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ARTICLE

The No of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine

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Abstract—This article explores the negative reaction of developed countries, as host State recipients of foreign investment, when they are faced with the possibility of having its national policies and regulations challenged through investor-State arbitration, a system of adjudication of investment disputes created and promoted by developed countries over time. The discussion about the need and suitability of an investor-State settlement dispute mechanism between developed countries has been particularly relevant in preferential trade agreements involving developed countries, some already in force (like NAFTA and AUFTA), and other in current negotiation (like CETA, TTIP and TPP). The article compares the reaction of developed countries against investor-State arbitration with the past experience of developing countries with respect to investment disputes, particularly considering the experience of Latin American States in cases of 'diplomatic protection' and investor-state arbitration. The article concludes that developed countries can draw lessons from such experience, especially if they want to improve the international settlement of investment disputes, a mechanism that requires a reciprocal commitment from all States in order to be effective.

Gentlemen, you can't fight in here!
This is the War Room.

Stanley Kubrick, *Dr Strangelove* (Turner Classic Films 1964)

In recent years, we have witnessed an increasing sense of unease on the part of developed countries with respect to investor–State dispute settlement (ISDS), a system for the adjudication of foreign investment disputes. The first negative reactions came after Canada and the USA became respondents in cases brought by investors under Chapter 11 of the North American Free Trade Agreement

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(NAFTA).[2] Today we are observing a similar debate in the negotiations of the 'mega-regional' agreements involving developed countries, such as the Trans-Pacific Partnership (TPP),[3] the Comprehensive Economic and Trade Agreement (CETA)[4] and the Transatlantic Trade and Investment Partnership (TTIP).[5] The reason for this debate is that some groups—including civil society, academia and certain government officials—view the proposed inclusion of ISDS in such treaties as dangerous because it would give foreign investors access to investor–State arbitration, a forum that is seen as inappropriate in legal systems with a strong tradition of rule of law and independent and impartial courts.

The response of developed countries as respondent States in ISDS has been 'regressive'. Some are now looking to 'rebalance' the system, clarifying investment protection rules in a way that would allow more 'policy space' for host States, and others want to improve how ISDS operates, including measures on conflicts of interest, transparency and consistency of awards, among others. Several politicians and the general public in developed host States are waking up to the fact of these agreements and questioning them, and they are especially amazed that their judicial system is discarded as a natural forum of these disputes. At the heart of these concerns lies the idea that in host States with a 'proper' rule of law, the State's domestic courts are a more fitting forum for settling claims with foreign investors. National judges, and not foreign arbitrators, would be best suited to tackle these disputes, as judicial decision-making in these countries would offer

[2] North American Free Trade Agreement (opened for signature 17 December 1992, entered into force 1 January 1994) 32 ILM 289 (NAFTA).

[3] Trans-Pacific Partnership (TPP), see: Organization of American States (OAS), Foreign Trade Informations System, *Trans-Pacific Partnership Agreement*, Trade Policy Developments <http://www.sice.oas.org/TPD/TPP/TPP_e.ASP> accessed 6 November 2004. For a leaked version of the TPP Investment Chapter see: Citizens Trade Campaign (CTC), 'Trans-Pacific Investment Partnership (TPP) Investment Chapter (leaked version)' (13 June 2012) <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf> accessed 6 November 2014. In the case of the TPP, which currently involves Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the USA and Vietnam, the main objections against investor–State arbitration (ISA) have come from Australia and the USA. See, among others, Leon E Trakman, 'Investor-State Dispute Settlement under the Trans-Pacific Partnership Agreement' in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar 2013) 179–206; Daniel J Ikenson, 'A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement' (2014) Intellectual Prop 4.

[4] Comprehensive Economic and Trade Agreement (CETA), see: European Commission - Directorate General for Trade, 'Consolidated CETA Text, 26 September 2014' (2014) Transnatl Dispute Management <http://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=544> accessed 21 October 2014. In the case of CETA, the debate has been taking place in both negotiating parties: Canada and the European Union (EU). See, among others, European Commission, *Investment Provisions in the EU–Canada Free Trade Agreement (CETA)* (3 December 2013); Nathalie Bernasconi-Osterwalder and Howard Mann, 'A Response to the European Commission's December 2013 Document Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' [International Institute for Sustainable Development (IISD) 2014].

[5] Transatlantic Trade and Investment Partnership (TTIP), see: European Commission, 'Transatlantic Trade And Investment Partnership (TTIP)' (*In Focus: The Transatlantic Trade and Investment Partnership. Making Trade Work for You*, 29 October 2014) <http://ec.europa.eu/trade/policy/in-focus/ttip/> accessed 6 November 2014. In the case of the TTIP, due to the substantial interest generated by this proposed feature of the agreement, the European Commission held an online public consultation process, receiving a total of 149,399 contributions, mostly from the United Kingdom (UK), followed by Austria, Germany, France, Belgium, the Netherlands and Spain. European Commission, *Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement* (July 2014). A group of 121 academic experts has spoken out against the inclusion of ISA in the TTIP: Kent Law School, 'Statement of Concern About Planned Provisions on Investment Protection and Investor-State Dispute Settlement in the Transatlantic Trade and Investment Partnership' (University of Kent 2014) <https://www.kent.ac.uk/law/isds_treaty_consultation.html> accessed 4 August 2014.

better guarantees of accountability, independence and openness.[6] ISDS between developed countries would then be unnecessary or superfluous.

The apprehensions of developed countries about being a respondent State in a foreign investment dispute might be justified. The United Nations Conference on Trade and Development (UNCTAD) reported that in 2013, for the first time, there were more ISDS cases brought against developed countries than against developing countries and that, interestingly, in the majority of these disputes claimants were from developed countries.[7] In recent years, investment flows have changed, and developed countries are increasingly becoming the recipients of investment from developing countries.[8] This shift creates the possibility for disputes, where in a reversal of the traditional roles, investors from developing countries challenge a developed State's policies or regulations.

However, the reaction of developed countries is no different from that of developing countries in the past. Long before ISDS, the perception from investors from developed countries to the level of protection they received in developing countries was rarely a good one. Developed countries at that time secured the status of their nationals either through unequal treaties that guaranteed extraterritorial application of the law and jurisdiction of their own 'civilized' countries',[9] or challenged the substantive and procedural treatment that foreign investors received in domestic courts as not conforming to an 'international minimum standard'. As a consequence of the latter, Latin America became the main example of the use—and, in certain cases, the abuse—of 'diplomatic protection'.[10]

The creation of ISDS was supposed to overcome these problems, depoliticizing investment disputes and providing more legal certainty to foreign investors, through an independent, neutral and qualified tribunal.[11] Latin American countries were initially reluctant to accept investor–State arbitration as a mechanism to settle foreign investment disputes—a position that is well summarized in the 'No of Tokyo',[12] a declaration in which they rejected the establishment of the International Centre for Settlement of Investment Disputes (ICSID).[13] However, this approach changed in the 1990s, when almost every State in the region (with the notable exception of Brazil) embraced ISDS as a suitable method to solve foreign investor's claims.[14] At the time, they probably did

[6] Gus Van Harten, 'Comments on the European Commission's Approach to Investor-State Arbitration in TTIP and CETA' (2014) SSRN Scholarly Paper <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466688> accessed 21 November 2014.

[7] In 2013, of a total of 57 new cases, 45 were brought by investors from developed countries and the remainder by investors from developing countries. United Nations Conference on Trade and Development (UNCTAD), 'Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note No 1 April 2014' 2.

[8] In 2013, developing countries' share in global outflows reached a record 39%, amounting to US$454 billion, and in the same period were the recipients of 54% of global foreign direct investment inflows, with a new high of US$778 billion. The USA is still the largest recipient of foreign direct investment in the world, and several other developed countries, such as Canada, Australia, Spain, the UK and Germany, are in the top 20 host economies. UNCTAD, *World Investment Report 2014—Investing In SDGs: An Action Plan* (United Nations 2014) 2, 4–5.

[9] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007) 85.

[10] Ibrahim FI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 ICSID Rev–FILJ 1, 1.

[11] UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (United Nations 2013) 12, 2.

[12] International Centre for Settlement of Investment Disputes (ICSID), *History of the ICSID Convention,* vol 2 (ICSID 1968) 606. The 'No of Tokyo' will be discussed in the second part of this article.

[13] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention).

