# Intra-Latin America Investor-State Dispute Settlement

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**Abstract**

This chapter examines the main features of investor-state dispute settlement (ISDS) in Latin America, in the particular set of cases that have been brought by Latin American investors against host states from the region. Our goal is to determine if there is any regional specificity in these cases or if they rather comply with the trends found on investor-state arbitration in general. For that purpose, we have examined all ISDS cases that correspond to this group, including information on the claims and respondent states, their respective economic sectors, claimants and their home states, applicable international investment agreements (IIAs), breaches claimed and decisions awarded, as well as an analysis of the arbitral rules and arbitral tribunals, including their nationality, as well as the language of proceedings and decisions. We conclude that overall, intra-Latin America ISDS is largely underused, and when it is implemented, it mainly reflects



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the general trends of investment treaty making and dispute settlement found worldwide. We did not find relevant specificities that could be assumed to exist in arbitration involving countries of the same region, something that actually happens in regional investment treaty making.

**Keywords**
Investor-state dispute settlement · Latin America · Language of proceedings · Regional arbitration

## Introduction

Latin America has a long-standing and complex relationship with foreign investment. The usual description of the rapport of the region with the international investment regime is one of hostility, particularly regarding international investment agreements ("IIAs") and the investor-state dispute settlement ("ISDS") typically included in those treaties. However, this account usually falls in an oversimplification that fails to capture the complexity and fine distinctions between different Latin American countries and the investment regime.[1]

Countries of the Latin American region have been subject to the highest number of ISDS cases worldwide. Based on this experience, some of these countries have taken a strong stance against treaty-based ISDS and certain other features of IIAs. Another important group of Latin American countries continues to adhere to ISDS and to the current investment regime in general, with several other countries taking an intermediate or mixed position.[2] At the same time, Latin America is one of the regions of the world that has concluded – and continues to negotiate – one of the largest numbers of IIAs with a rethinking of investment standards and specific provisions improving or excluding ISDS.[3]

In this contribution we will examine a largely unexplored angle of the relationship between Latin America and the international investment regime, which are the settlement of investment disputes in the particular set of cases that have been brought by Latin American investors against host states from the region. We aim to determine if there is any regional specificity in this particular type of ISDS or if the cases comply with the general trends found on investor-state arbitration. For that purpose

[1]Titi C (2014) Investment arbitration in Latin America: the uncertain veracity of preconceived ideas. Arbitr Int 30:357–386, 358. For the purposes of this chapter we consider Latin America and the Caribbean as one single region.

[2]Polanco Lazo R (2016) Two worlds apart: the changing features of international investment agreements in Latin America. In: Tanzi A, Asteriti A, Polanco Lazo R, Turrini P (eds) International investment law in Latin America/Derecho Internacional de las Inversiones en América Latina. Brill/ Martinus Nijhoff, Leiden, pp 68–97, 69.

[3]Fach Gómez K, Titi C (2016) International investment law and ISDS: mapping contemporary Latin America. J World Invest Trade 17:515–535, 517. https://doi.org/10.1163/22119000-12340002

we have studied all ISDS cases that correspond to this subgroup, including information on the claims and respondent states, their respective economic sectors, claimants and their home states, applicable international investment agreements (IIAs), breaches claimed and decisions awarded, as well as an analysis of the arbitral rules and arbitral tribunals, including their nationality, as well as the language of proceedings and decisions.

This chapter is organized as follows: after the Introduction, we will present a brief description of the investment treaty making by Latin American countries, with special emphasis on the IIAs concluded between the countries of the region. In a following section, we will examine in detail the ISDS cases between Latin American investors and Latin American countries, with focus on both the claims brought against host states and the tribunals that have been appointed to decide them. Finally, in the last section, we will present the main conclusions derived from this analysis.

## IIAs Concluded by Latin American Countries

Overtime, countries of the Latin American region have concluded an important number of IIAs. This process started reticently in the mid-1960s, with the first bilateral investment treaties (BITs) being negotiated between Ecuador and Germany (1965) and between Costa Rica and Switzerland (1965). However, we can also consider that such process started few years before, with the signature of treaties of Friendship Commerce and Navigation ("FCNs") between Nicaragua and the United States (1956), Dominican Republic and Germany (1959), and Japan with Cuba (1960), Peru (1961), and El Salvador (1963), which already included some elements that are characteristic of international investment protection, like national treatment,[4] freedom of establishment[5] (usually in accordance with the provisions of the laws and regulations of the host state),[6] freedom of transfer[7] or national and most-favored nation (MFN) treatment in respect of payments, remittances and funds,[8] compensation against expropriation,[9] and full protection and security.[10]

But already in the same decade, Latin American countries started to conclude treaties with investment provisions (TIPs) between themselves, notably the "Cartagena Agreement," signed in 1969 between Bolivia, Chile, Colombia, Ecuador, and

[4]Japan-El Salvador FCN, Art. III; Japan-Peru FCN, Art. III; Cuba-Japan FCN, Art. III; Dominican Republic-Germany FCN, Art. 7; Nicaragua-US FC, Arts. IV, IX, and VII

[5]Nicaragua-US FC, Art. II

[6]Japan-El Salvador FCN, Art. II; Japan-Peru FCN, Art. II; Cuba-Japan FCN, Art. III; Dominican Republic-Germany FCN, Art. 8

[7]Dominican Republic-Germany FCN, Art. 15

[8]Nicaragua-US FC, Art. XII

[9]Japan-El Salvador FCN, Art. IV; Japan-Peru FCN, Art. IV; Cuba-Japan FCN, Art. IV; Dominican Republic-Germany FCN, Art. 6; Nicaragua-US FC, Art. VI

[10]Dominican Republic-Germany FCN, Art. 4; Nicaragua-US FC, Art. III

Peru, which created the Andean Common Market (ANCOM, or "Andean Pact"). ANCOM was a broad effort to liberalize regional trade in that subregion, establishing wide common economic policies including the treatment of foreign capital. In 1973, Venezuela became the sixth member of ANCOM, but Chile withdrew from the Andean Pact in 1976, as the country had conflicting positions, among other issues, on the treatment of foreign investment. Chile took a unilateral path for liberalization a few years after the military coup of 1973, one-sidedly changing its investment policy, granting national treatment to foreign investors.[11]

The pace of negotiation of investment treaties in the following decades was slow. While the total number of IIAs signed by Latin American countries was only nine in the 1960s, it went down to six in the 1970s and rose to thirty-four in the 1980s. With limited exceptions, Latin American countries did not agree with provisions commonly included in IIAs, like that nationalization necessarily required compensation, and therefore generally did not sign BITs or FCNs that upheld such principle, continuing to defend the primacy of national treatment with respect to foreign investors, mainly due to their adherence to the so-called Calvo Doctrine.[12]

Another point of contention against IIAs was the inclusion of investor-state arbitration. In the early 1960s, the World Bank began to work on an approach for the settlement of investment disputes as an alternative to domestic courts or diplomatic protection. The result was the proposal of a center for the settlement of disputes between private parties on the one side and host states on the other.[13] On 9 September 1964, at the Annual Meeting of the Board of Governors of the World Bank held in Tokyo, a resolution was approved asking the Executive Directors to formulate the final text of the envisaged convention.[14] All Latin American Member States voted against this proposal,[15] and in a declaration dubbed "the No of Tokyo,"[16] they rejected the establishment of that center on the basis that that the legal and constitutional systems of Latin American countries offered to foreign investors "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 [. . .]." According to Latin American countries, the creation of a system granting foreign investors the right to bring claims against a sovereign State outside its national courts was seen as contrary to their accepted legal

[11]Edwards S, Lederman D (1998) The Political Economy of unilateral trade liberalization: the case of chile. NBER working paper no. 6510, pp 4–9

[12]Montt S (2009) State liability in investment treaty arbitration: global constitutional and administrative law in the BIT generation. Hart Pub, Oxford/Portland, pp 39–40

[13]Lowenfeld AF (2003) International economic law. Oxford University Press, Oxford, pp 456–457

[14]Parra AR (2012) The History of ICSID. Oxford University Press, Oxford, pp 67–68

[15]International Centre for Settlement of Investment Disputes (ICSID) (1968) History of the ICSID convention. International Centre for Settlement of Investment Disputes, Washington, DC, p 606

[16]Lowenfeld AF (2003) International economic law. Oxford University Press, Oxford, p 460

principles, conferring a privilege on the foreign investors and placing the nationals of the host states in a position of inferiority.[17] Although finally the Convention establishing the International Centre for Settlement of Investment Disputes ("ICSID") was open for signature in March 1965, only two Latin American countries initially signed it: Jamaica in 1965 and Trinidad and Tobago in 1966.[18]

During the early 1990s, a major reversal of this situation took place in Latin America, as most countries of the region started to sign BITs and became members of ICSID.[19] In fact, by the end of that decade, almost every country in the region had signed several IIAs, with the intention of presenting themselves as an attractive location for potential foreign investors,[20] aiming to stimulate economic growth through foreign direct investment ("FDI").[21] The notable exception to this trend was Brazil, which did not ratify any of the BITs that it negotiated in that decade.[22] Also in the 1990s, investment chapters began to be included in some free trade agreements ("FTAs"), starting with the Chap. "Investment" of the North American Free Trade Agreement ("NAFTA"), which involved Canada, Mexico, and the United States. After NAFTA, other regional agreements signed by Latin American countries followed the same path, like the MERCOSUR's Protocols of Colonia and Buenos Aires.[23]

At present, almost all Latin American countries that had originally opposed the creation of ICSID have become signatories of the ICSID Convention, with some notable exceptions. First, at the beginning of the twenty-first century, three countries that had signed and ratified the Convention decided to denounce it: Ecuador (signed and in force since 1986), Bolivia (signed in 1991 and in force since 1995), and Venezuela (signed in 1993 and in force since 1995). Bolivia denounced the ICSID

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[17] Polanco Lazo R (2015) The no of Tokyo Revisited: or how developed countries learned to start worrying and love the Calvo Doctrine. ICSID Rev 30:172–193, 182. https://doi.org/10.1093/icsidreview/siu028

[18] Parra AR (2012) The History of ICSID. Oxford University Press, Oxford, p 95

[19] The first Latin American States to ratify the ICSID Convention were El Salvador in 1984 and Ecuador in 1986. Hamilton JC (2009) Three decades of Latin American commercial arbitration. Int Litig Arbitr 30:1099–1119, 1100.

