Lessons Learned and Lessons to Be Learned: Investment Law & Development for Developed Countries

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Law & Development is a movement originally based on the idea that Law is a process by which rules governing social life are consciously formulated and consistently applied, in a way that society is effectively governed by universal and purposive rules.[1] The State is seen has the primary agent of change and social control, which will use law as an instrument with the purpose to transform society and yet will itself be constrained by that law.[2]

In that context, some rules seemed to be naturally better than others, as the Law & Development studies in the 1960's advanced the idea that developing nations could/should learn from the legal systems of developed countries. This goal entailed many changes in the legal system of developing countries, including the reform of their legal education, judicial systems and substantive laws (and if necessary importing foreign norms) with the aim that impartial application of rules becomes a reality.[3]

But what if is the other way around and developed countries could/should learn from the legal solutions of developing countries?

From the case study of foreign investment disputes we can draw an example of lessons learned by Latin American countries that developed countries could/should consider as a learning

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[1] David M. Trubek, *Toward a Social Theory of Law*, 82 YALE LAW JOURNAL 1, 9 (1972).
[2] David M. Trubek and Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, WISCONSIN LAW REVIEW 1062, 1079 (1974).
[3] David M. Trubek, *supra* note 1, at 9.

experience, while they are increasingly facing the challenges posed by the current Investor-State Dispute Settlement regime.

When investment flows were running mostly from developed to developing countries, the reaction about the level of protection received in developing countries was rarely a good one. Developed countries secured the status of their nationals through unequal treaties that guaranteed extraterritorial application of the law and jurisdiction of such "civilized" countries,[4] or challenged the substantive and procedural treatment that foreign investors received as not conformed to an "international minimum standard". As a consequence of the latter, Latin America became the main example of the use (and abuse) first of "diplomatic protection", and later, of investor-state arbitration.

In recent years, investment flows have changed and developed countries are increasingly recipients of investment from developing countries. That has opened the possibility for disputes where in a reversal of the traditional roles, a developed country is challenged in its policies or regulations by foreign investors from developing countries whose investment has been affected. The reaction of developed countries as host States is no different from the ones of developing countries in the past. Some are looking to limit the interpretation of certain standards and others are outraged that their domestic courts are discarded as a natural forum of these disputes. This paper will analyze what developed countries can learn from developing countries copious experience in this field.

[4] ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 85 (Cambridge University Press 2007).

Lesson # 1: Latin American reaction to the use of force by developed countries to protect foreign investors

Historically, foreign investment disputes were settled either by the domestic courts where investment took place (host State) or through diplomatic protection.[5] Diplomatic protection is a concept of customary international law and consists of the invocation by a State ("Home State"), of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.[6]

The main reason for the use of diplomatic protection was that home States would not always agree 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 vis-à-vis a "National Standard" espoused by certain developing countries notably in Latin America.[7] Elihu Root, in his address to the 1910 Annual Meeting of the American Society of International Law (ASIL) summarized the position of United States with regards to the protection of its citizens abroad: [8]

> *"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*

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5 RUDOLF DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 221–220 (2012).
6 Jorge E. Viñuales and Dolores Bentolila, *The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards Against States*, *in* DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT 248, 267 (Laurence Boisson de Chazournes eds., Martinus Nijhoff Publishers 2012).
7 SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 33 (Studies in international law, v. 26, Oxford ; Portland, Or, Hart Pub 2009).
8 Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 517, 20–21 (1910).

> *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 inform 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."*

At this time, the use of diplomatic protection included both peaceful and non-peaceful means of dispute settlement and powerful countries could decide either to stand before an international tribunal or to use force unilaterally. When the latter happened – as Paulsson as famously acknowledged – the "diplomatic" part of the "diplomatic protection", was "an ironic but hardly subtle fiction".[9] Latin American countries were especially affected by the abuse of diplomatic protection and faced armed intervention and occupation by military forces sent by the government of the investor's home State.[10]

The perceived abuse on the use of diplomatic protection led the countries of the region to take the position that aliens had no greater rights than those recognized to the citizens of the host country,[11] especially in cases of loss of life or property.[12] For that reason, most Latin American host States tried to confine investment remedies to its local courts and institutions, holding that domestic courts had a primary role in the settlement of foreign investment disputes and rejecting diplomatic protection except in cases of denial of justice or evident violation of principles of international law.[13] This idea was dubbed as the "Calvo Doctrine" following the writings of the Argentinean diplomat Carlos Calvo, especially in his treatise "International Law of Europe and

[9] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 15 (Hersch Lauterpacht Memorial Lectures (No. 17), Cambridge University Press 2005).
[10] Ibrahim F. I. Shihata, *Towards a Greater Depoliticization of Investment Disputes*, 1 ICSID REVIEW 1, 1 (1986).
[11] ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 395 (Oxford University Press 2003).
[12] Jorge L Esquirol, *Latin America*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 553, 568 (Bardo Fassbender and Anne Peters eds., Oxford University Press 2012).
[13] SANTIAGO MONTT, *supra* note 8, at 40–41.