[14] Although Mexico is also not a contracting State of the ICSID Convention, it has accepted the use of the ICSID Additional Facility in NAFTA's investment disputes and has also signed several treaties containing investor–State

not foresee that Latin American countries would become the main respondents in investment arbitration cases.[15]

The central message of this article is that developed countries could learn from developing countries' extensive experience as respondent States in foreign investment disputes. From the case study of Latin American countries, we can draw lessons that developed countries can consider, while they increasingly face the challenges posed by the ISDS regime. Two relevant learning experiences can be identified. First, the improvement of a dispute settlement system can be achieved using international law and, second, international dispute settlement requires a reciprocal commitment from States to be effective.

I. LESSON 1: INTERNATIONAL DISPUTE SETTLEMENT CAN BE IMPROVED USING INTERNATIONAL LAW

Historically, foreign investment disputes were settled either by the domestic courts where investment took place or through diplomatic protection.[16] The main reason for the use of diplomatic protection was that home States were not always happy with the level of protection host States could provide to foreign investors via domestic courts, and the idea of an 'international minimum standard' was advanced by developed countries as opposed to the 'national treatment' espoused by certain developing countries, especially in Latin America.[17] Elihu Root, in his address to the 1910 Annual Meeting of the American Society of International Law, summarized the US position with regard to the protection of its citizens abroad:

> Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: *provided the protection which the country gives to its own citizens conforms to the established standard of civilization*.
>
> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. *The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard*. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.[18]

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dispute settlement (ISDS). Rodrigo Polanco Lazo, 'Is There a Life for Latin American Countries after Denouncing the ICSID Convention?' (2014) 11 Transnatl Dispute Management 6.

[15] Latin American countries account for 33% of the cases brought before ICSID. ICSID, 'Caseload—Statistics 2014–2' <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics> accessed 31 July 2014. As of the end of 2013, Argentina and Venezuela were the most frequent respondent States in ISA cases. UNCTAD (n 7) 8.

[16] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2012) 220–1.

[17] Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*, vol 26 (Hart Publishers 2009) 33.

[18] Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 Amer J Intl L 517, 20–1 (emphasis added).

At the time this address was given, the use of diplomatic protection included both peaceful and non-peaceful means. When force was used or its use was threatened, the 'diplomatic' part of the 'diplomatic protection' was 'an ironic but hardly subtle fiction'.[19] Although Latin American countries were particularly affected by the abuse of forceful diplomatic protection and faced armed interventions and even occupation by military forces sent by the investor's home State, 'gunboat diplomacy' was not systematically used to settle foreign investment disputes, and domestic courts and peaceful diplomatic means were still preferred to armed intervention.[20]

However, the perceived abuse of the use of diplomatic protection led Latin American countries to take the position that aliens had no greater rights than those afforded to its citizens.[21] For this reason, most host States of the region tried to confine investment remedies to local courts and institutions, rejecting diplomatic protection except in cases of denial of justice or evident violation of the principles of international law.[22] This idea was dubbed the 'Calvo Doctrine',[23] following the writings of the Argentinean diplomat Carlos Calvo.[24] With respect to the use of force as a legitimate means to settle investment disputes, Calvo underscored that in their dealings with Latin America, European nations had followed a different principle of intervention than in their reciprocal relations with other European States, where they had invariably upheld the view that 'the recovery of debts and the pursuit of private claims does not justify *de plano* the armed intervention of governments'.[25]

Soon afterwards, Latin American countries began to go beyond the idea of accepting diplomatic protection as a subsidiary remedy to unsatisfactory domestic judgments, and they devised the so-called 'Calvo Clause',[26] a provision inserted in contracts between foreign investors and host States, under which aliens agreed to forego their rights to request diplomatic protection from their home State in any dispute arising out of that contract,[27] even if such protection was implemented through peaceful means.

[19] Jan Paulsson, *Denial of Justice in International Law, Hersch Lauterpacht Memorial Lectures no 17* (CUP 2005) 15.

[20] In his very detailed research focused on sovereign debt and private bondholders between 1820 and 1913, Tomz found that contrary to popular wisdom, 'creditor governments generally did not use—or even threaten to use—force on behalf of bondholders, and neither investors nor borrowers expected that default would lead to military intervention'. Michael Tomz, *Reputation and International Cooperation: Sovereign Debt across Three Centuries* (Princeton University Press 2007) 157.

[21] Andreas F Lowenfeld, *International Economic Law* (OUP 2003) 395; Jorge L Esquirol, 'Latin America' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 568.

[22] Montt (n 17) 40–1.

[23] There is evidence that another prominent Latin American jurist, the Venezuelan Andres Bello, was in fact the first to advance this principle. See Frank Griffith Dawson, 'The Influence of Andres Bello on Latin-American Perceptions of Non-Intervention and State Responsibility' (1987) 57 Brit YB Intl L 253, 273; Montt (n 17) 42.

[24] Carlos Calvo, *Derecho Internacional Teórico y Práctico de Europa y América,* vol 1 (D'Amyot 1868). These ideas were further elaborated in the French edition of this book published in 1896 (*Le Droit International Théorique et Pratique*). See Manuel R Garcia-Mora, 'The Calvo Clause in Latin American Constitutions and International Law' (1949) 33 Marquette L Rev 205, 206.

[25] Carlos Calvo, *Le Droit International Théorique et Pratique* (Arthur Rousseau ed, Paris 1896) 350–1, s 205, cited by Amos S Hershey, 'The Calvo and Drago Doctrines' (1907) 1 Amer J Intl L 26, 27.

[26] According to Montt, this offshoot of the Calvo Doctrine was also not invented by Calvo. The earliest evidence for these provisions is a decree that Peru issued in 1846, and it was also included in a contract for completion of the most important railroad line in Chile in 1861, both several years before Calvo's first edition of his treatise. Montt (n 17) 46.

[27] Chittharanjan Felix Amerasinghe, *Diplomatic Protection* (OUP 2008) 192.

The Calvo Doctrine, and especially the Calvo Clause, were contested by developed capital-exporting countries and notably by the USA.[28] In 1873, after receiving a note from the Mexican Minister of Foreign Affairs affirming that Mexico was not responsible for the harm caused to foreigners during the civil war with reference to Calvo' s writings, the US Ambassador in Mexico responded that 'Dr Calvo was a young lawyer whose theories had not been accepted internationally'.[29] There was a debate as to whether, under the Calvo Clause, foreign investors could waive the right to diplomatic protection that is vested in their national State and not in the investor itself.[30] Most European countries were less vehemently opposed to the Calvo Doctrine and even recognized its partial validity, holding that a contractual undertaking by a private person not to have recourse to diplomatic protection does not bind the home State unless there is a violation of the generally recognized rules of international law.[31]

However, the Calvo Doctrine and the Calvo Clause were not the only avenues explored by Latin American countries to oppose forceful diplomatic protection. When it was not possible to maintain exclusive domestic jurisdiction for investment disputes, most countries of the region agreed to settle such disputes using peaceful methods of diplomatic protection, mainly bi-national (or mixed) claims commissions or *ad hoc* arbitrations. The use of arbitration to settle international conflicts between Latin American countries was even advanced as a 'principle of American Public Law' at Pan-American conferences,[32] and Latin American countries participated in almost 200 arbitrations from 1794 to 1938,[33] although most of these proceedings took place from 1829 to 1910, during the first century following the independence of these countries.[34]

When disputes involved developed countries, Latin American countries were not necessarily keen on arbitration. Arbitration was sometimes imposed as the sole alternative to forceful intervention[35] or as an extension of 'gunboat diplomacy', and home States of the foreign investors 'were seen to control the arbitral process in a way that permitted it to be used simply as a tool for extracting concessions from the host State'.[36] A detailed analysis of the outcomes of these arbitrations and of the claims commissions shows that they were far from being a 'victor's justice' and that developing countries of the region had an interest in improving diplomatic protection when it was used peacefully.

It is true that Latin American countries were sometimes forced to submit disputes to arbitrators whose predispositions 'did not always inspire confidence among developing countries',[37] but arbitration normally took place under arbitrators freely appointed by the parties. However, because in some of the

[28] Donald Richard Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press 1955) 37.

[29] Paulsson (n 19) 21.

[30] Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 366.

[31] Shea (n 28) 46–56.

[32] Alejandro Alvarez, 'Latin America and International Law' (1909) 3 Amer J Intl L 269, 301, 303, 328–30.

[33] Christopher F Dugan and others, *Investor-State Arbitration* (OUP 2008) 36.

[34] Alexander Marie Stuyt, *Survey of International Arbitrations: 1794-1989* (Martinus Nijhoff 1990). In this period, Latin American countries entered into at least 160 arbitrations, including almost 80 arbitrations with European countries, approximately 40 with the USA, approximately 40 among themselves, and one with Japan. Lionel M Summers, 'Arbitration and Latin America' (1972) 3 California Western Intl LJ 1, 7.

[35] Montt (n 17) 38.