[20] Guzman AT (1998) Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties. Va J Int Law 38:639–688, 643–644

[21] Fach Gomez K (2011) Latin America and ICSID: David versus Goliath. Law and Business Review of the Americas 17:195–230, 196

[22] Brazil signed 14 BITs between 1994 and 1999 but failed to ratify them. Barreiro Lemos L, Campello D (2015) The non-ratification of bilateral investment treaties in Brazil: a story of conflict in a land of cooperation. Rev Int Polit Econ 22:1055–1086.

[23] Both protocols never entered into force and have been currently repealed. Suñe N, Carvalho de Vasconcelos R (2013) Inversiones y Solución de Controversias en el MERCOSUR. Revista de la Secretaría del Tribunal Permanente de Revisión 1:195–220, 213.

Convention in 2007, Ecuador in 2009, and Venezuela in 2012, for different reasons that are explained in detailed elsewhere, but they can be generally characterized as part of the "backlash" against investor-state arbitration.[24]

Second, there is a small group of countries that have not signed or ratified the ICSID Convention, notably Brazil, the Dominican Republic, and, until recently, Mexico. While Brazil never signed the ICSID Convention, the Dominican Republic signed it in 2000 but has not ratified it yet, although it has accepted the use of ICSID's Additional Facility in the investment chapter of the FTA they have concluded with Central America and the United States ("CAFTA–DR") and it has also signed several BITs containing investor-state arbitration.[25] Mexico signed the ICSID Convention only recently on 11 January 2018 (in force since 26 August 2018), but before it had already accepted the use of ICSID's Additional Facility Rules in NAFTA's investor-State arbitration cases, and has also signed several treaties including ISDS.[26]

Other Latin American countries that were not part of the "No of Tokyo," such as Antigua and Barbuda, Belize,[27] Cuba, Dominica, and Suriname also remain outside the ICSID Convention, but they all have BITs in force, which include provisions of investor-state arbitration, under the rules of the United Nations Commission on International Trade Law ("UNCITRAL") or other ad hoc arbitral rules.[28]

By January 2020, the total number of IIAs concluded by Latin American countries is 675 (of which 570 are BITs and 105 are other IIAs), being currently 498 in

[24]Polanco Lazo R (2014) Is there a life for Latin American countries after denouncing the ICSID convention? Transnatl Disput Manag 11; Schreuer CH (2010) Denunciation of the ICSID convention and consent to arbitration. In: Waibel M, Kaushal A, Chung K-H, Balchin C (eds) The Backlash against investment arbitration: perceptions and reality. Wolters Kluwer Law & Business, Austin, pp 353–368; Vincentelli IA (2010) The uncertain future of ICSID in Latin America. Law Bus Rev Am 16:409–456; Waibel M, Kaushal A, Chung K-H, Balchin C (2010) The backlash against investment arbitration: perceptions and reality. Wolters Kluwer Law & Business, Austin; Tietje C, Nowrot K, Wackernagel C (2008) Once and Forever? The Legal Effects of a Denunciation of ICSID. Beiträge zum Transnationalen Wirtschaftsrecht, vol 74. Institut für Wirtschaftsrecht, Halle

[25]Dominican Republic has 11 BITs in force and 2 FTAs in force with investor-State arbitration, both referring to ICSID Additional Facility Rules and UNCITRAL Arbitration Rules: the CAFTA–DR and the Free Trade Agreement between Central America and the Dominican Republic. CAFTA members are Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. Central America includes Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. UNCTAD (2019) International investment agreements navigator. In: Investment policy hub. http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu. Accessed 22 May 2019.

[26]Polanco Lazo R (2016) Two worlds apart: the changing features of international investment agreements in Latin America. In: Tanzi A, Asteriti A, Polanco Lazo R, Turrini P (eds) International investment law in Latin America/Derecho Internacional de las Inversiones en América Latina. Brill/Martinus Nijhoff, Leiden, pp 68–97, 75

[27]Belize signed the ICSID Convention on 19 December 1986 but has never ratified the Convention

[28]From these countries, Cuba has the largest number of BITs in force: 39, with different countries of Latin America, Europe, Asia and Africa. UNCTAD (2019) International investment agreements navigator. In: Investment policy hub. http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu. Accessed 22 May 2019

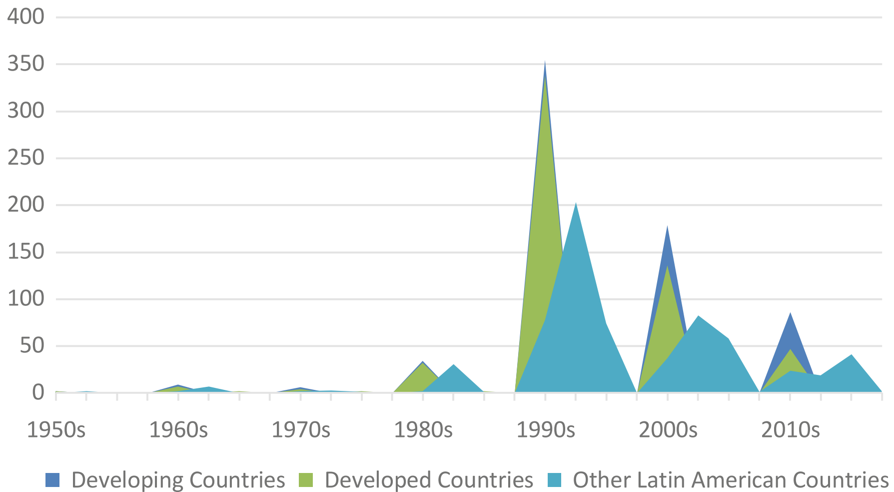


**Fig. 1** Latin American IIAs (1950s–2010s)

force (413 BITs and 85 other IIAs), with an impressive peak in the 1990s when more than half of the Latin American IIAs were concluded. In total, these agreements represent around 19% of the international investment agreements concluded worldwide.[29] The leaders in the region on investment treaty making are Chile (88 IIAs), Argentina (73 IIAs), and Cuba (63 IIAs).

Until the end of the 1990s, the negotiation of IIAs was largely a North-South affair. However, today, around half of the Latin American IIAs have been negotiated with developed countries and the other half with developing countries (Fig. 1).[30]

As presented below, a total of 145 IIAs have been concluded between Latin American countries. The leaders on the negotiation of intra-Latin America IIAs are Chile (34 IIAs), Argentina (25 IIAs), and Peru (22 IIAs) (Fig. 2; Table 1).

Overall, there is an important level of convergence across intra-Latin American IIAs. The first generation of these agreements signed by Latin American countries – most of them are BITs – closely follows the "Dutch gold standard,"[31] being short treaties with broad definitions for investors and investment (usually as an illustrative list of assets), with standards of treatment that include MFN and national treatment ("NT"), fair and equitable treatment ("FET"), and full protection and security

[29]Considering a total of 3689 signed IIAs, according to UNCTAD's International Investment Agreements Navigator (Ibid.), or 3596 signed IIAs, according to the WTI's Electronic Database of Investment Treaties (EDIT)

[30]For this purpose we have followed the classification found in the UN World Economic Situation and Prospects report, United Nations (2019) World Economic Situation and Prospects. United Nations Publications, New York.

[31]Lavranos N (2013) The New EU investment treaties: convergence towards the NAFTA model as the new plurilateral model BIT text? ID 2241455

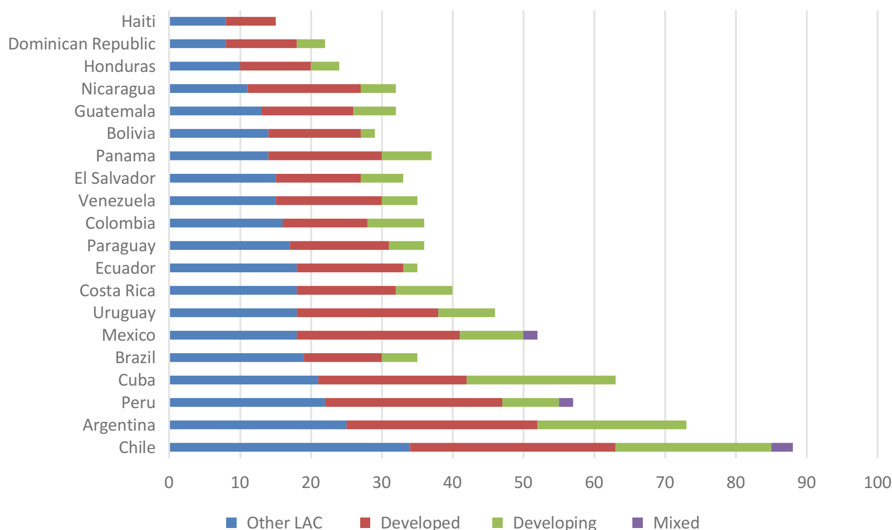


**Fig. 2** Latin American IIAs by Contracting Parties

("FPS"), full compensation for expropriation, free transfer of funds in connection with an investment, no exceptions for certain sectors, no filter mechanisms, and investor-State arbitration. All these characteristics are present, for example, in the very first intra-Latin America bilateral investment treaty[32]: the Argentina-Chile BIT (1991).[33] These features are very much in line with the IIAs that Latin American countries concluded at that time outside the region.[34]

Important changes are found in most recent "second-generation" intra-Latin American IIAs. These BITs and FTAs investment chapters are longer and more complex texts, with improved definitions that limit the scope of the investment protection, notably on the scope of the FET and FPS standards (both under the international minimum standard) and expropriation (particularly indirect expropriation). NT and MFN are applicable to investors and investments only in "like circumstances." These agreements also include filter mechanisms and carve-outs for certain sectors (like financial services or taxation), transparency rules, and provisions on sustainability, environment, and labor. All these characteristics are considered, for example, in the investment chapter of one of the latest FTAs concluded

[32]In 1985 Ecuador and Uruguay had an exchange of letters on investment protection that has the same value has a BIT, but it is not formally a treaty.