America in Theory and Practice" (1868),[14] although there is evidence that another prominent Latin American jurist, the Venezuelan Andres Bello, who was in fact the first one in advancing this principle.[15] In any case, Calvo explicitly pointed out that European nations followed a different principle of intervention in their dealings with Latin-American States, as European States in their reciprocal relations had invariably followed the rule that "the recovery of debts and the pursuit of private claims does not justify *de plano* the armed intervention of governments".[16]

But soon Latin American countries went beyond the idea of accepting diplomatic protection as a subsidiary remedy, and devised the so-called "Calvo Clause", which was inserted in contracts between foreign investors and the host State, where aliens agreed to forego their rights to request diplomatic protection from their home State, in any dispute arising out of that contract.[17] In this offspring of the Calvo Doctrine – that as Montt points out was also not invented by Calvo[18] – there is an intention to effectively restrict diplomatic protection, even if it is implemented through peaceful means.

The Calvo Doctrine and especially the Calvo Clause were contested by developed capital-exporting countries, and notably by the United States.[19] In 1873, after receiving a note from the Mexican Minister of Foreign Affairs affirming that Mexico was not responsible for the harm

[14] 1 CARLOS CALVO, DERECHO INTERNACIONAL TEÓRICO Y PRÁCTICO DE EUROPA Y AMÉRICA (D'Amyot 1868). These ideas were further elaborated in the 1896 French edition of this book ("*Le Droit International Théorique et Pratique*"). See: Manuel R. Garcia-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 MARQ. L. REV. 205, 206 (1949).
[15] Frank Griffith Dawson, *The Influence of Andres Bello on Latin-American Perceptions of Non-Intervention and State Responsibility*, 57 BRITISH YEARBOOK OF INTERNATIONAL LAW 253, 273 (1987).SANTIAGO MONTT, *supra* note 8, at 42.
[16] Carlos Calvo, *Le Droit International Théorique et Pratique*, §205, pp. 350-351, cited by Amos S. Hershey, *The Calvo and Drago Doctrines*, 1 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 26, 27 (1907).
[17] CHITTHARANJAN FELIX AMERASINGHE, DIPLOMATIC PROTECTION 192 (Oxford; New York, Oxford University Press 2008).
[18] According to Montt, 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. SANTIAGO MONTT, *supra* note 8, at 46.
[19] DONALD RICHARD SHEA, THE CALVO CLAUSE 37 (University of Minnesota Press 1955).

caused to foreigners during the civil war by 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". [20] Regarding the Calvo Clause, it was debated if foreign investors could waive the right of diplomatic protection that is vested in their national State and not in the investor itself.[21] Most European countries followed a less stringent opposition about the Calvo Doctrine and even recognized a partial validity of the Calvo Clause, holding that a contractual undertaking by a private person not to have recourse to diplomatic protection does not bind the home State if there is a violation of the generally recognized rules of international law.[22]

But the Calvo Doctrine and the Calvo Clause were not the only avenue that was explored by Latin American countries to oppose forceful diplomatic protection. When it was not possible to sustain exclusive domestic jurisdiction for investment disputes, most of Latin American countries agreed on resolve such disputes using peaceful methods of diplomatic protection, mainly bi-national (or mixed) claims commissions or ad-hoc arbitrations. The solution of every international conflict arising between Latin American States, by means of arbitration was even advanced as a "principle of American Public Law" in Pan-American Conferences, being commonly used by the end of the 19th century[23] and early on the 20th century. [24] From 1794 to 1938, Latin American countries participated in almost 200 arbitrations.[25] The bulk of the arbitrations took place during the first century following the independence of Latin American countries from 1829 through 1910. In that period, Latin American States entered into 160

[20] JAN PAULSSON, *supra* note 10, at 21.
[21] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 366 (Cambridge University Press).
[22] DONALD RICHARD SHEA, *supra* note 20, at 46–56.
[23] Alejandro Alvarez, *Latin America and International Law*, 3 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 269, 301, 303, 328–30 (1909).
[24] CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 36 (New York, Oxford University Press 2008).
[25] ALEXANDER MARIE STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS (Martinus Nijhoff Publishers 1990).

arbitrations, including almost 80 arbitrations with European States, around 40 with the United States, around 40 among themselves, and 1 with Japan.[26]

It has been affirmed that Latin American countries were not necessarily fond of arbitration, when disputes involved developed countries, as it was frequently imposed as the sole alternative to forceful intervention,[27] or as a merely extension of the "gunboat diplomacy", as 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 country".[28] For Summers, as a large number of disputes were effectively solved through arbitration, is pointless to discuss if they "were entered into by a genuine respect for the arbitral process or by fear of force, or by a combination of both factors".[29]

However, a more detailed analysis of the output of these peaceful mechanisms of dispute settlement shows that were far from a "victor's justice", and there was also an interest of developing countries to improve diplomatic protection when it was used peacefully.