[36] Guillermo Aguilar Alvarez and William W Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 Yale J Intl L 365, 367.

[37] ibid. Notably European sovereigns served either as arbitrators or umpires in these disputes.

earlier arbitrations each party directly paid their own arbitrators, an arbitrator was almost 'compelled to be the particular representative of his country rather than a judge'.[38] Umpires were occasionally selected by lot, a method that was criticized as being random and likely to lead to injustice and dissatisfaction.[39] Later arbitrations showed substantial improvement, with the appointment of 'neutral' or independent arbitrators and umpires.[40] Yet, there was rarely a Latin American individual acting as an arbitrator, and countries from the region preferred European arbitrators, even in intra-Latin American disputes.[41]

In the beginning, bi-national claims commissions were essentially 'one-sided', with the Latin American States always being the respondent State. A likely explanation for this imbalance is that there were more European and US investments in Latin America than the other way around, and those investors were affected by disturbances that caused substantial damage to persons and property.[42] Later, binational commissions were created to settle the claims of nationals of both sides, although Latin American countries were subject to far more cases, which were also financially more significant for their budgets.

The commissions set up to deal with disputes between Mexico and the USA provide an example of this evolution. The first was established under the Treaty of 11 April 1839[43] for claims involving hundreds of American citizens and millions of dollars in damages to their property, mainly during the Mexican independence war.[44] This commission worked in Washington from 1840 to 1842 and reviewed 109 claims, awarding a total of US$2,026,139.68 to the Claimants. Still, a large number of cases were left unsettled, and over the following years new claims continued to multiply. As the Mexican government failed to pay the full amount of the Awards, these became a source of conflict that later led to the Mexican–American War of 1846–48.[45]

A new Mexico–US General Claims Commission was constituted by a Convention in 1923,[46] with the intention of settling disputes between the two countries from 1868 onwards and including claims against one government by nationals of the other. In the period from 1924 to 1931, a total of 3,617 claims were filed with the Commission, of which 2,781 were against Mexico and 836 against the USA.[47] The Commission continued to work from 1934 to 1937, reaching a final agreement in 1941.[48]

It has been pointed out that the total amount of the awards made by claims commissions was disproportionately large in favour of the USA and Europe.[49] But

[38] Jackson H Ralston, *International Arbitration from Athens to Locarno* (Stanford University Press 1929) 224.
[39] ibid 225.
[40] ibid.
[41] Summers (n 34) 8.
[42] ibid.
[43] Convention for the adjustment of claims of citizens of the United States of America upon the Government of the Mexican Republic (signed 11 April 1839). Charles Irving Bevans, *Treaties And Other International Agreements Of The United States Of America, 1776–1949*, vol 9 (Department of State 1972) 783–87.
[44] Peter Mark Jonas, 'United States Citizens versus Mexico, 1821-1848' (PhD thesis, Marquette University 1989) 1–2.
[45] ibid 3–4.
[46] Special Claims Commission (Agreement 10 September 1923) (United Mexican States, United States of America). Bevans (n 43) 941–945.
[47] United Mexican States and United States of America, 'US–Mexico-US General Claims Commission' in *Reports of International Arbitral Awards*, vol 4 (United Nations 2006) 3.
[48] Lowenfeld (n 21) 401, 402.
[49] Summers (n 34) 8.

we should compare the sums awarded with the amounts claimed. For example, the 'Venezuelan debt crisis' (1902–03), which occurred when Britain, Germany and Italy imposed a naval blockade against Venezuelan ports, seized customs houses and even bombarded a fort after President Cipriano Castro's refusal to pay debts and damages suffered by citizens of those countries during the Venezuelan civil war (1899),[50] ended with an agreement to arbitrate with the 'enforcing powers' and other countries that did not participate in the forceful intervention but made similar claims (Belgium, France, the Netherlands, Spain, Mexico, the USA and Sweden and Norway).[51] The outcome of these arbitrations fell far short of the amounts claimed by the investors: US claimants were awarded approximately 3 percent of their claims; Germans approximately 27 percent and the British 63 percent (which might be explained by the fact that the United Kingdom filtered the claims submitted to arbitration, allowing only those considered to be of a 'good character').[52]

The 1923 Mexico–US General Claims Commission is also a good example of the amounts effectively awarded by these commissions. On 30 August 1931, the Commission disposed of 148 claims with awards favourable to American claimants in 89 cases (in total amounting to US$4,607,926.59) and disposed of five cases favourable to Mexican claimants (in total amounting to US$39,000.00).[53] By a Convention that came into force on 19 November 1941,[54] Mexico agreed to pay in installments a total of US$40,000,000.00 in an *en bloc* settlement of the claims brought before the Commission, including other previous outstanding claims. This sum was distributed to the claimants by a US commission established in 1942,[55] which worked until 1947 and considered 1,397 cases, rendering final awards on the claims of American nationals against Mexico in a total sum of US$37,948,200.05, charging no interest even if the disputes dated back to the nineteenth century.[56]

Some of these claims commissions and *ad hoc* arbitrations even accorded recognition to the Calvo Clause. Perhaps the most influential decision in this regard was the one formulated in the *North American Dredging Company of Texas* case (1923) by the earlier-mentioned Mexico–US General Claims Commission.[57] In this case, the Commission recognized the limited validity of the Calvo Clause under the rules of international law, establishing that it was legally binding on the individual—requiring him to seek redress for his grievances in the local courts—but that it was not binding on the home State in cases of denial or delay of justice.[58] Later arbitral decisions followed the same reasoning as *North American Dredging Company of Texas,* holding that a Calvo Clause could be effective except

[50] Amerasinghe (n 27) 191. For a detailed account of the Venezuelan debt crisis, see Brian Stuart McBeth, *Gunboats, Corruption, and Claims: Foreign Intervention in Venezuela, 1899-1908* (Greenwood Press 2001).

[51] Ralston (n 38) 223.

[52] ibid 224.

[53] United Mexican States and United States of America (n 47) 3.

[54] Convention Providing for the Final Adjustment and the Settlement of Certain Unsettled Claims (signed 19 November 1941) 56 Stat 1347. Bevans (n 43) 1059–1062.

[55] The Mexico–US General Claims Commission was established by the Settlement of Mexican Claims Act of 1942. Convention ibid 4.

[56] In fact, of a total of 2,781 claims filed against Mexico, only 1,545 were awarded in favour of American citizens—55.5% of the total—this means the average award per claim was US$24,561.9.

[57] *North American Dredging Company of Texas (USA) v United Mexican States* (1926) IV RIAA 26. For a detailed analysis of this jurisprudence, especially in the Mexico–US General Claims Commission, see Shea (n 28) 194–257.

[58] *North American Dredging Company of Texas* ibid s 14.

in cases of denial of justice where the conduct of the State was grave and the interest involved was substantial.[59]

The lesson that developed countries can learn from this experience of Latin American developing countries is that international law can be an effective means to improve the settlement of foreign investment disputes. Part of the debate that we are witnessing today against ISDS comes from the very States that created the system and that no longer seem comfortable with it now that they are facing claims as respondent States. The temptation for a State to fall back on claiming sole jurisdiction of its domestic courts or to take unilateral action is great, especially if a State has the power to enforce these policies. Latin American countries did not accept the legal theories emanating from developed capital-exporting countries allowing the use of diplomatic protection to protect their investors and investments, either by forceful or diplomatic means. They used legal reasoning to defend their position against diplomatic protection, advancing principles of international law (such as the restrictions on the use of force and the Calvo Doctrine) and fostering the improvement of mechanisms of peaceful diplomatic protection (such as international arbitration and binational claims commissions).

Latin American countries were particularly successful in one key aspect—the legal proscription of forceful diplomatic protection for the recovery of private debts[60]—a debate that was triggered after the Venezuelan debt crisis. Signatories to the 1907 Convention Respecting the Limitations of the Employment of Force for the Recovery of Contract Debts (also known as the Drago-Porter Convention)[61] agreed not to use armed force against another State for the recovery of contract debts claimed as being due to its nationals, except if the debtor State refused or neglected to reply to an offer of arbitration, prevented that procedure, or failed to comply with the award.[62] After the innocuous 1928 General Treaty for Renunciation of War as an Instrument of National Policy (also known as the Briand-Kellogg Pact),[63] a more absolute restriction on the use of

[59] Christopher K Dalrymple, 'Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause' (1996) 29 Cornell Intl LJ 161, 168.

[60] Montt (n 17) 49. Of course, Latin America's reaction against forceful diplomatic protection was not the only reason for its success. It has been suggested that the extended use of arbitration by the USA at this time was related to the preference of the American 'founding fathers' for its use (together with mediation and negotiation) as alternatives to war and also to the promotion of peaceful settlement by religious communities and 'pacifist societies' that were also common in Europe. See Mary Ellen O'Connell, 'Arbitration and Avoidance of War: The Nineteenth-Century American Vision' in Cesare PR Romano (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (CUP 2009) 31–2.