[33]Argentina-Chile BIT (1991), Arts. 1–5 and Art. 10

[34]Polanco Lazo R (2016) Two worlds apart: the changing features of international investment agreements in Latin America. In: Tanzi A, Asteriti A, Polanco Lazo R, Turrini P (eds) International investment law in Latin America/Derecho Internacional de las Inversiones en América Latina. Brill/Martinus Nijhoff, Leiden, pp 68–97, 81–82

**Table 1** Latin American IIAs (1950s–2010s)

| Country | BITs | Other IIAs | Total IIAs | Other LAC | Developed | Developing | Mixed |
|---|---|---|---|---|---|---|---|
| Chile | 56 | 32 | 88 | 34 | 29 | 22 | 3 |
| Argentina | 62 | 11 | 73 | 25 | 27 | 21 | 0 |
| Cuba | 60 | 3 | 63 | 21 | 21 | 21 | 0 |
| Peru | 34 | 23 | 57 | 22 | 25 | 8 | 2 |
| Mexico | 36 | 16 | 52 | 18 | 23 | 9 | 2 |
| Uruguay | 36 | 11 | 47 | 18 | 21 | 8 | 0 |
| Costa Rica | 23 | 17 | 40 | 18 | 14 | 8 | 0 |
| Panama | 24 | 13 | 37 | 14 | 16 | 7 | 0 |
| Paraguay | 27 | 9 | 36 | 17 | 14 | 5 | 0 |
| Colombia | 20 | 16 | 36 | 16 | 12 | 8 | 0 |
| Venezuela | 30 | 5 | 35 | 15 | 15 | 5 | 0 |
| Ecuador | 29 | 6 | 35 | 18 | 15 | 2 | 0 |
| Brazil | 26 | 12 | 38 | 20 | 11 | 7 | 0 |
| El Salvador | 23 | 10 | 33 | 15 | 12 | 6 | 0 |
| Guatemala | 22 | 10 | 32 | 13 | 13 | 6 | 0 |
| Nicaragua | 21 | 11 | 32 | 11 | 16 | 5 | 0 |
| Bolivia | 22 | 7 | 29 | 14 | 13 | 2 | 0 |
| Honduras | 12 | 12 | 24 | 10 | 10 | 4 | 0 |
| Dominican Republic | 17 | 5 | 22 | 8 | 10 | 4 | 0 |
| Haiti | 8 | 7 | 15 | 8 | 7 | 0 | 0 |

Table elaborated with the information available at UNCTAD's International Investment Agreements Navigator and the WTI's EDIT by January 2020. For our purposes, an agreement is "mixed" when it has both developing and developed contracting parties, besides the Latin American contracting parties

by Latin American countries: the Argentina-Chile FTA (2017).[35] Overall these agreements take notice of the criticisms made to the ISDS system and give States more policy space and control over investment claims.[36]

Three important exceptions to this trend are noteworthy: the situation of some countries that have terminated IIAs, the special case of Brazil, and the recent signature of the United States, Mexico, and Canada Agreement (USMCA), which is intended to replace the NAFTA after the domestic approvals by each of the parties.

Also as part of the process of backlash against the investment regime, after denouncing the ICSID Convention, Bolivia, Ecuador, and Venezuela decided to terminate or denounce bilateral investment treaties.

[35]Argentina-Chile FTA (2017), Arts. 8.4, 8.7, 8.8, 8.12 (and Annex 8.12). Art. 8.32, and Art. 19.4

[36]Polanco Lazo R (2016) Two worlds apart: the changing features of international investment agreements in Latin America. In: Tanzi A, Asteriti A, Polanco Lazo R, Turrini P (eds) International investment law in Latin America/Derecho Internacional de las Inversiones en América Latina. Brill/ Martinus Nijhoff, Leiden, pp 68–97, 84

The most active country in this regard has been Ecuador, who after a protracted process denounced nine BITs in 2008, one in 2010 and then 16 in 2017.[37] However, in October 2017 the newly installed government of Lenin Moreno expressed its intention to negotiate and enter into new BITs and to even have Ecuador become once again a party to the ICSID convention.[38] Furthermore, in March 2018, the Ecuadorian Ministry of Foreign Affairs presented a new Model Bilateral Investment Agreement ("BIA") to the Ambassadors of the countries that previously maintained BITs with Ecuador. It has been affirmed that this draft develops more balanced standards of protection considering both the rights of investors and the regulatory powers of the state. However, it is still uncertain if ad hoc arbitration is contemplated in this proposal.[39] According to the reports, in the new BIA arbitration for a treaty breach is only possible if it is submitted to regional mechanisms in Latin America or to arbitration centers of the host State, under the condition that the place of arbitration is a Latin American country agreed by the Contracting Parties.[40]

Between 2002 and 2018, Bolivia has denounced 13 BITs and the FTA with Mexico which included an investment chapter. However, according to public records, Bolivia still has nine BITs in force, including the agreements with Cuba, Chile, Peru, and Paraguay.

Venezuela has only terminated the BITs with Netherlands (in 2008) and Ecuador (in 2018) and still has 25 BITs in force, several with Latin American countries (Argentina, Barbados, Chile, Costa Rica, Cuba, Paraguay, Peru, and Uruguay).[41]

As mentioned, Brazil did not ratify any "traditional" investment treaty that had negotiated in the 1990s. However, since 2015 it has come up with novel Agreements on Cooperation and Facilitation Investment Agreements (ACFIs), which significantly narrow substantive investment protections, and do not include ISDS but mechanisms to prevent disputes, in the hands of focal points or ombudspersons.[42]

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[37] International Institute for Sustainable Development (IISD) (2017) Ecuador denounces its remaining 16 BITs and publishes CAITISA audit report. In: Investment treaty news. https://www.iisd.org/itn/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/. Accessed 3 June 2019

[38] Coronel Ortega C (2017) Ecuador and ISDS – a rough journey and a possible new beginning. In: Investment claims. https://oxia.ouplaw.com/page/Ecuador-and-ISDS. Accessed 3 June 2019

[39] Espinosa Velasco SX (2019) Ecuador and international investment law and policy: between constitutional sovereignty and state responsibility. Maastricht University, p 499

[40] Jaramillo J (2018) New Model BIT proposed by Ecuador: is the cure worse than the disease? In: Kluwer arbitration blog. http://arbitrationblog.kluwerarbitration.com/2018/07/20/new-model-bit-proposed-ecuador-cure-worse-disease/. Accessed 3 June 2019

[41] UNCTAD (2019) International investment agreements navigator. In: Investment policy hub. http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu. Accessed 22 May 2019

[42] Ratton Sánchez-Badin M, Morosini F (2017) Navigating between resistance and conformity with the international investment regime. The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs). In: Morosini F, Ratton Sánchez-Badin M (eds) Reconceptualizing international investment law from the Global South. Cambridge University Press, Cambridge, UK/New York, pp 218–250

A first group of these agreements was negotiated with African countries (Angola, Mozambique, Malawi, and Ethiopia), but today the majority of ACFIs have been concluded with Latin American countries: Mexico (2015), Colombia (2015), Chile (2015), Suriname (2018), and Guyana (2018). Additionally, in 2016, Brazil signed a PTA with Peru that includes an investment chapter which closely follows the ACFI model. Similarly, in 2017, Brazil concluded a new MERCOSUR intra-investment protocol, together with Argentina, Uruguay, and Paraguay, which does not include ISDS, FET, or MFN. More recently, in November 2018, Brazil concluded a FTA with Chile, which is in an intermediate point between ACFIs and the 2017 Argentina-Chile FTA, as includes provisions on NT, MFN, and expropriation, as well as special rules for financial services and taxation, but the treaty does not include FET, FPS, or ISDS. Beyond the mechanism of dispute management and prevention in charge of the ombudspersons, the agreement put special emphasis on inter-State arbitration in case of dispute.[43]

Finally, it is important to mention that although the USMCA does not qualify as an intra-Latin America IIA, its content could indicate an important change in the investment treaty making in the region, if subsequently followed by Mexico and other Latin American countries. USMCA has several differences to IIAs concluded before by countries of the region. On substance, investors will have more limited protection than previously available under NAFTA Chap. “Investment”, with a more restricted definition of investment (largely following the “Salini test”) and a detailed qualification of traditional investment protections.[44] NT and MFN treatments are qualified under “like circumstances” which depend on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of “legitimate public welfare objectives.”[45]

But more importantly, USMCA Chap. “Investment” and its annexes radically change the approach on ISDS. Now, an investor may only submit a claim to arbitration in three scenarios: “legacy investment claims” and pending claims (Annex 14-C), new claims (Annex 14-D), and covered government contracts transition provisions contained in Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), and Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts). Legacy investments are those established or acquired between the date of entry into force of NAFTA and its date of termination and which existed on the date of USMCA’s entry into force. Under Annex 14-C, arbitration remains available for

[43]Brazil-Chile FTA, Ch. 8 and Ch. 9

[44]Gallegos Zúñiga J (2019) Algunos cambios que incorpora el T–MEC, en materia de inversiones extranjeras, en relación con lo previsto en el capítulo XI del TLCAN. Revista Arbitraje XII:167–179, 171–177