To start, it is true that Latin American States were sometimes forced to submit disputes to arbitration by European sovereigns "whose predispositions and sympathies did not always inspire confidence among developing countries", [30] but normally arbitration took place under party-appointed arbitrators, although this did not always guarantee impartiality. In some of the earlier arbitrations, each party selected and paid their own arbitrators, so the one appointed was "almost

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[26] Lionel M. Summers, *Arbitration and Latin America*, 3 CAL. W. INT'L L.J. 1, 7 (1972).
[27] SANTIAGO MONTT, *supra* note 8, at 38.
[28] Guillermo Aguilar Alvarez and William W. Park, *New Face of Investment Arbitration*, 28 YALE J. INT'L L. 365, 367 (2003).
[29] Lionel M. Summers, *supra* note 27, at 6.
[30] Guillermo Aguilar Alvarez and William W. Park, *supra* note 29, at 367.

of necessity compelled to be the particular representative of his country rather than a judge".[31] Plus, an umpire was sometimes selected by lot, a method that was questioned as haphazard and likely to breed injustice and dissatisfaction.[32] In any case, they rarely had a Latin American acting as an arbitrator.[33] Later arbitrations showed a substantive improvement, with the appointment of "neutral" or independent arbitrator and umpires.[34]

With respect to bi-national claims commissions, in the beginning they were essentially "one-sided", having the Latin American country always as the defendant. An explanation to this imbalance could be the fact that there were more European and American investments in Latin America than the opposite, and those investors were effectively affected by revolutions and disturbances in Latin America that caused substantial damage to persons and property.[35] However, in later cases bi-national claims commissions were created to hear the claims of nationals of both sides.

An example of this evolution is provided by the claims commissions between Mexico and the United States. The first bi-national claims commission between both countries was established under the Treaty of April 11, 1839, for claims involving hundreds of American citizens, and millions of dollars in damages on their property, mainly during the Mexican independence war.[36] This commission met in Washington from August 25, 1840 to February 25, 1842 and reviewed 109 claims, with a total of USS$2,026,139.68 awarded to the claimants. However, a large number of cases were left unsettled by the commission and over the following years new claims

[31] JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 224 (Stanford University Press 1929).
[32] *Id.* at 225.
[33] Lionel M. Summers, *supra* note 27, at 8. Summers offers an explanation for this unbalance: Latin American States preferred European sovereigns as arbiters, even in intra- Latin American disputes.
[34] JACKSON H. RALSTON, *supra* note 32, at 225.
[35] Lionel M. Summers, *supra* note 27, at 8.
[36] Peter Mark Jonas, United States Citizens Vs. Mexico, 1821-1848 1–2 (1989) (unpublished Ph.D., Marquette University).

continued to multiply. As the Mexican government failed to pay the full amount of the awards, these became a source of conflict between the United States and Mexico that later derived in the Mexican-American War of 1846-1848.[37]

A later US-Mexico General Claims Commission was constituted by a Convention in 1923, with the intention to settle disputes between both countries from 1868 and including claims against one government by nationals of the other, for losses or damages originating from acts of officials or others acting for either government. The commission worked from 1924-1931 and from 1934-1937, reaching a final agreement in 1941.[38] A total of 3,617 claims were filed with the General Claims Commission, of which 2,781 claims were against Mexico and 836 against the United States.[39]

It has also been pointed out that the total amount of the awards in claims commissions was disproportionately large in favor of the US and Europe.[40] But we should also compare the sums awarded with the amounts claimed. For example the blockade and bombing of Venezuelan ports in 1902 by Germany, England and Italy after the failure of Venezuela to pay unsettled debts and damages to foreigners,[41] ended up with a subsequent agreement to arbitrate with the "enforcing powers" and with other countries that did not participate in the forceful intervention but held similar claims against Venezuela (Belgium, France, Netherlands, Spain, Mexico, United States and Sweden-Norway). [42] The outcomes of such arbitrations were far from the amounts claimed by the investors. For example, the Americans claimants were awarded around 3% of their claims;

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[37] *Id.* at 3–4.
[38] ANDREAS F. LOWENFELD, *supra* note 12, at 401, 402.
[39] United States of America, United Mexican States, *U.S. - Mexico General Claims Commission*, *in* REPORTS OF INTERNATIONAL ARBITRAL AWARDS - RECUEIL DES SENTENCES ARBITRALES, VOLUME IV 3 (United Nations 2006).
[40] Lionel M. Summers, *supra* note 27, at 8.
[41] CHITTHARANJAN FELIX AMERASINGHE, *supra* note 18, at 191.
[42] JACKSON H. RALSTON, *supra* note 32, at 223.