[61] This is because the Convention is based on the doctrine advanced in 1902 by the Argentinian Minister of Foreign Affairs José María Drago, seeking the support of the USA in asserting the principle that a public debt cannot occasion armed intervention or occupation of the territory of American nations by European powers. Having the Monroe Doctrine (1823) as a background, Drago claimed that foreign creditors involved in the State debts derived from loans were aware of the risks involved and that sovereignty of the debtor State prohibited the use of force to execute these entitlements. A modified version by the US delegate Horace Porter was finally adopted at The Hague in 1907, adding that the limitations of the use of force were not applicable if the debtor State refused an offer of arbitration or refused to comply with an arbitral award. 'Convention Respecting The Limitation Of The Employment Of Force For The Recovery Of Contract Debts' (1908) 2 Amer J Intl L 81. Wolfgang Benedek, 'Drago-Porter Convention (1907)' (2007) Max Planck Encyclopedia Pub Intl L 4 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e733?rskey=s0r2Cp&result=1&prd=OPIL> accessed 26 March 2014.

[62] Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts ibid 81, 82.

[63] Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy (concluded 27 August 1928, entered into force 24 July 1929) 94 LNTS 57, which is mostly known as the Briand-Kellogg Pact, condemned the recourse to war as a means of solving international controversies or as an instrument of national policy. Contracting parties also agreed that the settlement of disputes or conflicts of whatever

force finally came about with the 1945 Charter of the United Nations. In the Charter, Article 2(4) states that use of force is not a permissible method for the exercise of the right of diplomatic protection.[64]

Latin American countries were also partially successful in affirming the principle that domestic courts should be the main forum for dealing with foreign investment disputes. As we have seen, the Calvo Doctrine, and even the Calvo Clause, were eventually accepted in claims commissions and *ad hoc* arbitrations, except in justified cases, such as the denial of justice.[65] This partial success is reflected today in the fact that several aspects of the Calvo Doctrine have been accepted in practice[66] and that peaceful diplomatic protection has increasingly become an institution of last resort.[67] However, this achievement was superseded at the beginning of the twenty-first century by the widespread acceptance by developing countries—most Latin American countries included—of ISDS as a special system of settlement for foreign investment disputes.

II. LESSON 2: INTERNATIONAL DISPUTE SETTLEMENT REQUIRES A RECIPRICAL COMMITMENT FROM STATES TO BE EFFECTIVE

In the quarter century following the end of the Second World War, a wave of expropriations took place in Eastern Europe, in the former European colonies and in Latin America.[68] During this period, these countries strengthened their opposition to the 'international minimum standard' and to the use of diplomatic protection (including peaceful dispute settlement) affirmed by developed countries for the protection of foreign investment. Latin American countries upheld the principle of national treatment even in the extreme cases where no compensation was provided after expropriation.[69] In this context, the tribunals naturally competent to decide an investment claim were the host State's domestic courts.

In the early 1960s, the World Bank began to work on an alternative approach for the settlement of investment disputes. The result of years of work and negotiations was the ICSID Convention,[70] a mechanism for the settlement of

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nature or origin should never be sought except by specific means. However, this Treaty did not mean a renunciation of war as a means of coercive enforcement of international law, and in practice wars for the purpose of imposing sanctions or for self-defence were admissible. Wilhelm G Grewe, *The Epochs of International Law,* translated by Michael Byers (revised edn, De Gruyter 2000) 621.

[64] Amerasinghe (n 27) 27. Charter of the United Nations (signed 26 June 1945) 1 UNTS XVI, art 2(4) provides that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.

[65] However, at several international conferences held during the first part of the twentieth century as well as in the discussion of the new international economic order during the second half of that century, it was common to see developing countries strongly defending the Calvo Doctrine (together with the principle of national treatment) and developed capital exporting countries supporting diplomatic protection (together with the international minimum standard). Montt (n 17) 48–62.

[66] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 25–6.

[67] This is partially a result of the political tensions generated by the protection of the nationals of Western countries after the flood of nationalizations on foreign property, especially in Eastern Europe and Latin America in the middle of the twentieth century, but it is also linked with the dissatisfaction foreign investors felt with respect to the efficacy of some of the rules governing diplomatic protection, especially the exhaustion of local remedies. Amerasinghe (n 27) 17–19.

[68] Lowenfeld (n 21) 405–6.

[69] Montt (n 17) 56.

[70] ICSID Convention (n 13).

disputes not between States but rather between private parties on the one side and host States on the other.[71] At the annual meeting of the Board of Governors of the World Bank, which was held in Tokyo, a resolution was approved asking the executive directors to formulate the final text of the envisaged convention.[72]

For the first time in the World Bank's history, a major resolution was met with substantial opposition to a final vote, as 21 countries voted against the proposal (all Latin American countries, the Philippines and Iraq).[73] During this meeting on 9 September 1964, the governor for Chile, Félix Ruiz, who was representing the Latin American countries, made the following statement that later became known as 'the No of Tokyo':

> I should particularly like to stress the opinion of the countries whom I here represent with respect to the draft Agreement on Conciliation and Arbitration.
>
> We consider undesirable the resolution submitted to the Board of Governors, which recommends, and entrusts to the Boards of Directors of the Bank, the drafting of an international agreement to create a center for conciliation and arbitration to which foreign private investors could have recourse for the settlement of their disputes with governments of member countries, *without necessarily having to exhaust the formalities and procedures of the national tribunals*. It is believed that this would stimulate private investment in the underdeveloped economies.
>
> *The legal and constitutional systems of all Latin American countries that are members of the Bank offer the foreign investor at the present time the same rights and protection as their own nationals*; they prohibit confiscation and discrimination and require that any expropriation on justifiable grounds of public interests shall be accompanied by fair compensation fixed, in the final resort, by the law courts.
>
> *The new system that has been suggested would give the foreign investor, by virtue of the fact that he is a foreigner, the right to sue a sovereign state outside its national territory, dispensing with the courts of law.* This provision is contrary to the accepted legal principles of our countries and, de facto, would confer a privilege on the foreign investor, placing the nationals of the country concerned in a position of inferiority.
>
> I must state, Mr. President, that the procedure suggested does not meet with the approval of our countries because it contravenes constitutional principles relating to this question that cannot be ignored.[74]

At the time, Latin American countries recognized peaceful diplomatic protection only after local remedies had been exhausted. Even arbitration was not supported by the countries of the region. From 1910 to 1939, there were only 30 arbitrations involving Latin American countries, and since the Second World War the only significant arbitrations have been those related to the boundaries between Chile and Argentina and between Honduras and Nicaragua.[75]

During the 1980s and early 1990s, a major reversal of this policy took place in Latin America, as most countries became members of ICSID and began to sign bilateral investment treaties (BITs)[76] that included ISDS in order to stimulate

[71] Lowenfeld (n 21) 456–7.
[72] Antonio R Parra, *The History of ICSID* (OUP 2012) 67–8.
[73] Lowenfeld (n 21) 460.
[74] History of the ICSID Convention (n 12) 606 (emphasis added).
[75] Summers (n 34) 7.
[76] Bilateral investment treaties (BITs) are defined as 'a reciprocal legal agreement concluded between two sovereign States for the promotion and protection of investments by investors of the one State ("home State") in the territory of the other State ("host State")'. Marc Jacob, 'Investments, Bilateral Treaties' (2011) Max Planck Encyclopedia Pub Intl L 1–14. <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1061> accessed 13 January 2014.

economic growth through foreign direct investment,[77] with the intention of presenting themselves as an attractive location for potential foreign investors.[78] The only notable exception to this trend was Brazil, which is not an ICSID member and has not ratified any of the BITs that it has negotiated.[79]

Although, initially, BITs were concluded between a developing and a developed State, usually at the initiative of the latter,[80] this pattern later changed, especially during the 1990s when developing countries and economies in transition started signing BITs among themselves and in increasingly large numbers.[81] In addition, investment chapters started to be included within certain free trade agreements (FTAs) following the example of NAFTA Chapter 11,[82] which can be considered the first investment treaty between two developed countries, Canada and the USA.[83] Today, the vast majority of the investment chapters of BITs and FTAs include ISDS.[84]

So now, developed countries can be the target of investor–State arbitration. And they do not like it.[85] Remarkably, in the case of NAFTA, the role reversal did not occur because investors from Mexico started bringing claims against the USA or Canada. Instead, Canadian and American investors started challenging each other's government.[86] After the USA and Canada experienced the respondent State perspective, their praise for ISDS began to fade and was replaced by complaints about infringement of national sovereignty, lack of transparency and accountability. As Guillermo Aguilar and William Park point out:

> Environmental and consumer groups, as well as the media and Congress, began taking the position that NAFTA undermined legitimate governmental regulations, challenged legislative prerogatives, and opened decision-making to ill-informed foreign tribunals. The NAFTA process was attacked for the confidentiality of its proceedings (lack of transparency), uncertainty, and absence of accountability to domestic constituents. A dispute resolution process that had been fair for the rest of the world came to be seen as a tool to put business before public interest.[87]

The concerns about ISDS are now also being voiced on the other side of the Atlantic. At the end of 2013, two European Union (EU) members were among the overall top 10 respondent States in ISDS: Czech Republic (ranked third with 27

[77] Katia Fach Gómez, 'Latin America and ICSID: David Versus Goliath?' (2010) SSRN Scholarly Paper 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708325> accessed 21 November 2014.