[45]USMCA, Arts. 14.4.4 and 14.5.4

these investments in accordance with NAFTA Chap. "Investment" for 3 years after NAFTA's termination. Similarly, pending arbitrations will be permitted to proceed to their natural conclusion.[46]

New ISDS claims under the USMCA are only restricted to claims by US and Mexican investors against one of these two parties. Annex 14-D also restricts the types of claims that may be submitted to ISDS to NT and MFN (except with respect to the establishment or acquisition of an investment) and direct expropriation. Claims for indirect expropriation, FET or FPS may not be submitted to ISDS.[47]

Given the role played by NAFTA in the expansive interpretation of certain investment protections, it is significant that the USMCA has considerably limited the application of ISDS. However, under Annex 14-E, a special regime for resolving contractual disputes through ISDS is maintained for the full set of investment protections (which includes indirect expropriation, FET, and FPS), for government contracts in certain "covered sectors" (oil and natural gas, power generation, telecommunications, transportation services, and infrastructure) will be able to rely on the included in Chap. 14 (including indirect expropriation).[48] Seemingly, this annex appears to have been developed to protect industries that are heavily regulated and may be influenced by heavy government presence or by state-owned enterprises.[49]

## ISDS Between Latin American Investors and Latin American Countries

We consider "intra-Latin American ISDS," those disputes that have been brought by Latin American investors against host states from the region. In order to determine if there is any regional specificity in these claims, or if the cases generally comply with the general trends found on investor-state arbitration, in the following sections we will study the different ISDS claims brought by Latin American investors against Latin American countries, followed by a more specific focus on the work of the arbitrators that have been appointed to decide such disputes.

[46]Valasek MJ et al (2018) Major changes for investor-state dispute settlement in new United States-Mexico-Canada Agreement. In: Norton Rose Fulbright. https://www.nortonrosefulbright.com:443/en/knowledge/publications/91d41adf/major-changes-for-investor-state-dispute-settlement-in-new-united-states-mexico-canada-agreement. Accessed 29 May 2019

[47]USMCA, Annex 14-D, Art. 14.D.3

[48]Labonté R, Crosbie E, Gleeson D, McNamara C (2019) USMCA (NAFTA 2.0): tightening the constraints on the right to regulate for public health. Glob Health 15:35, 10. https://doi.org/10.1186/s12992-019-0476-8

[49]Valasek MJ et al (2018) Major changes for investor-state dispute settlement in new United States-Mexico-Canada Agreement. In: Norton Rose Fulbright. https://www.nortonrosefulbright.com:443/en/knowledge/publications/91d41adf/major-changes-for-investor-state-dispute-settlement-in-new-united-states-mexico-canada-agreement. Accessed 29 May 2019

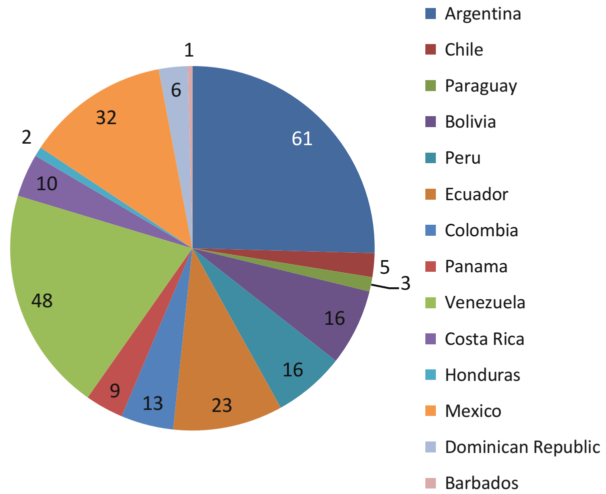



**Fig. 3** ISDS in Latin America: Respondent states

## Claims

Latin America is the region of the world where host states have subject to the largest number of ISDS claims. According to ICSID caseload statistics, countries of the region have been respondents to around one third of all the cases registered at the Center – which is the most used forum for investor-state arbitration.[50] Overall, with 245 cases, Latin American countries represent around 25% of all known treaty-based investor-State arbitrations (from a total of 983 cases by December 2019), with Argentina (61 cases), Venezuela (48 cases), and Mexico (32 cases), being the number one, third, and sixth most frequent respondent states, respectively (Fig. 3).[51]

However, the number of cases that have been brought against Latin American countries by investors of the region is radically smaller, with a current total number of 31 cases, considering all fora, which represents around 3% of the known treaty-based investor-State arbitrations,[52] which is a testimony of the little use that this mechanism has had in intra-regional investment disputes. The most frequent respondent in the subset of cases is Venezuela (ten cases), followed by Argentina (four cases), and Mexico and Peru (with three cases each).[53]

The most common home state of the investors in these intra-Latin American disputes is Chile (seven cases), followed by Barbados (six cases) and Panama (five

[50]International Centre for Settlement of Investment Disputes (ICSID) (2019) The ICSID caseload – statistic (Issue 2019-1). https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf. Accessed 9 Feb 2019, p 11

[51]UNCTAD (2019) Investment Dispute Settlement Navigator. https://investmentpolicyhubold.unctad.org/ISDS. Accessed 28 May 2019

[52]Ibid.

[53]For this purpose, we have considered the nationality that was claimed in each respective case and the applicable IIA to that dispute.

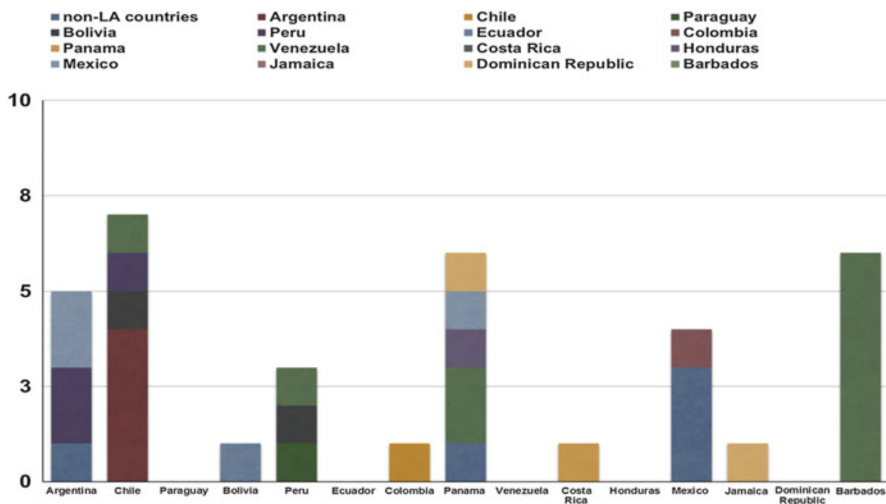



**Fig. 4** Intra-Latin American ISDS: Home states

cases). It is interesting to point out the relative high number of cases where Chilean investors have made use of investor-State arbitration. In seven cases, Chilean investors have used IIAs to trigger arbitration against host states. Interestingly, all the cases have been against other Latin American countries. Argentina has been respondent State in four claims brought by Chilean investors between 1999 and 2005,[54] with the other three cases gone against Peru,[55] Bolivia,[56] and Venezuela.[57] The large majority of these cases have been started by Chilean companies, having mainly local capital and shareholders (the major exception is the *Flughafen Zürich* v. *Venezuela* case, where the main claimant was a Swiss company) (Fig. 4).[58]

The claimants in these cases have largely been legal entities incorporated in Latin American countries (with an important number of companies that were initially state-owned enterprises, but already privatized at the moment of bringing the claim), with only four cases initiated by natural persons. The very first case brought by a

[54] *Empresa Nacional de Electricidad S.A.* v. *Argentine Republic* (ICSID Case No. ARB/99/4); *Metalpar S.A. and Buen Aire S.A.* v. *Argentine Republic* (ICSID Case No. ARB/03/5); *Enersis, S. A. and others* v. *Argentine Republic* (ICSID Case No. ARB/03/21); *Compañía General de Electricidad S.A. and CGE Argentina S.A.* v. *Argentine Republic* (ICSID Case No. ARB/05/2)

[55] *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.)* v. *Republic of Peru* (ICSID Case No. ARB/03/4)

[56] *Quiborax S.A., Non-Metallic Minerals S.A.* v. *Plurinational State of Bolivia* (ICSID Case No. ARB/06/2)

[57] *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A.* v. *Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/19)

[58] Polanco Lazo R (2017) The chilean experience in South-South investment and trade agreements. In: Morosini F, Ratton Sánchez-Badin M (eds) Reconceptualizing international investment law from the global South. Cambridge University Press, Cambridge, UK/New York, pp 95–145, 140–141

