexico, as well as grant the exclusive right to carry out lithium exploration and production activities to a newly created state-owned enterprise. See 'Presidential Decree Amending And Adding Several Provisions Of The Mining Law' (20 April 2022), available at: https://www.dof.gob.mx/nota_detalle.php?codigo=5649533&fecha=20/04/2022#gsc.tab=0.