[78] Andrew T Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia J Intl L 639, 643–4.

[79] Leany Barreiro Lemos and Daniela Campello, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation' (2013) SSRN Scholarly Paper.

[80] Pakistan and Germany signed the first BIT on 25 November 1959. Other European countries soon followed Germany's example.

[81] UNCTAD, *South-South Cooperation in International Investment Arrangements* (United Nations 2005).

[82] NAFTA (n 2).

[83] Charles H Brower, II, 'International Law in Ferment: Recent Developments in Private International Law' (2000) 94 Proceedings of the Annual Meeting of the ASIL 13, 14.

[84] David Gaukrodger and others, 'Investor-State Dispute Settlement: A Scoping Paper of the Investment Policy Community' (2012) OECD Working Papers on International Investment no 2012/3, 10. Usually the generic term 'international investment agreements' (IIAs) is used to refer to the investment treaties, whether part of a free trade agreement or a standalone BIT.

[85] Alvarez and Park (n 36) 368–9.

[86] Nicola Ranieri, 'Investor's Rights, Legal Concepts, and Public Policy in the NAFTA Context' in Leon Trakman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (OUP 2013) 405; Alvarez and Park (n 36) 370.

[87] Alvarez and Park (n 36) 370–1.

cases) and Poland (ranked eighth with 16 cases). In 2013, 24 arbitrations (42 percent of all cases) were brought against EU Member States, including the Czech Republic (seven cases), Spain (six cases), Croatia, Hungary and Slovakia (two cases each), Bulgaria, Cyprus, France, Greece and Slovenia (one case each).[88] In all but one of these arbitrations,[89] the claimants are also EU nationals, which based their claims on intra-EU BITs or on the Energy Charter Treaty (ECT).[90] In fact, intra-EU investment arbitrations represent approximately 15 percent of all ISDS cases globally.[91]

As expected, the reaction of European countries—now in the position of respondent States—has been mostly negative. The European Commission, while acknowledging that the number of cases brought to arbitration is small, declared that 'some of the most recent cases brought by investors against states have given rise to strong public concerns. The main concern is that the current investment protection rules may be abused to prevent countries from making legitimate policy choices'.[92] It seems that developed countries are revisiting the No of Tokyo. They now praise the Calvo Doctrine—without mentioning it by name, of course—and they are also highlighting their concerns about the efficiency of investment treaties and their particular arbitration system.[93]

Both Canada and the USA have promoted the 'clarification' of the standards of fair and equitable treatment and full protection and security prescribed in NAFTA Article 1105, and NAFTA's Free Trade Commission has declared that those standards 'do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens'.[94] However, several Tribunals have challenged this interpretation, emphasizing the evolutionary character of these standards and recognizing, at least theoretically, a level of protection for foreign investors that is superior to that offered by the traditional interpretation of the minimum standard of treatment.[95]

In 2002, the then Senator from Massachusetts, John Kerry, presented to the US Senate an amendment to ensure that any artificial trade-distorting barrier related to foreign investment was eliminated from US trade agreements. Among other things, the 'Kerry Amendment' established that a treaty including investment provisions should:

> (D) *ensure that foreign investors are not granted greater legal rights than citizens of the United States possess* under the United States Constitution;
>
> . . .

[88] UNCTAD (n 7) 2, 28.

[89] *Erbil Serter v French Republic*, ICSID Case No ARB/13/22. The case was registered by ICSID Secretary-General on 10 September 2013 was brought by a Turkish national under the France–Turkey BIT.

[90] Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) OJ L380.

[91] UNCTAD (n 7) 2.

[92] European Commission, *Investment Protection and Investor-to-State Dispute Settlement in EU Agreements* (2013) 5.

[93] Leon Trakman, 'Investor State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46 J World Trade 83.

[94] NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (2001) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx> accessed 29 April 2014.

[95] Patrick Dumberry, 'The Emergence of A Consistent Case Law: How NAFTA Tribunals Have Interpreted the Fair and Equitable Treatment Standard' (*Kluwer Arbitration Blog*, 30 October 2013) <http://kluwerarbitrationblog.com/blog/2013/10/30/the-emergence-of-a-consistent-case-law-how-nafta-tribunals-have-interpreted-the-fair-and-equitable-treatment-standard/> accessed 29 April 2014.

(F) *ensure that standards for minimum treatment*, including the principle of fair and equitable treatment, *shall grant no greater legal rights than United States citizens possess* under the due process clause of the United States Constitution.[96]

In addition, it required an investor to go through a home State screening mechanism before submitting a claim against the host State to arbitration:

(H) ensure that—

(i) *a claim by an investor under the agreement may not be brought directly unless the investor first submits the claim to an appropriate competent authority in the investor's country;*
(ii) such entity has the authority to disapprove the pursuit of any claim solely on the basis that it lacks legal merit; and
(iii) if such entity has not acted to disapprove the claim within a defined period of time, the investor may proceed with the claim.[97]

Although the Kerry Amendment was ultimately defeated,[98] a similar bill was introduced to the US Congress in January 2014, this time with the sponsorship of both Democrat and Republican parties. If approved, the Bipartisan Congressional Trade Priorities Act of 2014 would declare that:

Recognizing that United States law on the whole provides a high level of protection for investment, consistent with or greater than the level required by international law, the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade distorting barriers to foreign investment, while ensuring that *foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States*, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice.[99]

In any case, the Obama administration has publicly declared its adherence to investor–State arbitration, on the premise that it offers 'basic legal protections for American companies abroad *that are based on the same assurances the United States provides at home*'.[100] All of these elements seem to indicate that Calvo's ideas are still alive, but now in another part of America.

In Europe, the discussion of investor–State arbitration dominated the early negotiations of the TTIP with the USA and the closing of the CETA negotiations with Canada. The question has been raised whether it is really necessary to have investor–State arbitration in these treaties, as the administrative and judicial systems in place in Canada, the EU and the USA ought to be considered sufficient for protecting the rights of foreign investors who disagree with regulatory

[96] John Kerry, *Amendment No. 3430 to the Bipartisan Trade Promotion Authority Act of 2002*, Congressional Record (US Senate 17 May 2002) s 4529 (emphasis added).
[97] ibid (emphasis added). The proposal also aimed to improve mechanisms used to resolve disputes between an investor and a government in matters such as selection of arbitrators, transparency, *amicus curiae* and the establishment of a single appellate body.
[98] US Senate, *Bipartisan Trade Promotion Authority Act of 2002: Report* (Diane Publishing 2002) 60.
[99] Bipartisan Congressional Trade Priorities Act of 2014, HR3830, 113th Congress (2013–14), 12 (emphasis added).
[100] Office of the United States Trade Representative, *The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors* (2014) <http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors> accessed 28 April 2014 (emphasis added).

intervention and seek legal remedies.[101] However, ISDS is included in the recently concluded CETA[102] and also continues to be part of the ongoing negotiations of the TTIP, although textual discussions on the latter were suspended pending the outcome of an EU public consultation on investment protection and investor–State arbitration.[103]

EU Member States and members of the European Parliament are not necessarily following the path of the European Commission. In Germany, after an ISDS case brought under the ECT by the Swedish energy company Vattenfall (operator of two nuclear power plants), claiming compensation for Germany's decision to phase out nuclear energy, public and official opinion was swayed decisively against the inclusion of investor–State arbitration in trade agreements, especially those with other developed countries.[104] It has been reported that Germany's Deputy Economy Minister Stefan Kapferer declared that '[t]he German government does not view as necessary stipulations on investor protection, including on arbitration cases between investors and the state with states that guarantee a resilient legal system and sufficient legal protection from independent national courts'.[105] Several members of the European Parliament have called for the Commission to drop ISDS in the TTIP for various reasons, including that investor–State arbitration is not necessary for two partners with 'functioning legal systems'.[106]

However, the backlash against ISDS in developed countries is not limited to the USA and the EU. In the context of the negotiations of the TPP, the Australian government even produced its own version of the No of Tokyo, announcing in April 2011 that it will no longer include ISDS in trade agreements, declaring its support for the principle of national treatment 'that foreign and domestic businesses are treated equally under the law' and rejecting the provisions 'that would confer greater legal rights on foreign businesses than those available to domestic businesses' or 'that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses'.[107] Under this policy, Australian courts would be the sole jurisdiction

[101] See, among others, Jan Kleinheisterkamp, 'Is There a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?' (2014) SSRN Scholarly Paper. Consumers International, *Resolution on Investor-State Dispute Resolution in the Transatlantic Trade and Investment Partnership* (2013).