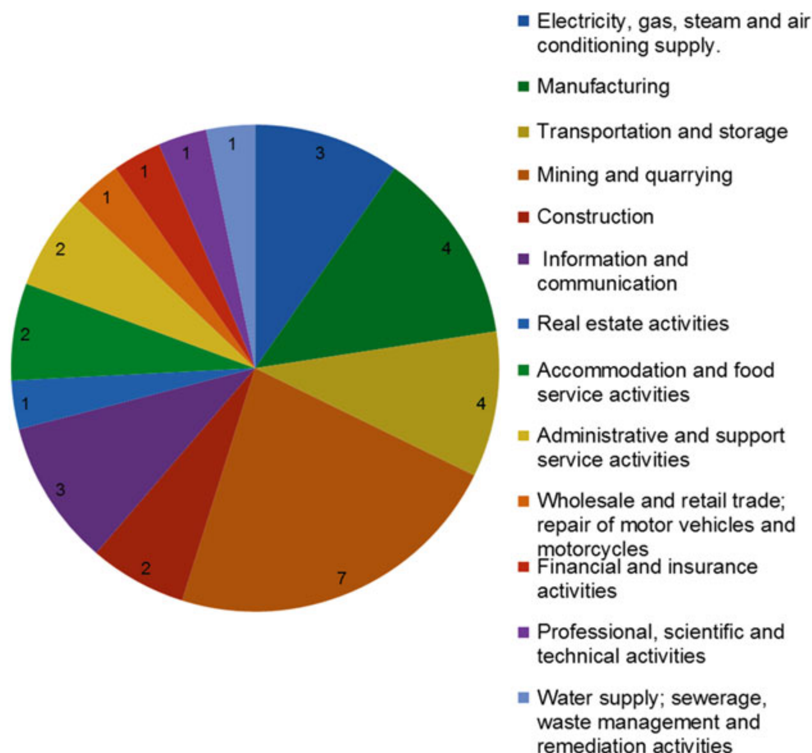



**Fig. 5** Intra-Latin American ISDS: Sectors

Latin American investor against a country of the region was *Eudoro Armando Olguín* v. *Republic of Paraguay* (ICSID Case No. ARB/98/5), initiated in 1998, under the 1994 Paraguay-Peru BIT, and it was decided on 26 July 2001 with an award in favor of the host state.[59]

The sectors where more disputes have been initiated are mining and quarrying (seven cases), manufacturing (four cases), information and communication, transportation and storage, and electricity, gas, steam, and air conditioning supply (with three cases in each sector). However, following the line of the overall distribution of ISDS cases, the large majority of disputes are concentrated in the tertiary sector (20 cases) (Fig. 5).[60]

[59]The other cases initiated by natural persons are: *Carlos Ríos and Francisco Ríos* v. *Republic of Chile* (ICSID Case No. ARB/17/16), initiated in 2017, under the 2006 Chile-Colombia FTA; *Carlos Esteban Sastre* v. *United Mexican States* initiated in 2017, under the 1996 Argentina-Mexico BIT, 2006 Mexico-Spain BIT and 1995 Mexico-Switzerland BIT; and *Michael Anthony Lee-Chin* v. *Dominican Republic* (ICSID Case No. UNCT/18/3), initiated in 2018 under the CARICOM – Dominican Republic FTA (1998)

[60]UNCTAD (2019) Investment Dispute Settlement Navigator. https://investmentpolicyhubold.unctad.org/ISDS. Accessed 28 May 2019

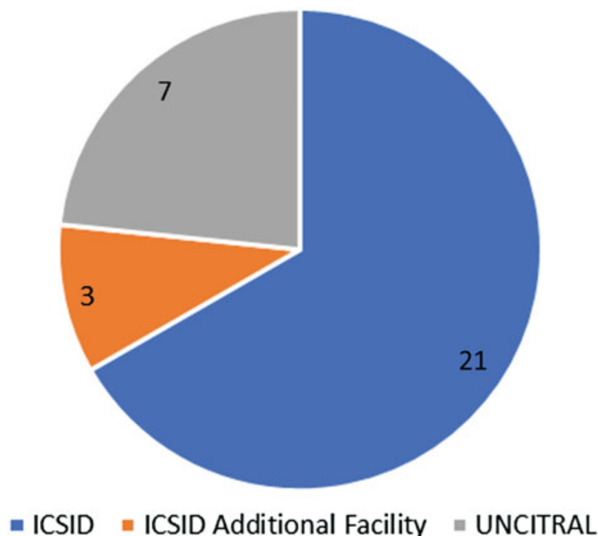



**Fig. 6** Intra-Latin American ISDS: Arbitral rules

In the large majority of intra-Latin America ISDS cases, the arbitration rules are those of the ICSID Convention, followed by UNCITRAL and ICSID Additional Facility Rules, in slightly higher percentages than the overall trends in ISDS cases (Fig. 6).[61]

Also following the common trends in overall ISDS, the most frequent breaches of IIAs claimed by investors are fair and equitable treatment (19 cases), indirect expropriation (15 cases), arbitrary, unreasonable, or discriminatory measures (12 cases) and full protection and security (11 cases) (Fig. 7).[62]

The large majority of these intra-Latin American ISDS cases are still pending, but the ones that have been yet decided follow roughly in line with the overall outcome of ISDS cases, with a slightly higher number of cases decided in favor of the host state (Fig. 8).[63]

## Arbitrators

The number of arbitrators appointed in these cases is 70, considering 30 claims and 7 annulment proceedings for a total of 101 appointments.[64] If from this group, we

[61]Ibid.

[62]UNCTAD (2017) Special update on investor–state dispute settlement: facts and figures. IIA issues note 3, p 6

[63]UNCTAD (2019) Investment Dispute Settlement Navigator. https://investmentpolicyhubold.unctad.org/ISDS. Accessed 28 May 2019

[64]At the moment of writing, in three cases there is no information about the constitution of the tribunal: *Shanara Maritime International, S.A. and Marfield Ltd. Inc.* v. *United Mexican States* (UNCITRAL), *Carlos Esteban Sastre* v. *United Mexican States* (UNCITRAL), and *Dick Fernando Abanto Ishivata* v. *Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/18/6). In one case, the appointment of the President is still pending: *Inversiones Continental (Panamá), S.A.* v. *Republic of Honduras* (ICSID Case No. ARB/18/40).

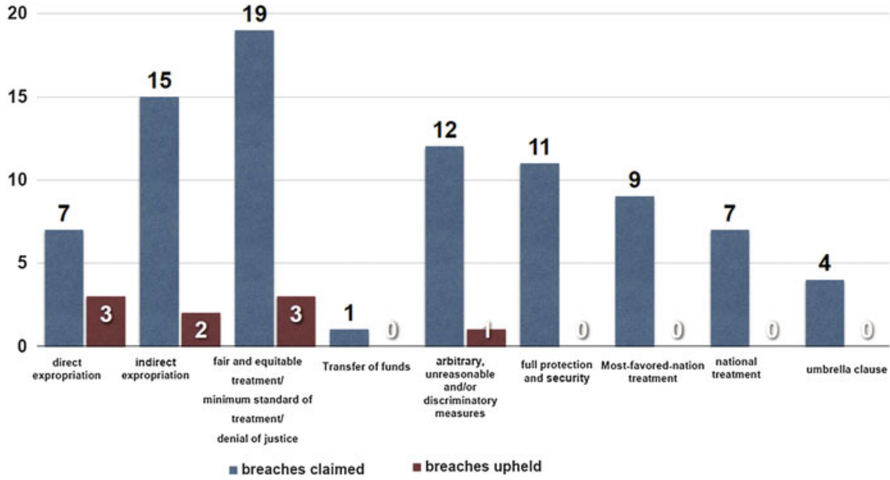
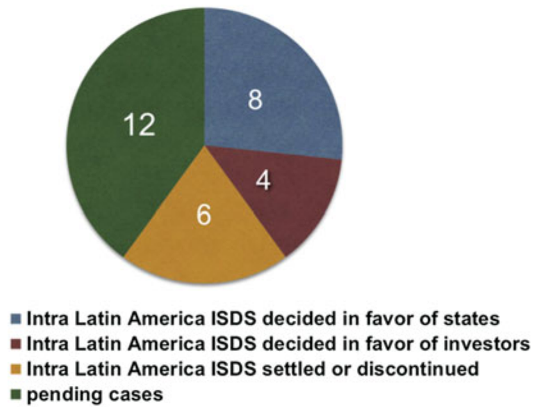



**Fig. 7** Intra-Latin American ISDS: Breaches

**Fig. 8** Intra-Latin American ISDS: Outcome




consider just the arbitrators that have been appointed more than once, only 8[65] are also part of the list of top 25 most appointed arbitrators in the overall ISDS cases, a group that accounts for around 5% of all investment arbitrators[66] but that represent over a third of all known arbitral appointments (Table 2).[67]

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[65]Brigitte Stern (five appointments), Rodrigo Oreamuno (four appointments), Juan Fernández-Armesto (three appointments), Horacio Grigera Naón (two appointments), L. Yves Fortier (two appointments), Marc Lalonde (two appointments), Bernardo Cremades (2 appointments), and Gabrielle Kaufmann-Kohler (two appointments)

[66]Polanco Lazo R, Desilvestro V (2018) Does an Arbitrator's background influence the outcome of an investor-state arbitration? Law Pract Int Courts Tribunals 17:18–48, 27. https://doi.org/10.1163/15718034-12341366

[67]Langford M, Behn D, Lie RH (2017) The revolving door in international investment arbitration. J Int Econ Law 20:301–332, 310. https://doi.org/10.1093/jiel/jgx018