the Germans around 27%, and the English 63% (an outcome that could derive from the fact that the UK decided to filter the claims submitted to arbitration, allowing only the ones considered of a "good character").[43]

The US-Mexico General Claims Commission is also a good example of this. Within the period ending August 30, 1931, it disposed only of 148 claims (out of the total of 3,617 claims filed with it). Awards favourable to American claimants were granted in 89 cases, the sums allowed amounting to US$4,607,926.59. Awards favourable to Mexican claimants were granted in five cases, the sums allowed amounting to US$39,000.00. [44]

But, by a convention of November 19, 1941, Mexico agreed to pay in instalments a total of $40,000,000.00 in settlement of the claims presented before the General Claims Commission, and certain other outstanding agrarian and international claims. From that sum, under the Settlement of Mexican Claims Act approved December 18, 1942, a domestic American Mexican Claims Commission rendered final decisions in claims of American nationals against Mexico. This domestic commission worked until April 4, 1947, and considered 1,397 cases and granted awards in the total sum of US$37,948,200.05, payable to claimants, with no money available for payment of any interest.[45] So in fact, from the total of 2781 claims filed against Mexico, only 1545 were awarded in favour of American citizens, a 55,5% of the total, that received an average of US$24,561.9 with no interest, even if in some cases disputes arose in the 19th century.

On the other hand, some of these claims commissions and ad-hoc arbitrations even gave recognition to the Calvo Clause. Probably the most influential decision in this regard was the one formulated in the *North American Dredging Company of Texas* case (1923), by the

[43] *Id.* at 224.
[44] United States of America, United Mexican States, *supra* note 40, at 3.
[45] *Id.* at 4.

abovementioned US-Mexico General Claims Commission.[46] In this case, the commission recognized a limited validity of the Calvo Clause under the rules of international law, establishing that it was legally binding on the individual, as required him to seek redress for his grievances in the local courts, but that was not binding on the government of the home State of the same person, in cases of denial or delay of justice.[47] Later arbitral decisions followed the same reasoning of North American Dredging Co. holding that a Calvo Clause could be effective unless in cases of a "denial of justice" in instances where the conduct of the State was grave and the interest involved was substantial.[48]

If we analyze this example in the framework of Law & Development, we have that Latin American States – as developing countries – did not accept the legal theories coming from developed capital-exporting countries, regarding the use of diplomatic protection as a legal mean to protect its foreign investors and investments in developing countries, either by forceful or diplomatic means.

They did that mostly using legal reasoning to defend its position against diplomatic protection, as it took place in the region during the second half of 19th century and the first half of the 20th century. Among the tools used by these countries in this process, we find the advancement of principles of international law (such as the Calvo Doctrine) and the improvement of mechanisms of peaceful diplomatic protection (such as bi-national claims commissions).

[46] For a detailed analysis of this jurisprudence, especially in the US-Mexico General Claims Commission, see DONALD RICHARD SHEA, *supra* note 20, at 194–257.
[47] North American Dredging Company of Texas (U.S.A.) v. United Mexican States (March 31, 1926), IV [2006] Reports of International Awards 26, ¶ 14 (us).
[48] Christopher K. Dalrymple, *Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*, 29 CORNELL INTERNATIONAL LAW JOURNAL 161, 168 (1996).

Latin American countries were particularly successful in one key aspect: the legal proscription of the use of force for the enforcement of private debts.[49] In the 1907 Convention Respecting the Limitations of the Employment of Force for the Recovery of Contract Debts, also known as "Hague Convention II" or "Drago-Porter Convention",[50] the contracting States agreed not to use armed force for the recovery of contract debts claimed from the government of one country as being due to its nationals, against the government of another country, except if the debtor state refuses or neglects to reply to an offer of arbitration, prevents any "compromis" from being agreed on, or fails to comply with the award.[51] A more absolute restriction of the use of force came finally with the 1945 UN Charter, and according to its Article 2(4) is not a permissible method for the exercise of the right of diplomatic protection.[52] Today the use of armed force is formally limited to give effect to decisions of the Security Council in cases of any threat to the peace, breach of the peace, or act of aggression (Article 42) or in cases of individual or collective self-defence (Article 51).[53]

Latin American countries were also partially effective in affirming the principle that domestic courts should be the main forum to deal with foreign investments disputes, except in justified cases, such as denial of justice. Although as we will see in the next section, this achievement was superseded by the ample acceptance of international arbitration as a method to solve investor-State disputes, that took place in Latin America by the end of the 20th century.