[102] European Commission - Directorate General for Trade (n 4).

[103] European Commission, *Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement in the Transatlantic Trade and Investment Partnership Agreement* (2014) <http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179> accessed 28 April 2014.

[104] *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12. The case was registered by ICSID Secretary-General on 31 May 2012 and is still pending. The conflict between Vattenfall and the German federal government was triggered by the August 2011 decision of the German Parliament—after the nuclear disaster in Fukushima, Japan—to abandon the use of nuclear energy by the year 2022. Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann, 'The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the New Dispute *Vattenfall v Germany* (II)' (2012) Intl Inst for Sustainable Development 2, 2–3.

[105] Letter dated 26 June 2014 and written in response to an enquiry from a Greens lawmaker, reprinted in 'Germany to Reject EU-Canada Trade Deal' *Reuters* (26 July 2014) <http://www.reuters.com/article/2014/07/26/germany-canada-trade-idUSL6N0Q10CS20140726?irpc=932&ref=browsi> accessed 19 August 2014.

[106] James Kilcourse, 'TTIP Faces Political Hurdles on Both Sides of the Atlantic' (*Institute of International and European Affairs*, 3 February 2014) <http://www.iiea.com/blogosphere/ttip-faces-political-hurdles-on-both-sides-of-the-atlantic> accessed 20 August 2014.

[107] Government of Australia, *Trading Our Way to More Jobs and Prosperity* (Trade Policy Statement, April 2011) 14. Almost at the same time of this statement, Australia concluded one IIA with New Zealand, without ISA. Protocol on Investment to the Australia New Zealand Closer Economic Relations Trade Agreement Australian Treaty Series (signed 16 February 2011, entered into force 1 March 2013) ATS 10 <https://www.dfat.gov.au/fta/anzcerta/downloads/Protocol-on-investment-to-the-ANZCERTA.pdf> accessed 21 November 2014.

available for investment disputes, at least to investors from countries with no treaty currently providing ISDS. A recent change of government in Australia was perceived as leading to a change of policy in this regard, as the FTA it agreed with Korea in early December 2013 again contemplated ISDS.[108] However, the more recent Australia–Japan FTA does not include provisions on investor–State arbitration.[109]

Although Australia had already declined to be bound by an investor–State arbitration provision in the Australia USA FTA or AUSFTA (2004),[110] after highlighting the reliability of its own legal system to solve disputes with US investors,[111] it did not prevent the US company Philip Morris from starting arbitration proceedings through its Hong Kong branch on 21 November 2011,[112] claiming that Australian regulations on plain packaging of cigarettes violated their intellectual property rights under the Hong Kong–Australia BIT.[113]

It seems, however, that developed countries should move beyond the No of Tokyo as a 'lesson learned' from Latin America with respect to ISDS. The reactions of the USA, the EU and Australia can be compared with the attitudes of the developing countries of Latin America when faced with investor–State arbitration. And there is a stark contrast. Today, Latin America is the region with the highest number of ISDS cases, and Argentina is the most frequent respondent, followed by Venezuela in the overall statistics.[114] Among ISDS respondent States, Ecuador and Mexico rank as sixth and seventh respectively, but only since 2013 when the Czech Republic and Egypt replaced them as third and fourth respectively.[115] Ecuador has also faced one of the highest awards against a host State (US$1.77 billion),[116] although an annulment proceeding is still taking place. Claims registered under the ICSID Convention and the Additional Facility Rules[117] against Latin American countries represent 33 percent of the total number of cases.[118] While some investors from the region have initiated arbitration proceedings with ICSID (notably investors from

[108] Australia Department of Foreign Affairs and Trade, 'Korea–Australia Free Trade Agreement (KAFTA) - Key Outcomes' (no date) <http://dfat.gov.au/fta/kafta/fact-sheet-key-outcomes.html> accessed 29 April 2014.

[109] Luke Nottage, 'Why No Investor–State Arbitration in the Australia–Japan FTA?' (*East Asia Forum*, 7 April 2014) <http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/> accessed 28 April 2014.

[110] Australia–United States Free Trade Agreement (entered into force 1 January 2005) (AUSFTA) <http://www.dfat.gov.au/fta/ausfta/final-text/> accessed 28 April 2014.

[111] Luke Eric Peterson, 'In Policy Switch, Australia Disavows Need for Investor-State Arbitration Provisions in Trade and Investment Agreements' *Investment Arbitration Reporter* (14 April 2011) <http://www.iareporter.com/articles/20110414> accessed 29 April 2014.

[112] *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12. (Hong Kong–Australia BIT).

[113] IISD, 'Philip Morris Files for Arbitration over Intellectual Property Dispute with Australia' (2011) 2 Inv Treaty News Q 13.

[114] Most of Argentina's cases arose from the economic crisis and social collapse of 2011 and the measures taken by the Argentine State to offset it and its consequences. Ignacio Torterola and Diego Brian Gosis, 'Argentina' in Jonathan C Hamilton and others (eds), *Latin American Investment Protections: Comparative Perspectives on Laws, Treaties, and Disputes for Investors, States and Counsel* (Martinus Nijhoff 2012) 15.

[115] UNCTAD (n 7) 8.

[116] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012). Unless otherwise indicated, all ISA cases are available at Investment Treaty Arbitration <http://www.italaw.com/> accessed 28 April 2014.

[117] International Centre for Settlement of Investment Disputes Additional Facility Rules (January 2003).

[118] As of 30 June 2014, the percentages were 27% for South America and 6% for Central America and the Caribbean. *Caseload Statistics* (n 15) 11.

Mexico, Argentina and Chile),[119] Latin American investors do not rank among the most frequent ICSID claimants.

This scenario has understandably led to concerns and criticisms about the regime of ISDS in Latin America and especially to criticism of ICSID, which has become the most relevant forum for dealing with investment disputes for the region. However, the reaction of Latin American countries has not been an *en bloc* return to the Calvo Doctrine. Some have not reacted with special nervousness after facing an ISDS claim. Having the same problem as Australia—the challenge of its policy of plain packaging of cigarettes in an ICSID case[120]—Uruguay has not declared that it would stop negotiating agreements with ISDS provisions or withdraw from ICSID.[121] Notably these 'plain packaging' cases are the first ICSID claims for both Uruguay and Australia.

Other countries have decided to exhaust all recourses within the system before complying with an award,[122] and some have even pushed the limits of the regime by 'proactively non-paying'[123] before settling some claims, as is the case of Argentina,[124] which recently paid five long due outstanding awards.[125] Some other countries have confirmed their adherence to the system after including an investment chapter in a regional trade bloc—notably the Pacific Alliance[126] between Chile, Colombia, Peru and Mexico—but with important improvements with respect to ISDS, especially regarding arbitral proceedings and treaty

[119] Guido Santiago Tawil, 'Schiedsgerichtsbarkeit —Arbitration in Latin America—Current Trends and Recent Developments' (2004) 15 Europaisches wirtschafts und steuerrecht 15.

[120] *Philip Morris Brands Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7. The case was registered by ICSID Secretary-General on 26 March 2010 and is still pending (formerly *FTR Holding SA, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*).

[121] Jonas Bergstein and Alicia Gambetta, 'Uruguay' in Jonathan C Hamilton and others (eds), *Latin American Investment Protections: Comparative Perspectives on Laws, Treaties, and Disputes for Investors, States and Counsel* (Martinus Nijhoff 2012) 552.

[122] See the case *Victor Pey Casado and President Allende Foundation v Republic of Chile,* ICSID Case No ARB/98/2. The case was registered by ICSID Secretary-General on 20 April 1998, the longest arbitration in ICSID history, spanning more than 16 years from the filing of the request for arbitration, with a resubmission proceeding still pending, even after the annulment decision.