**Table 2** Intra-Latin American ISDS: Appointed arbitrators

| | Name | Gender | Nationality | Appointed by the investor | Appointed by/for the host state | President/ chairman | Member annulment committee | Total appointments |
|---|---|---|---|---|---|---|---|---|
| 1 | Stern, Brigitte | Female | France | | 5 | | | 5 |
| 2 | Oreamuno, Rodrigo | Male | Costa Rica | | 1 | 3 | | 4 |
| 3 | Álvarez, Henri C. | Male | Canada | 2 | 1 | | | 3 |
| 4 | Derains, Yves | Male | France | | 1 | 2 | | 3 |
| 5 | Castellanos Howell, Álvaro Rodrigo | Male | Guatemala | | | 1 | 2 | 3 |
| 6 | Fernández-Armesto, Juan | Male | Spain | | | 3 | | 3 |
| 7 | Grigera Naón, Horacio | Male | Argentina | 2 | | | | 2 |
| 8 | Tawil, Guido Santiago | Male | Argentina | 2 | | | | 2 |
| 9 | Kohen, Marcelo G. | Male | Argentina | | 2 | | | 2 |
| 10 | Fortier, L. Yves | Male | Canada | 2 | | | | 2 |
| 11 | Lalonde, Marc | Male | Canada | 2 | | | | 2 |
| 12 | Barros Bourie, Enrique | Male | Chile | 1 | | 1 | | 2 |
| 13 | Zuleta, Eduardo | Male | Colombia | 3 | | | | 3 |
| 14 | Urrutia Valenzuela, Carlos | Male | Colombia | | | | 2 | 2 |
| 15 | Abraham, Cecil W.M | Male | Malaysia | | | 1 | 1 | 2 |
| 16 | von Wobeser, Claus | Male | Mexico | | 1 | 1 | | 2 |
| 17 | Tomka, Peter | Male | Slovakia | | | 2 | | 2 |
| 18 | Cremades, Bernardo M. | Male | Spain | | 1 | 1 | | 2 |

| 19 | Rigo Sureda, Andrés | Male | Spain | 1 | | 1 | | 2 |
|---|---|---|---|---|---|---|---|---|
| 20 | Söderlund, Christer | Male | Sweden | | | 1 | 1 | 2 |
| 21 | Kaufmann-Kohler, Gabrielle | Female | Switzerland | | | 2 | | 2 |
| 22 | Low, Lucinda A. | Female | United States | | 1 | 1 | | 2 |
| 23 | Vinuesa, Raúl | Male | Argentina | | 1 | | | 1 |
| 24 | Martínez de Hoz, José A. | Male | Argentina | 1 | | | | 1 |
| 25 | Fernández Arroyo, Diego | Male | Argentina, Spain | | | 1 | | 1 |
| 26 | Garibaldi, Oscar M. | Male | Argentina, United States | 1 | | | | 1 |
| 27 | Pryles, Michael C. | Male | Australia | | | | 1 | 1 |
| 28 | Rezek, Francisco | Male | Brazil | | 1 | | | 1 |
| 29 | Nunes Pinto, José Emilio | Male | Brazil | | 1 | | | 1 |
| 30 | Volterra, Robert | Male | Canada | 1 | | | | 1 |
| 31 | Mann, Howard | Male | Canada | | 1 | | | 1 |
| 32 | Orrego Vicuña, Francisco | Male | Chile | 1 | | | | 1 |
| 33 | Bulnes Serrano, Felipe | Male | Chile | | | | 1 | 1 |
| 34 | Abi-Saab, George | Male | Egypt | | 1 | | | 1 |
| 35 | Hassouna, Houssein A. | Male | Egypt | | | | 1 | 1 |
| 36 | Paulsson, Jan | Male | France | 1 | | | | 1 |
| 37 | Dupuy, Pierre-Marie | Male | France | | 1 | | | 1 |
| 38 | Knieper, Rolf | Male | Germany | | | | 1 | 1 |
| 39 | Mayora, Eduardo A. | Male | Guatemala | 1 | | | | 1 |

(*continued*)

**Table 2** (continued)

| | Name | Gender | Nationality | Appointed by the investor | Appointed by/for the host state | President/ chairman | Member annulment committee | Total appointments |
|---|---|---|---|---|---|---|---|---|
| 40 | Argueta Pinto, Milton Estuardo | Male | Guatemala | | | | 1 | 1 |
| 41 | Bernardini, Piero | Male | Italy | | | 1 | | 1 |
| 42 | Malintoppi, Loretta | Female | Italy | | | 1 | | 1 |
| 43 | Ferrari, Franco | Male | Italy | | 1 | | | 1 |
| 44 | Giardina, Andrea | Male | Italy | | | | 1 | 1 |
| 45 | Radicati di Brozolo, Luca | Male | Italy, United Kingdom | | | 1 | | 1 |
| 46 | Magallón Gómez, Eduardo | Male | Mexico | | 1 | | | 1 |
| 47 | Sepúlveda Amor, Bernardo | Male | Mexico | | 1 | | | 1 |
| 48 | McLachlan, Campbell Alan | Male | New Zealand | | | 1 | | 1 |
| 49 | Elías, Enrique | Male | Peru | 1 | | | | 1 |
| 50 | Chabaneix, Jean-Paul | Male | Peru | | 1 | | | 1 |
| 51 | MacLean, Roberto | Male | Peru | | | 1 | | 1 |
| 52 | Zusman Tinman, Shoschana | Female | Peru | | | | 1 | 1 |
| 53 | Yusuf, Abdulqawi Ahmed | Male | Somalia | | | 1 | | 1 |
| 54 | Torres-Bernárdez, Santiago | Male | Spain | | 1 | | | 1 |
| 55 | Fernández Rozas, José Carlos | Male | Spain | | | 1 | | 1 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 56 | Danelius, Hans | Male | Sweden | | | 1 | | 1 |
| 57 | Tercier, Pierre | Male | Switzerland | | | 1 | | 1 |
| 58 | Patocchi, Paolo Michele | Male | Switzerland | | | | 1 | 1 |
| 59 | Veeder, V.V. | Male | United Kingdom | | | 1 | | 1 |
| 60 | Leathley, Christian | Male | United Kingdom | 1 | | | | 1 |
| 61 | Berman, Franklin | Male | United Kingdom | | | | 1 | 1 |
| 62 | Shore, Laurence | Male | United Kingdom, United States | | | 1 | | 1 |
| 63 | Cameron, Duncan H. | Male | United States | 1 | | | | 1 |
| 64 | Buergenthal, Thomas | Male | United States | | | 1 | | 1 |
| 65 | Bermann, George | Male | United States | 1 | | | | 1 |
| 66 | Caron, David D. | Male | United States | 1 | | | | 1 |
| 67 | Polebaum, Elliot | Male | United States | 1 | | | | 1 |
| 68 | Gros Espiell, Héctor | Male | Uruguay | | 1 | | | 1 |
| 69 | Herrera-Marcano, Luis | Male | Venezuela | | 1 | | | 1 |
| 70 | Anzola, J. Eloy | Male | Venezuela | 1 | | | | 1 |

Table elaborated according to the information available at Behn D et al (2019) PITAD Investment Law and Arbitration Database: Version 1.1 (2019-03-27), Pluricourts Centre of Excellence, University of Oslo (31 January 2019). https://pitad.org/index#detailed/flat_files/802370006/edit. Accessed 30 December 2019; ICSID (2019) Cases Advanced Search. In: International Centre for Settlement of Disputes. https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx. Accessed 30 December 2019; and UNCTAD (2019) Investment Dispute Settlement Navigator. https://investmentpolicyhubold.unctad.org/ISDS. Accessed 30 December 2019

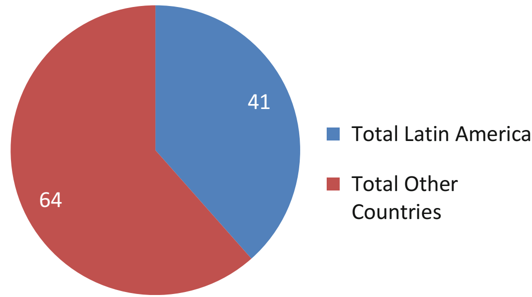


**Fig. 9** Intra-Latin American ISDS: Appointed arbitrators by nationality. (Table 2 elaborated according to the information available at Behn D et al (2019) PITAD Investment Law and Arbitration Database: Version 1.1 (2019-03-27), Pluricourts Centre of Excellence, University of Oslo (31 January 2019). https://pitad.org/index#detailed/flat_files/802370006/edit. Accessed 30 December 2019; ICSID (2019) Cases Advanced Search. In: International Centre for Settlement of Disputes. https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx. Accessed 30 December 2019; and UNCTAD (2019) Investment Dispute Settlement Navigator. https://investmentpolicyhubold.unctad.org/ISDS. Accessed 30 December 2019)

The most appointed arbitrators in these intra-Latin American ISDS cases are generally not Latin American nationals, although these represent an important number of the arbitrators that have been nominated. While 41 appointments have gone to Latin American nationals, 64 appointments have gone to arbitrators outside of the region, largely to European nationals (39 appointments) (Fig. 9; Table 3).

However, that was not the initial tendency, as in the first two intra-Latin American ISDS cases initiated by the end of the 1990s, the appointed arbitrators were all Latin American.[68]

One thing that seems consistent is the gender gap, something that is also a tendency in the overall ISDS arbitration. The overwhelming majority of arbitrators are male (90%), with only 10% of arbitrators being female. Within that group are included two remarkable women who represent the large majority of female appointments (Brigitte Stern and Gabrielle Kaufmann-Kohler, both figures conspicuously in the elite group of top 25 ISDS arbitrators).[69] The same proportion of gender gap is present in the intra-Latin American ISDS cases, with the notable inclusion of Lucinda Low in the list of most appointed arbitrators (two nominations) (Fig. 10).

As these disputes have taken place between Latin American investors and host states of the region, the language of proceedings and decisions should in theory, mostly be Spanish, especially considering that countries of the region that have another language have concluded none (e.g., Brazil) or very few (e.g., Belize)

[68] *Olguín* v. *Paraguay* (ICSID Case No. ARB/98/5) and *Empresa Nacional de Electricidad S.A.* v. *Argentina*

[69] Polanco Lazo R, Desilvestro V (2018) Does an Arbitrator's background influence the outcome of an investor-state arbitration? Law Pract Int Courts Tribunals 17:18–48, 27. https://doi.org/10.1163/15718034-12341366

**Table 3** Intra-Latin American ISDS: Appointed arbitrators by nationality

| Country | Number of appointments |
|---|---|
| Argentina | 10 |
| France | 10 |
| Spain | 10 |
| Canada | 9 |
| United States | 8 |
| Guatemala | 5 |
| Italy | 5 |
| United Kingdom | 5 |
| Chile | 4 |
| Colombia | 5 |
| Costa Rica | 4 |
| Mexico | 4 |
| Peru | 4 |
| Switzerland | 4 |
| Sweden | 3 |
| Brazil | 2 |
| Egypt | 2 |
| Malaysia | 2 |
| Slovakia | 2 |
| Venezuela | 2 |
| Australia | 1 |
| Germany | 1 |
| New Zealand | 1 |
| Somalia | 1 |
| Uruguay | 1 |

Table 2 elaborated according to the information available at Behn D et al (2019) PITAD Investment Law and Arbitration Database: Version 1.1 (2019-03-27), Pluricourts Centre of Excellence, University of Oslo (31 January 2019). https://pitad.org/index#detailed/flat_files/802370006/edit. Accessed 30 December 2019; ICSID (2019) Cases Advanced Search. In: International Centre for Settlement of Disputes. https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx. Accessed 30 December 2019; and UNCTAD (2019) Investment Dispute Settlement Navigator. https://investmentpolicyhubold.unctad.org/ISDS. Accessed 30 December 2019

agreements with ISDS. One exception to this rule is the English-speaking Barbados, having several investors bringing claims; all of them are against one Spanish-speaking country: Venezuela.