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49 SANTIAGO MONTT, *supra* note 8, at 49.
50 Wolfgang Benedek, *Drago-Porter Convention (1907)*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Jan. 2007), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e733?rskey=s0r2Cp&result=1&prd=OPIL.
51 *Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts*, 2, 82 81 (1908).
52 CHITTHARANJAN FELIX AMERASINGHE, *supra* note 18, at 27. Article 2(4) of the UN Charter provides that "All 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." United Nations, Charter of the United Nations (Jun. 26, 1945), http://www.un.org/en/documents/charter/.
53 United Nations, Charter of the United Nations, *supra* note 54.

Lesson # 2: Latin America and Investor-State arbitration

After the Cold War, developing countries in Latin America quickly changed their approach to the standards of protection to property of foreigners, carrying to more radical extremes than their previously moderate positions. In the quarter century following the end of World War II, a wave of expropriations took place in Eastern Europe, former colonies and also in Latin America.[54] From defending national treatment against the international minimum standard, Latin American countries moved to the principle of compensation according to what the host State deemed appropriate – even if it was different to the one applicable to nationals, or in fact to expropriation without compensation.[55] In this framework, the tribunal naturally competent to know an investment claim was the host State's domestic courts.

By the early 60's, the difficulties to achieve a consensus on the obligations of host States toward foreign investors had become evident for developed countries. In that context, the World Bank began to work on an alternative for the settlement of investment disputes to host State courts – affirmed by developing countries as the natural forum of these conflicts, and the State to State dispute settlement, through either legal or diplomatic means – asserted by developed countries when the international minimum standard of treatment to aliens was not achieved in host States.

The result of the several years of work and negotiations at the World Bank, was the Convention establishing the International Centre for Settlement of Investment Disputes (CIADI), [56] which

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[54] ANDREAS F. LOWENFELD, *supra* note 12, at 405–6.
[55] SANTIAGO MONTT, *supra* note 8, at 56.
[56] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 17 UST 1270, TIAS 6090, 575 UNTS 159.

establishes a dispute settlement of disputes not between States but between private parties on one side and host States on the other.[57]

The preliminary and first drafts of the ICSID Convention were elaborated in 1963-1964. At the Annual Meeting of the Board of Governors of the World Bank held in Tokyo in September 1964, a resolution was approved asking the Executive Directors to formulate the final text of the envisaged convention, with the assistance of invited legal experts designated by member countries.[58]

For the first time in the Bank's history a major resolution was met with substantial opposition on a final vote, as 21 countries voted against the proposal[59] (all Latin American States, the Philippines and Iraq). During that meeting, on September 9, 1964, the Governor for Chile, Mr. Felix Ruiz, in representation of 19 Latin American countries made the following statement that has been later known as "the No of Tokyo":[60]

> *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 necessary 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.*

[57] ANDREAS F. LOWENFELD, *supra* note 12, at 456–57.
[58] ANTONIO R. PARRA, THE HISTORY OF ICSID 67–68 (Oxford, Oxford University Press 2012).
[59] ANDREAS F. LOWENFELD, *supra* note 12, at 460.
[60] 2 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID), HISTORY OF THE ICSID CONVENTION, 606 (Washington D.C, International Centre for Settlement of Investment Disputes 1968).

> ***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*
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> *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.*

This declaration affirms what Latin American countries defended at the time: domestic courts as a natural forum to solve investment disputes, with peaceful diplomatic protection only eventually allowed, always previous exhaustion of local remedies. At this moment, even arbitration was not supported by Latin American countries. From 1910 to 1939, there were only 30 arbitrations involving Latin American States, and since World War II, the only significant arbitrations were those related to the boundaries between Chile and Argentina, and Honduras and Nicaragua. [61]

The political context probably contributed to this diminishing trend, as also the practice of contract-based arbitration for investment disputes used in the 50's, where arbitral decisions concluded that contracts between the host States and foreign corporations were "internationalized" and therefore not governed by the domestic law of the host country.[62]

By the end of the '80s and early '90s, a major reversal of this policy took place in Latin America, as some countries began to sign bilateral investment treaties (BITs)[63] in order to stimulate economic growth through foreign direct investment (FDI) and at the same time privatized their

[61] Lionel M. Summers, *supra* note 27, at 7.
[62] ANTONY ANGHIE, *supra* note 4, at 225–26.
[63] Bilateral Investment Treaties 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*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (May 2011), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1061.

energy and utility companies,[64] in pursuit of their economic interests, in order to become an attractive location to potential foreign investors.[65]

Although initially, BITs were concluded between a developing and a developed country, usually at the initiative of the latter,[66] with the increasing integration of the world economy and trade liberalization, this pattern changed especially during the '90s, when developing countries and economies in transition started signing bilateral investment treaties among themselves and in large numbers.[67] Also, only some years later, investment chapters began to be included within certain free trade agreements (FTAs), following the example of the North American Free Trade Agreement (NAFTA)[68] which Chapter 11 is in many respects, based on BITs.[69] In fact, NAFTA placed the regime in a new context, and we can consider its Chapter 11 as the first investment treaty signed between two developed countries, Canada and the United States.[70]