[123] Luke Eric Peterson, 'Argentina by the Numbers: Where Things Stand with Investment Treaty Claims Arising Out of the Argentine Financial Crisis' *Investment Arbitration Reporter* (1 February 2011) <http://www.iareporter.com/articles/20110201_9> accessed 29 April 2014.

[124] It is also interesting to note that even though most of Argentina's BITs have already expired, and they could be terminated one year after notification since they do not include a renewal period, Argentina has not decided to terminate them yet. Federico M Lavopa and others, 'How to Kill a BIT and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties' (2013) 16 J Intl Econ L 869, 880.

[125] It has been reported that Argentina has settled five ICSID cases with France's Vivendi SA; British electric and gas utility, National Grid PLC; Continental Casualty Company (a unit of Chicago-based CNA Financial Corporation); US-based water company, Azurix and Blue Ridge Investments (a subsidiary of Bank of America Corporation). Luke Eric Peterson, 'After Settling Some Awards, Argentina Takes More Fractious Path in Bond-Holders Case, with New Bid to Disqualify Arbitrators' *Investment Arbitration Reporter* (30 December 2013) <http://www.iareporter.com/articles/20131230> accessed 29 April 2014. Recently, Argentina also settled a case right after the constitution of the Tribunal. *Repsol, SA and Repsol Butano, SA v Argentine Republic,* ICSID Case No ARB/12/38. The Tribunal issued an order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 44 on 19 May 2014, after a settlement was agreed between the parties on 20 March 2014. 'Repsol-Argentina Settlement Agreement, April 2014' *Investment Arbitration Reporter* (30 April 2014) <http://www.iareporter.com/downloads/20140430> accessed 20 August 2014.

[126] The Pacific Alliance was established between Chile, Colombia, Peru and Mexico in April 2011 and formalized by a framework agreement signed in Paranal, Chile, on 6 June 2012. Costa Rica is finishing up the process to be incorporated as the Alliance's fifth member, and Panama is an official candidate to the bloc. See Organization of American States, 'Pacific Alliance' <http://www.sice.oas.org/TPD/Pacific_Alliance/Pacific_Alliance_s.asp> accessed 20 August 2014.

interpretation.[127] Alternatively, Brazil is still the only State of the region that has consistently rejected adherence to the ISDS system.[128]

Other countries have taken a stronger stance against the system. This is the case with Bolivia, Ecuador and Venezuela, all of which have denounced the ICSID Convention and terminated several investment treaties. Nevertheless, it is interesting to analyse what these States are proposing as alternatives. The most obvious substitute is the domestic court. This approach has been expressly advocated by Bolivia, Ecuador and Venezuela, but, interestingly, these countries are not automatically proposing to go back to a solely domestic jurisdiction for foreign investment disputes, as when the Calvo Doctrine prevailed in Latin America.[129] In fact, Ecuador has been heading the proposal to create a regional centre for the settlement of investment disputes in the framework of the Union of South American Nations (UNASUR),[130] which would include not only investor–State arbitration but also State-to-State arbitration, advisory jurisdiction, facilitation and promotion of alternative dispute resolution mechanisms and eventually an appeal facility[131]—a proposal also endorsed by the Bolivarian Alliance for the Peoples of Our America[132] and the Southern Common Market.[133]

However, Bolivia, Ecuador and Venezuela have not rejected international arbitration based on contracts, which is playing an increasingly important role in the region.[134] Under Articles 320 and 366 of the Bolivian Constitution, the exclusive jurisdiction of its courts is reserved only for foreign investment disputes involving companies conducting activities in the hydrocarbons production chain. The Bolivian government has even authorized the State-owned oil company

[127] Pacific Alliance Additional Protocol (signed 10 February 2014) (still not in force) <http://www.sice.oas.org/Trade/PAC_ALL/Index_PDF_s.asp> accessed 20 August 2014.

[128] Barreiro Lemos and Campello (n 79).

[129] Polanco Lazo (n 14).

[130] The Union of South American Nations (UNASUR) was created by the Treaty of Brasilia (signed 23 May 2008). Its member countries are Argentina, Brazil, Paraguay, Uruguay, Venezuela, Bolivia, Colombia, Ecuador, Peru, Guyana, Suriname and Chile. The proposal to create a regional centre for investment arbitration was raised by Ecuador in 2009, and a Working Group of Senior Experts was created in 2010 to elaborate a proposal, having held ten sessions as of August 2014.

[131] Silvia Karina Fiezzoni, 'The Challenge of UNASUR Member Countries to Replace ICSID Arbitration' (2011) 2 Beijing L Rev 134.

[132] The Bolivarian Alliance for the Peoples of Our America (ALBA) was created under the agreement signed in Havana on 14 December 2004. Its Member States are currently Venezuela, Cuba, Bolivia, Nicaragua, Dominica, Ecuador, Saint Vincent and the Grenadines, Antigua and Barbuda and St Lucia. The UNASUR initiative has been expressly endorsed by ALBA members, which support 'the constitution and implementation of regional organisms for settling investment disputes, to ensure fair and balanced rules when settling disputes between corporations and States. Encourage UNASUR in the approval of a regional mechanism currently under negotiation and promote the inclusion of other Latin American States in this mechanism'. Eduardo Silva Romero and Ana Carolina Simões E Silva, 'Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests (22 April 2013): Introductory Note by Eduardo Silva Romero and Ana Carolina Simões E Silva' (2013) 52 Intl Legal Materials 1321.

[133] The Southern Common Market (MERCOSUR) was created by the treaty signed at Asuncion on 26 March 1991 and is currently composed of Argentina, Brazil, Paraguay, Uruguay and Venezuela, pending a ratification of the accession of Bolivia. The UNASUR project has been implicitly supported by MERCOSUR member countries through MERCOSUR Decision no 24/12 (29 June 2012), which declared the need to promote the complementarity of policies, agreements and commitments in MERCOSUR initiatives with others of similar content developed in UNASUR to optimize resources, avoid duplication and enhance efforts in the integration schemes in South America. In addition, both the Colonial Protocol for the Promotion and Reciprocal Protection of Investments in MERCOSUR (signed 17 January 1994) and the Protocol of Buenos Aires Concerning the Encouragement and Reciprocal Protection of Investments from States Not Parties to MERCOSUR (signed 5 August 1994) have now been repealed. Natasha Suñe and Raphael Carvalho de Vasconcelos, 'Inversiones y Solución de Controversias en el MERCOSUR' (2013) 1 Revista de la Secretaría del Tribunal Permanente de Revisión 195.

[134] Polanco Lazo (n 14).

Yacimientos Petrolíferos Fiscales Bolivianos (YPFB) to accept international arbitration when purchasing goods, works or services abroad, when they are not available on the domestic market or if it is of greater economic benefit to YPFB.[135] Article 422 of the Ecuadorian Constitution rejects treaties or international instruments in which the State yields its sovereign jurisdiction to international arbitration—with the exclusion of regional arbitration entities—and when there is no prohibition on agreeing to international arbitration in contracts with foreign investors. In fact, such an agreement was recently made on a large-scale mining contract with the Chinese-owned company Ecuacorriente, which was investing US $1.4 billion in a copper project (El Mirador).[136] Article 151 of the Venezuelan Constitution provides for the exclusive jurisdiction of domestic courts in 'public interest contracts' unless they are inapplicable by reason of 'the nature of such contracts'. On this basis, the Venezuelan Supreme Court—while criticizing treaty-based investor–State arbitration, has hinted at a preference for contract-based arbitration after declaring that arbitration does not collide with the Constitution

> to the extent that the Republic in the exercise of its sovereignty can specifically determine the terms and conditions based on which it will be submitted to international arbitration, since under the principles of good faith and *pacta sunt servanda* a State must be sovereign enough to honor his promise to submit to international arbitration.[137]

It seems that Latin American countries have come to realize that even if their legal and constitutional systems offer foreign investors the same rights and protection that they offer their own nationals, having in certain cases an external mechanism of review for governmental actions is not necessarily a bad thing. Investors from Latin American countries in developed host States might fear that:

> the courts of wealthy developed states will rely on common or civil law traditions that, historically, were insulated from the plight of developing countries, and remain so today. The perceived harm is that the domestic courts in developed states that apply 'their' laws will discriminate against investors from developing states by failing to address the historical disadvantages faced by those investors.[138]

Developed countries should learn this lesson from Latin American developing countries for several reasons. On the one hand, developed countries' reliance on domestic courts to solve an investment dispute will not necessarily provide the protection they are seeking. Foreign investors may well challenge public policies and make expensive claims against developed countries before its domestic courts, and if they are truly independent developed countries cannot be certain that they will win.[139] On the other hand, developed countries' dismissal of ISDS may well expose their investors abroad to the foreign courts of host States that have deficient standards of transparency and independence.[140] The Australian

[135] Bolivia, Decreto Supremo No 224 (24 July 2009) <http://www.lexivox.org/norms/BO-DS-N224.xhtml> accessed 20 August 2014.