However, the number of appointed arbitrators from non-Spanish speaking countries is high: only 49 appointments have gone to arbitrators whose national language is Spanish. This may explain why English has become in practice an often-used language in both proceedings and decisions (jurisdictional decisions, intermediate decisions, and awards) when the majority of arbitrators are not from Latin America (or not Spanish speakers).

For example, in the first two intra-Latin American ISDS cases (*Olguin* v. *Paraguay* and *Empresa Nacional de Electricidad* v. *Argentina*), all arbitrators were Latin

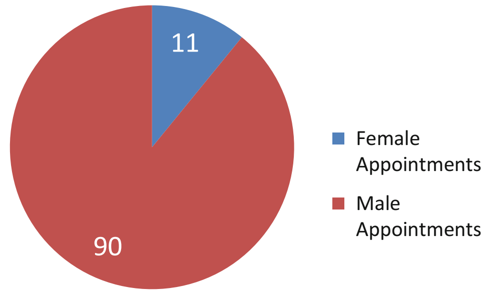


**Fig. 10** Intra-Latin American ISDS: Arbitrators by gender. (Table 2 elaborated according to the information available at Behn D et al (2019) PITAD Investment Law and Arbitration Database: Version 1.1 (2019-03-27), Pluricourts Centre of Excellence, University of Oslo (31 January 2019). https://pitad.org/index#detailed/flat_files/802370006/edit. Accessed 30 December 2019; ICSID (2019) Cases Advanced Search. In: International Centre for Settlement of Disputes. https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx. Accessed 30 December 2019; and UNCTAD (2019) Investment Dispute Settlement Navigator. https://investmentpolicyhubold.unctad.org/ISDS. Accessed 30 December 2019. This table also considers arbitrators with double nationality, with one entry for each one of them)

American nationals, and the language of the proceedings and decisions was Spanish. This situation did not change in the first two cases when non-Latin American arbitrators were appointed in 2003 (Duncan Cameron in *Metalpar* v. *Argentina*, and Robert Volterra in *Chilectra* v. *Argentina*).

However, the situation changed, as soon as the majority of the arbitrators were non-Latin Americans, where the use of both languages (English and Spanish) for proceedings and decisions became commonplace. For example, in *Gambrinus* v. *Venezuela* – where both the arbitral tribunal and the annulment committee arbitrators were non-Latin American, the proceedings were both in English and Spanish, but all decisions and awards are only available in English.[70]

Some exceptions are noteworthy, like the award in *Quiborax* v. *Bolivia*, which is only available in English (being all three arbitrators non-Latin American), whereas the annulment proceeding of the same case is only available in Spanish (being two arbitrators Spanish speaking Latin Americans). In *Convial Callao* v. *Peru*,[71] although the majority of the tribunal were French nationals, both the proceedings and the award are available only in Spanish. Similarly, in *Ríos* v. *Chile*,[72] the proceedings are taking place in Spanish, although the majority of the tribunal are non-Latin American arbitrators (Table 4).

[70] *Gambrinus, Corp.* v. *Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/31)

[71] *Convial Callao S.A. and CCI – Compañía de Concesiones de Infraestructura S.A.* v. *Republic of Peru*, ICSID Case No. ARB/10/2

[72] *Carlos Rios and Francisco Javier Rios* v. *Republic of Chile* (ICSID Case No. ARB/17/16)

**Table 4** Intra-Latin American ISDS: Language of proceedings and decisions

| | Case | Nationality of arbitrators | Language of the proceedings | Language of other decisions | Language of the award | Language of annulment proceeding | Language of annulment decisions | Unofficial translations of decisions |
|---|---|---|---|---|---|---|---|---|
| 1 | Olguin v. Paraguay (1998) | Costa Rica, Guatemala, Brazil | Spanish | Spanish | Spanish | Not applicable | Not applicable | English |
| 2 | Empresa Nacional de Electricidad v. Argentina (1999) | Costa Rica, Peru, Uruguay | Spanish | Not applicable | Not applicable | Not applicable | Not applicable | Not applicable |
| 3 | Metalpar v. Argentina (2003) | Costa Rica, United States, Peru | Spanish | Spanish | Spanish | Not applicable | Not applicable | English, only award on the merits |
| 4 | Chilectra and others v. Argentina (2003) | Peru, Canada, Venezuela | Spanish | Not applicable | Not applicable | Not applicable | Not applicable | Not applicable |
| 5 | Industria Nacional de Alimentos v. Peru (2003) | United States, France, Spain (arbitral tribunal); Sweden, United Kingdom, Italy (annulment committee) | English and Spanish | English and Spanish | English and Spanish | English and Spanish | English and Spanish | Not applicable |
| 6 | Talsud v. Mexico (2004) | United Kingdom, Canada, Mexico | English and Spanish | English and Spanish | English and Spanish | Not applicable | Not applicable | Not applicable |
| 7 | CGE v. Argentina (2005) | Switzerland, Canada, Egypt | English and Spanish | Not applicable | Not applicable | Not applicable | Not applicable | Not applicable |
| 8 | Quiborax v. Bolivia (2006) | Switzerland, Canada, France (arbitral tribunal); Spain, Guatemala, Sweden (annulment committee) | English and Spanish | English and Spanish | English | Spanish | Spanish | None |

(*continued*)

**Table 4** (continued)

| | Case | Nationality of arbitrators | Language of the proceedings | Language of other decisions | Language of the award | Language of annulment proceeding | Language of annulment decisions | Unofficial translations of decisions |
|---|---|---|---|---|---|---|---|---|
| 9 | Globalnet v. Ecuador (2009) | Mexico, Colombia, France | Spanish | Not applicable | Not applicable | Not applicable | Not applicable | Not applicable |
| 10 | Oiltanking v. Bolivia (2010) | France, Argentina, Mexico | Not available | Not available | Not available | Not available | Not available | Not applicable |
| 11 | Convial Callao v. Peru (2010) | France, Colombia, France | Spanish | Spanish | Spanish | Not applicable | Not applicable | None |
| 12 | Flughafen Zürich v. Venezuela (2010) | Spain, Canada, Argentina (arbitral tribunal); Guatemala, Peru, Colombia (annulment committee) | Spanish | Spanish | Spanish | Spanish | Spanish | None |
| 13 | Tidewater v. Venezuela (2010) | New Zealand, Spain, France (arbitral tribunal); Malaysia, Somalia, Germany (annulment committee) | English and Spanish | English and Spanish | English and Spanish | English and Spanish | English and Spanish | Not applicable |
| 14 | Gambrinus v. Venezuela (2011) | Italy, Canada, France (arbitral tribunal); Malaysia, Egypt, Australia (annulment committee) | English and Spanish | English | English | English and Spanish | English | Not applicable |
| 15 | Highbury International v. Venezuela (2011) | Chile, Argentina, Mexico (arbitral tribunal); Spain, Guatemala, Switzerland (annulment committee) | Spanish | Spanish | Spanish | Spanish | Pending | None |
| 16 | Blue Bank v. Venezuela (2012) | Sweden, United States, Italy (arbitral tribunal); Guatemala, Colombia, Chile (annulment committee) | English and Spanish | English | English | Spanish | Pending | None |

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|---|---|---|---|---|---|---|---|---|
| 17 | Transban v. Venezuela (2012) | Slovakia, United States, Spain | English and Spanish | Not available | Not available | Not applicable | Not applicable | Not available |
| 18 | Venezuela US v. Venezuela (2013) | Slovakia, Canada, Argentina | English and Spanish | English and Spanish | Not applicable | Not applicable | Not applicable | Not applicable |
| 19 | Highbury v. Venezuela (2014) | Spain, Chile, France | Spanish | Not applicable | Not applicable | Not applicable | Not applicable | Not applicable |
| 20 | Álvarez y Marín Corporación and others v. Panama (2015) | Spain, Argentina, Canada | Spanish | Spanish | Spanish | Not applicable | Not applicable | None |
| 21 | Shanara and Marfield v. Mexico (2015) | Not available | Not available | Not available | Not available | Not available | Not available | Not applicable |
| 22 | América Móvil v. Colombia (2016) | Italy, United Kingdom, Argentina, Costa Rica | Spanish | Not applicable | Not applicable | Not applicable | Not applicable | Not applicable |
| 23 | Saint Patrick Properties v. Venezuela (2016) | United Kingdom, United States, Canada | English and Spanish | Not applicable | Not applicable | Not applicable | Not applicable | Not applicable |
| 24 | Silverton v. Dominican Republic (2016) | Spain, Venezuela, Italy | English | English | Not applicable | Not applicable | Not applicable | Not applicable |
| 25 | Ríos v. Chile (2017) | Switzerland, Argentina, United States, France | Spanish | Spanish | Spanish | Not applicable | Not applicable | Not applicable |
| 26 | Sastre v. Mexico (2017) | Not available | Not available | Not available | Not available | Not available | Not available | Not applicable |