So now, developed countries could be the target of investor-State arbitration. And they did not like it.[71] Remarkably, in the case of NAFTA the role reversal for the US and Canada did not occur because investors from Mexico began bringing claims against them. Instead, investors from Canada and the United States started attacking each other's country. Today, possibilities for developed countries to be respondent in Investor-State arbitration are increasing, as FDI flows

[64] Katia Fach Gómez, *Latin America and ICSID*, SSRN Scholarly Paper ID 1708325 2 (Social Science Research Network, Rochester, NY), Nov. 12, 2010.
[65] Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them*, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW 639, 643–44 (1998).
[66] Pakistan and Germany signed the first BIT on November 25, 1959. Other European countries soon followed the German example.
[67] See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, SOUTH-SOUTH COOPERATION IN INTERNATIONAL INVESTMENT ARRANGEMENTS. (New York, United Nations 2005).
[68] Canada-Mexico-United States, *North American Free Trade Agreement (NAFTA), Dic. 17, 1992*, 32 INTERNATIONAL LEGAL MATERIALS 289 (1993).
[69] ANDREAS F. LOWENFELD, *supra* note 12, at 473. Usually the generic term "International Investment Agreements" (IIAs) is used to refer to the investment treaties, whether part of an FTA or an standalone BIT.
[70] Charles H. Brower, II, *International Law in Ferment*, 94 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 13, 14 (2000).
[71] Guillermo Aguilar Alvarez and William W. Park, *supra* note 29, at 368–69.

from developing economies are growing. In 2012 their share in global outflows reached a record 31%, amounting to $426 billion, although the region also accounted for a record share of 52% of FDI inflows. Yet, United States is still the largest recipient of FDI in the world and several developed countries are in the top 20 host economies. [72]

After Americans and Canadians began to experience the host State perspective, the praise for arbitration began to fade, being replaced by complaints about infringement of national sovereignty, transparency and democracy. As Aguilar and Park points out: [73]

> *"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"*

In 2013, an unusually high number of Investor-State arbitration cases were filed against developed States, the majority of them members of the European Union. The most frequent respondent State in that period was the Czech Republic, followed by Egypt, Spain, Uzbekistan and Canada. Of a total of 57 new cases, 45 were brought by investors from developed countries and the remaining by investors from developing countries.[74]

Critics of Investor-State arbitration in general, have stressed that such system allows foreign investors to bring a dispute against the host State without exhaustion of local remedies in domestic courts,[75] bringing private arbitrators to decide the legality of sovereign acts by

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[72] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), WORLD INVESTMENT REPORT 2013. GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT. 2–4 (2013).
[73] *Id.* at 370–71.
[74] United Nations Conference on Trade and Development (UNCTAD), *Recent Developments in Investor-State Dispute Settlement (ISDS)*, IIA ISSUES NOTE, Apr. 2014, at 2.
[75] Michael E. Schneider, *Investment Disputes - Moving Beyond Arbitration*, *in* DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT 119, 120 (Laurence Boisson de Chazournes eds., Martinus Nijhoff Publishers 2012).

contracting out the judicial function in public law.[76] There are also concerns about qualifications and independence of arbitrators, frivolous claims, “nationality planning” and “treaty shopping”, high costs of arbitration, its lack of transparency and coherence, expansive or inconsistent interpretations of treaty provisions, erroneous arbitral decisions, and a growing perception of lack of legitimacy of the system.[77]

Regardless of whether such self-perceptions are valid or not – that is definitely a matter of a separate research – it is interesting to analyse the reaction of developed countries to this “threat”. To some, a double standard seems to be in place in developed countries’ attitudes toward investor-Stare arbitration: it is good when it corrects misbehavior by foreign host States (mostly developing countries), but not so desirable when claims are filed for alleged wrongdoing by a developed State. [78]

But it seems, some developed countries have “learned the lessons” of the past experiences of Latin American countries with respect to investment dispute settlement. They now praise the Calvo Doctrine – most of the times without using that name, of course. There are also doubts among developed countries in general about the efficiency of investment treaties and their particular arbitration system. [79]

In 2002, the then Senator from Nevada John Kerry, presented to the US. Senate what has been known as “the Kerry Amendment” to ensure that any artificial trade distorting barrier relating to foreign investment was eliminated in any trade agreement entered into under the Bipartisan Trade

[76] *See* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 4 (Oxford University Press, USA 2008).
[77] United Nations Conference on Trade and Development (UNCTAD), *Reform of Investor-State Dispute Settlement: In Search of A Roadmap* 12, 2–4 (International Investment Agreements - Issues Notes, 2013).
[78] Guillermo Aguilar Alvarez and William W. Park, *supra* note 29, at 368–69.
[79] Leon Trakman, *Investor State Arbitration or Local Courts*, 46 JOURNAL OF WORLD TRADE 83 (2012).