[136] 'Ecuador Signs First Large-Scale Mining Contract' *Reuters* (5 March 2012) <http://www.reuters.com/article/2012/03/06/ecuador-mining-idUSL2E8E5D4M20120306> accessed 20 August 2014.

[137] Tribunal Supremo de Justicia de Venezuela, Interpretation of Article 258 (Judgment, 8 October 2008) <http://www.tsj.gov.ve/decisiones/scon/octubre/1541-171008-08-0763.htm > accessed 20 August 2014.

[138] With respect to Australia's refusal to include ISDS in the TPP, see Trakman (n 3) 189, 192.

[139] ibid 194–5. In comparison, the number of ISDS cases lost by developed countries is low. Without passing judgment on the appropriateness of its policies, it is noteworthy that the USA has not yet lost an ISDS case and has been a respondent State in at least 15 cases of ISA.

[140] ibid 201.

government seems conscious of this possibility, having declared that, '[i]f Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries'.[141] Mark Kantor has calculated that approximately 76 percent of the cases in which investment treaty awards were rendered (up to June 2006) involved countries that ranked at or below 50 on Transparency International's 2008 Corruption Perception Index and that 68 percent of these countries were in the bottom 60 percent, according to the 'rule of law' indicator of the World Bank's Worldwide Governance Indicator.[142]

Foreign investors might also have good reason not to trust all domestic courts, even those of developed countries. In the famous award of the *Loewen* case, relating to the conduct of the Mississippi trial court and the Mississippi Supreme Court, the Tribunal found that:

> [h]aving read the transcript and having considered the submissions of the parties with respect to the conduct of the trial, *we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law.*[143]

Developed countries might also want to extract some lessons from Brazil. While this State is effectively insulated from ISDS, Brazilian investors abroad can still be protected by international investment agreements (IIAs) and can even bring investment claims, using the networks of treaties of intermediary States, without exposing Brazil to ISDS.[144] However, treaty shopping is not risk-free. Treaty-shopping investors could lose ISDS claims on jurisdictional grounds if their business connection to an intermediary State is insufficiently substantial, a possibility that is accentuated if more States have intermediary status. These investors also face the risk of regulators, including treaty makers[145] and tribunals, establishing rules to limit such treaty shopping.[146]

Plus, not having ISDS in a treaty dealing with investment protection between developed countries would inevitably raise the question of why the same countries include ISDS in dealings with developing countries. Does the benefit of exempting developed countries from investor–State arbitration outweigh the benefit of having ISDS? Included in this cost–benefit analysis must be the political risk of other States opting out of investor–State arbitration as well[147] or of their asking to receive the same treatment as developed countries.

[141] Government of Australia (n 107) 14.

[142] Mark Kantor, *The Transparency Agenda for UNCITRAL Investment Arbitrations: Looking in All the Wrong Places* (Institute for International Law and Justice 2011) 10.

[143] *The Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Award (26 June 2013) para 54 (emphasis added).

[144] Another developing State outside the region is following a similar policy. South Africa has never been a contracting or signatory party of the ICSID Convention (n 13), and since 2012 it has embarked in the phase out and termination of IIAs and is currently discussing a bill that would eliminate the possibility of treaty-based ISA, providing only domestic legal recourse for foreign investors. Polanco Lazo (n 14) 56.

[145] On the limitation of treaty shopping using a 'denial-of-benefits' clause in IIAs, see Loukas A Mistelis and Crina Michaela Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty' (2008) 113 Penn St L Rev 1301.

[146] Trakman (n 3) 203–4.

[147] ibid 189.

Some have already pointed out the double standard of developed countries with respect to investment arbitration, a mechanism considered good when it corrects misbehaviour by foreign host States (mostly developing countries) but one that provokes outrage when claims that challenge the regulatory measures of developed countries are filed.[148] It is well known that BITs were initially promoted by European countries,[149] and the USA was a key driver in the creation of ICSID.[150] Germany, one of the key opponents to ISDS in the TTIP, is the State with the highest number of investment treaties in force, and several EU Member States are world leaders in the negotiation of IIAs that include provisions on investor–State arbitration.[151] Of all known disputes reported by the end of 2013, investment arbitrations were initiated most frequently by claimants from the EU (299 cases or 53 percent) and the USA (127 cases or 22 percent).[152] In almost all ISDS claims initiated against EU Member States in 2013, the claimants were also EU nationals. In fact, intra-EU investment arbitrations represent approximately 15 percent of all ISDS cases globally.[153] If ISDS is an unacceptable threat, a coherent reaction would be for intra-EU investment disputes to be dealt exclusively by European domestic courts and the European Court of Justice.

The problem that certain Latin American countries have with ISDS is not that they are against investor–State arbitration *per se*, but rather that they are not pleased with the way this system has been conducted up to now. For example, as the basis for the creation of UNASUR's arbitration centre, Ecuadorian officials have declared that States need an alternative to ICSID, 'with regional legitimacy and on which States can rely to solve any disputes. A center with clear rules and shared sovereignty . . . [providing] specialized, independent and impartial resolution of investment disputes, to maintain a balance between the interests of the State and investors'.[154] We might not agree with their criticisms of ICSID, but certainly their position is far from the No of Tokyo.

In conclusion—and leaving aside the discussion of whether the ISDS system is legitimate or if IIAs are useful to attract foreign investment, both topics that merit a debate on their own—developed countries cannot continue to have a double discourse with respect to ISDS. To be effective, an international dispute settlement

[148] With respect to the USA and Canada, see Aguilar Alvarez and Park (n 36) 368–9; Ranieri (n 86) 405.

[149] The first BIT was signed between Germany and Pakistan in 1959; the first BIT that expressly incorporated ISA—although with qualifications—was the Indonesia–Netherlands BIT (1968) and the first BIT providing for ISA without unqualified State consent seems to have been the Chad–Italy BIT (1969). Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 42, 44–5.

[150] Parra (n 72).

[151] As reported by UNCTAD, among the top 10 countries with most IIAs are Germany (number 1 with 126 BITs and 49 other IIAs in force); UK (number 4 with 95 BITs and 49 other IIAs in force); France (number 5 with 92 BITs and 49 other IIAs in force); Netherlands (number 7 with 90 BITs and 49 other IIAs in force); Belgium (number 8 with 66 BITs and 48 other IIAs in force); Luxembourg (number 9 with 66 BITs and 49 other IIAs in force) and Italy (number 10 with 73 BITs and 49 other IIAs in force). UNCTAD, *International Investment Agreements by Economy* (no date) <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu> accessed 15 August 2014.

[152] Among the EU Member States, claimants most frequently come from the Netherlands (61 cases); the UK (43 cases); Germany (39 cases); France (31 cases); Italy (26 cases) and Spain (25 cases). UNCTAD (n 7) 8.

[153] ibid 3.

[154] Ministry of External Relations and Human Resources, *UNASUR Avanza En La Creación De Un Centro De Solución De Controversias* (2014) <http://cancilleria.gob.ec/unasur-avanza-en-la-creacion-de-un-centro-de-solucion-de-controversias/> accessed 21 August 2014. Similarly, the Secretary General of UNASUR has recently stated that its centre must be reliable, transparent, swift, flexible and fair, neither strongly in favour of investors or States, declaring that the idea is not to create a mechanism that leaves investors unprotected and that gives too much protection to States, because it will lose credibility. 'Samper Cree Que El Centro De Soluciones De Controversias De La Unasur Debe Ser Equitativo' *Nuestra Tele Noticias 24 (NTN24), Bogotá, Colombia* (26 September 2014) <http://www.ntn24.com/noticia/samper-cree-que-el-centro-soluciones-de-controversias-de-la-unasur-debe-ser-equitativo-26755> accessed 13 October 2014.

requires a reciprocal commitment from all States involved. If developed countries want their investors to receive the benefit of protection through ISDS while abroad, they should be willing to accept that their domestic policies or governmental decisions might be challenged by foreign investors from developed or developing countries using ISDS. If developed countries are not willing to reciprocate and instead promote their own domestic courts as the sole forum for dealing with foreign investment disputes, they are opening the door to a complete disbandment of the ISDS system. Finally, if the focus of developed countries is the improvement of the ISDS system, maybe it is time to be open to the possibility that they could learn from previous experiences of developing countries with foreign investor–State disputes and that the considerable experience of Latin American countries in this area may be a good example to follow.