(*continued*)

**Table 4** (continued)

| | Case | Nationality of arbitrators | Language of the proceedings | Language of other decisions | Language of the award | Language of annulment proceeding | Language of annulment decisions | Unofficial translations of decisions |
|---|---|---|---|---|---|---|---|---|
| 27 | Corporación América and Kuntur Wasi v. Peru (2018) | United States, Chile, Brazil | Not available | Not available | Not available | Not available | Not available | Not applicable |
| 28 | Abanto v. Venezuela (2018) | Not available | Not available | Not available | Not available | Not available | Not available | Not applicable |
| 29 | Inversiones Continental v. Honduras (2018) | Argentina, United States | Not available | Not available | Not available | Not available | Not available | Not applicable |
| 30 | Lee-Chin v. Dominican Republic (2018) | Argentina, Spain, United Kingdom | Not available | Not available | Not available | Not available | Not available | Not applicable |
| 31 | LARAH v. Uruguay (2019) | Colombia | Not available | Not available | Not available | Not available | Not available | Not applicable |

Table 2 elaborated according to the information available at Behn D et al (2019) PITAD Investment Law and Arbitration Database: Version 1.1 (2019-03-27), Pluricourts Centre of Excellence, University of Oslo (31 January 2019). https://pitad.org/index#detailed/flat_files/802370006/edit. Accessed 30 December 2019; ICSID (2019) Cases Advanced Search. In: International Centre for Settlement of Disputes. https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx. Accessed 30 December 2019; and UNCTAD (2019) Investment Dispute Settlement Navigator. https://investmentpolicyhubold.unctad.org/ISDS. Accessed 30 December 2019. Language of other decisions, includes decisions on jurisdiction, provisional measures, disqualifications of arbitrators, etc. The nationality of an arbitrator is merely an indicator of a preferred language, and several of them are fluent in more languages than just their national language

## Conclusion

Historically, Latin America has a thorny relationship with foreign investment, marked by opposite extremes that change throughout different epochs and actors. When it comes to investment policies, countries of the region do not always act as a bloc, and any study of this topic cannot oversimplify this reality putting all Latin American countries in the same box.

After several phases of resistance and acceptance of international investment agreements and investor-state arbitration – which again, differ in every country – today Latin American countries have concluded around 19% of all IIAs negotiated worldwide, which is a relatively lower percentage number compared to other regions like Europe (59%), Asia (52%), and Africa (27%). Only North America and Oceania have lower percentages of concluded IIAs (5% and 2%, respectively).[73] Today, the negotiation of IIAs is no longer a North-South affair. Around half of the Latin American IIAs have been negotiated with developed countries and the other half with developing countries, including other Latin American countries.

At the same time, Latin America is the region of the world where host states have been subject to the largest number of ISDS claims, representing around 25% of all known treaty-based investor-State arbitrations.

However, in the region there is no direct correlation between the number of concluded IIAs and the ISDS cases that a country faces. Argentina, Venezuela, and Ecuador are in the top 12 list of respondent states, but they are not in the list of countries with more IIAs: Just considering BITs Argentina is ranked 34, Venezuela is 89, and Ecuador would be around the same position if it had not terminated these treaties.[74]

In contrast, Cuba has more BITs than Argentina and in the only case reported against that country; there was no use of ISDS but of state-to-state arbitration. In *Italy* v. *Cuba*, Italy brought arbitration proceedings against Cuba in May 2003, espousing the claims of injuries suffered by a group of 16 Italian investors operating in Cuba, for alleged breaches of the 1993 Italy–Cuba BIT, invoking the ad hoc arbitration in Article 10 of the same treaty. After an interim award in March 2005, the inter-state arbitral tribunal issued a final award in March 2008, rejecting all the claims made by Italy, both on jurisdictional grounds or on their merits.[75]

Furthermore, the number of cases that have been brought against Latin American countries by investors of the region is impressively small, representing just around 3% of the known treaty-based investor-State arbitrations (a total of 942 cases),[76]

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[73]According to the information available at UNCTAD (2019) Investment Dispute Settlement Navigator. https://investmentpolicyhubold.unctad.org/ISDS. Accessed 28 May 2019

[74]Ibid.

[75]Polanco R (2019) The return of the home state to investor-state disputes: bringing back diplomatic protection? Cambridge University Press, Cambridge, UK/New York, pp 253–254

[76]UNCTAD (2019) Investment Dispute Settlement Navigator. https://investmentpolicyhubold.unctad.org/ISDS. Accessed 28 May 2019

which is a testimony of the little use that this mechanism has had in intra-regional investment disputes.

While the most frequent respondent states in this subset of cases are in line with the general ISDS tendencies (Venezuela with ten cases, followed by Argentina with four, Mexico and Peru with three cases each), the most common home state of the investors in these intra-Latin American disputes are Chile (seven cases), Barbados (six cases), and Panama (five cases). It is noteworthy that Chile and Barbados register more cases as home states of ISDS claims than they do as respondent states, and that all the cases where investors have made use of investor-State arbitration have been against other Latin American countries.

Some of the cases brought by investors from Barbados and Panama could be seen more as an example of the use of "treaty shopping" rather than real intra-Latin American disputes, indirectly initiated in certain cases by nationals of the respondent state (notably from Venezuela). For example, in *Transban* v. *Venezuela*,[77] the tribunal decided that it had no jurisdiction *ratione personae*, since the claimant had originally been incorporated in Venezuela, under a different name, and its relocation to Barbados did not amount to incorporation or constitution in that country for the purposes of the Barbados-Venezuela BIT (1994).[78]

In *Gambrinus* v. *Venezuela*, the respondent state held that the claimant was a "shell company" with no activity whatsoever either in Barbados or in Venezuela, being the subject of the transfer of interest by a Venezuelan company (Inv. Polar) just to get the benefit of the Barbados-Venezuela BIT. The tribunal finally did not make a decision on this issue, as it had already declined its jurisdiction on the ground that *Gambrinus* did not own an investment in Venezuela at the time of the alleged BIT breaches.[79]

In *Tidewater* v. *Venezuela*, the respondent held that the claimant was a "corporation of convenience" incorporated for the sole purpose of gaining access to ICSID and submitted that Tidewater's invocation of the Barbados-Venezuela BIT is an abuse of that treaty, a claim that was finally dismissed by the tribunal.[80]

Similarly, in *Highbury* v. *Venezuela*, the respondent submitted that the effective control of the claimant companies belonged to Mr. Manuel Fernández, who was a Venezuelan and American citizen until December 2009, when he renounced the first nationality. Therefore, even if it had been shown that Highbury owned the Venezuelan companies holding the investment, there would be no foreign investment because Highbury was controlled by a Venezuelan. However, the tribunal did not

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[77] *Transban Investments Corp.* v. *Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/24)

[78] Hepburn J (2017) Tomka-chaired tribunal declines jurisdiction over Transban claim – but majority diverges from Fabrica tribunal, and sees no problem with investor consent given after Venezuela's ICSID denunciation notice. In: Investment arbitration reporter (IAReporter). https://www.iareporter.com/articles/tomka-chaired-tribunal-declines-jurisdiction-over-claim-filed-on-final-day-of-venezuelas-icsid-membership/. Accessed 6 June 2019

[79] *Gambrinus, Corp.* v. *Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/31), Award 15 June 2015, paras 135 and 277

[80] *Tidewater Investment SRL and Tidewater Caribe, C.A.* v. *Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Jurisdiction, 8 February 2013, paras 8 and 198

decide on this issue, having previously accepted another ground to dismiss jurisdiction.[81]

Up to now, the arbitrators appointed in intra-Latin American cases varies considerably, and the large majority of them are not part of the top 25 most appointed arbitrators in the overall ISDS cases, a group that accounts for around a third of all known arbitral appointments. Although there is an important presence of Latin American arbitrators appointed in these cases (around 40%), the most appointed arbitrators are generally not Latin American nationals, with a marked preference for male European nationals of non-Spanish speaking countries. This is consistent with the general trend in ISDS cases.[82]

In theory, as these disputes have taken place between Latin American countries and Latin American investors, the language of proceedings and decisions should mostly be Spanish, especially considering that countries of the region that have another language have concluded none or very few agreements with ISDS. However the national language of the appointed arbitrators seems to have an impact in both the proceedings and the decisions in ISDS cases. In practice, English has become an often-used language when the majority of arbitrators are not from Latin America (or not Spanish speakers), even if both the claimant and the respondent State are from Spanish-speaking countries.

Overall, intra-Latin America ISDS is largely underused, and when it is implemented mainly reflects the general trends of investment treaty making and dispute settlement found worldwide. This is in contrast with the different regional approaches that Latin American countries have embarked on the negotiation and conclusion of international investment agreements. It would be interesting to know if these conclusions would change if a long-negotiated project of having a regional center for intra-Latin American investment disputes is finally concluded, something that at the moment of this writing seems highly unlikely.[83]

## Cross-References

► Argentina and ISDS
► International Investment Law and Latin America

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[81] *Highbury International AVV and Ramstein Trading Inc.* v. *Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/1), Award, 26 September 2013, paras 127 and 236

[82] Polanco Lazo R, Desilvestro V (2018) Does an Arbitrator's background influence the outcome of an investor-state arbitration? Law Pract Int Courts Tribunals 17:18–48, 27. https://doi.org/10.1163/15718034-12341366

[83] Polanco Lazo R (2016) Beyond ICSID arbitration – the Centre for Settlement of Investment Disputes of UNASUR. In: Bjorklund AK (ed) Yearbook on international investment law and policy 2014–2015. Oxford University Press, New York, pp 375–404; Sarmiento MG (2016) The UNASUR Centre for the Settlement of Investment Disputes and Venezuela: Will Both Ever See the Light at the End of the Tunnel? J World Invest Trade 17:658–680. https://doi.org/10.1163/22119000-12340008