Promotion Authority Act of 2002. This proposal was quite controversial, as it reflected the positions of various organizations that have been most ardently opposed to investment treaties in general and to investor-State dispute settlement in particular. Among other things, the Kerry Amendment established that a trade agreement that includes investment provisions should: [80]

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

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. However, required an investor to go through a home State screening mechanism before submitting a claim against the host State to arbitration: [81]

> *(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;*

The Kerry Amendment was ultimately defeated.[82] However, the Obama Administration has recently declared its adherence to Investor-State arbitration, based on the premise that offers

[80] John Kerry, Amendment No. 3430 to the Bipartisan Trade Promotion Authority Act of 2002 § 4529 (Congressional Record - Senate 2002).
[81] *Id.*
[82] U.S. SENATE, BIPARTISAN TRADE PROMOTION AUTHORITY ACT OF 2002 60 (Diane Publishing 2002).

"*basic legal protections for American companies abroad* ***that are based on the same assurances the United States provides at home***".[83]

Within NAFTA, both Canada and United States have promoted the "clarification" of the standards of Fair and Equitable Treatment (FET) and Full Protection and Security (FPS) prescribed in its Article 1105, and NAFTA Free Trade Commission has declared that they "do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens".[84] However, several arbitral tribunals have surprisingly challenged this interpretation, emphasizing the evolutionary character of these standards, and recognizing at least theoretically, a level of protection to foreign investors superior to the one under the traditional interpretation of the minimum standard of treatment.[85]

In Europe, the discussion of Investor-State arbitration has dominated the early negotiations of the Transatlantic Trade and Investment Partnership (TTIP) with the U.S, with several commentators questioning if it is really necessary to have Investor-State arbitration in that treaty, as the administrative and judicial systems developed in the EU and the US have to be considered sufficient for protecting legal rights of foreign investors who disagree with regulatory intervention and seek legal remedies.[86] Although Investor-State arbitration is still part of the on-

[83] Office of the United States Trade Representative, The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors (Mar. 27, 2014), http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors.

[84] North American Free Trade Agreement (NAFTA) - Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (Jul. 31, 2002), http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx.

[85] Patrick Dumberry, *The Emergence of a Consistent Case Law: How NAFTA Tribunals have Interpreted the Fair and Equitable Treatment Standard*, KLUWER ARBITRATION BLOG (Oct. 30, 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/.

[86] See among others, Jan Kleinheisterkamp, *Is There a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?*, SSRN Scholarly Paper ID 2410188 (Social Science Research Network, Rochester, NY), Feb. 14, 2014; and Consumers International, *Resolution on Investor -State Dispute Resolution in the Transatlantic Trade and Investment Partnership*, DOC No: Trade 15/13 Oct. 2013.

going negotiations, the EU is holding an online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the TTIP, with the aim of improving the system.[87]

The Australian Government announced in April 2011 that will no longer include investor-State dispute resolution procedures in trade agreements, declaring that "If 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". [88]

At the same time, and completely embracing the "Calvo Doctrine", the Gillard Government declared its support to the principle of national treatment "that foreign and domestic businesses are treated equally under the law", denying support to 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".[89] If this policy is implemented, domestic courts would be the sole jurisdiction available for investment disputes, to investors from countries with no current investment treaty providing Investor-State arbitration.

Although Australia already notably declined to be bound by an investor-State arbitration in the US-Australia FTA pointing out the reliability of its own legal system for resolving disputes involving U.S. investors,[90] that did not prevent US-based Philip Morris to start a well-known

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[87] European Commission, Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP) - Trade - European Commission (Apr. 29, 2014), http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179.
[88] Gillard Government Trade Policy Statement, Trading Our Way to More Jobs and Prosperity 14 (2011).
[89] *Id.*
[90] Luke Eric Peterson, *In policy switch, Australia disavows need for investor-state arbitration provisions in trade and investment agreements*, INVESTMENT ARBITRATION REPORTER (IAREPORTER) (Apr. 14, 2011), http://www.iareporter.com/articles/20110414.

arbitration against Australia on November 21, 2011[91] - through its Hong Kong branch – claiming that governmental regulations on plain-packaging of cigarettes violated the Hong Kong-Australia BIT. [92] However, a recent change of government in Australia could signal a change in this policy, as is suggested by the recent FTA agreed with Korea in early December 2013, which again contemplates, Investor-State arbitration.[93] However, the more recent Australia-Japan FTA does not include provisions on Investor-State arbitration.[94]

The abovementioned examples of US, EU and Australia can be compared with the attitudes of the developing countries of Latin America against the same criticisms formulated against Investor-State arbitration. And there is a stark contrast.

Today, as ICSID caseload statistics shows, Latin America is the region with the higher number of cases registered under the ICSID Convention and Additional Facility Rules by State Party involved (34%).[95] Over the past years, several countries of the area have responded to one or more investment treaty arbitration, being Argentina[96] the most frequent respondent in the overall statistics, followed by Venezuela, Ecuador and Mexico.[97] Ecuador has also faced the highest

[91] *Philip Morris Asia Limited v. Australia*, UNCITRAL (Hong Kong/Australia BIT).
[92] International Institute for Sustainable Development (IISD), *Philip Morris Files for Arbitration over Intellectual Property Dispute with Australia*, 2 INVESTMENT TREATY NEWS QUARTERLY 13 (2011).
[93] Australian Government Department of Foreign Affairs and Trade, Korea-Australia Free Trade Agreement (KAFTA) - Key outcomes, http://dfat.gov.au/fta/kafta/fact-sheet-key-outcomes.html.
[94] Luke Nottage, Why no investor–state arbitration in the Australia–Japan FTA? | East Asia Forum (Apr. 7, 2014), http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/.
[95] By December 31, 2013, this percentage accounts 27% for South America and 7% for Central America and the Caribbean. International Centre for Settlement of Investment Disputes (ICSID), *The ICSID Caseload - Statistics*, ISSUE 2014-1 11, https://icsid.worldbank.org/ICSID/FrontServlet.
[96] Most of Argentina's cases arose from the economic crisis and social collapse of 2011and the measures taken by the Argentine State to offset it and its consequences. Ignacio Torterola and Diego Brian Gosis, *Argentina*, *in* LATIN AMERICAN INVESTMENT PROTECTIONS: COMPARATIVE PERSPECTIVES ON LAWS, TREATIES, AND DISPUTES FOR INVESTORS, STATES AND COUNSEL 5, 15 (Jonathan C. Hamilton eds., Martinus Nijhoff Publishers 2012).
[97] United Nations Conference on Trade and Development (UNCTAD), *Recent Developments in Investor-State Dispute Settlement (ISDS)*, IIA ISSUES NOTE, Mar. 2013, at 4.

award against a host State (US$1.77 billion)[98] although an annulment proceeding is currently taking place since October 2012. While some investors from Latin American countries have initiated arbitration proceedings under ICSID, notably from Mexico, Argentina and Chile,[99] foreign investors from States of the region do not rank as the most frequent claimants.

Such scenario has understandably fostered concerns and criticisms about this regime of Investor-State dispute settlement in Latin America, and especially against ICSID which has become the most relevant forum of investment disputes for the region. While some countries have taken the more radical position of exiting the system, others have decided to exhaust all recourses within the system before complying with the award,[100] or even have pushed the limits of the regime "proactively non-paying"[101] before settling some claims – as is the case of Argentina,[102] who has reportedly paid five outstanding awards[103] and reached a preliminary pact on compensation in the *Repsol*[104] case.[105]

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[98] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012. Unless otherwise indicated, all Investor-State arbitration cases are available at Investment Treaty Arbitration (ITA), http://www.italaw.com/

[99] Guido Santiago Tawil, *Schiedsgerichtsbarkeit - Arbitration in Latin America - Current Trends and Recent Developments*, 15 EUROPAISCHES WIRTSCHAFTS UND STEUERRECHT 15 (2004).

[100] See the case *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, the longest arbitration in ICSID history, spanning more than 15 years from the filing of the request for arbitration with a resubmission proceeding still pending, even after the annulment decision.

[101] Luke Eric Peterson, *Argentina by the numbers*, INVESTMENT ARBITRATION REPORTER (IAREPORTER) (Feb. 1, 2011), http://www.iareporter.com/articles/20110201_9.

[102] 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 et al., *How to Kill a BIT and Not Die Trying*, 16 J INT ECONOMIC LAW 869, 12 (2013).

[103] 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 Corp), U.S.-based water company Azurix and Blue Ridge Investments (a subsidiary of Bank of America Corp). 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 (IAREPORTER) (Dec. 30, 2013), http://www.iareporter.com/articles/20131230.

[104] *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38).

[105] *Argentina, Repsol reach preliminary pact on compensation for YPF*, FOX NEWS LATINO (Nov. 25, 2013), http://latino.foxnews.com/latino/news/2013/11/25/argentina-repsol-reach-preliminary-pact-on-compensation-for-ypf/.

After facing basically the same problem than Australia – the questioning of its policy of plain packaging of cigarettes in the framework of general anti-tobacco measures – Uruguay has not menaced to stop negotiating agreements with Investor-State arbitration provisions or to withdraw from ICSID. Notably this is the first arbitration before ICSID equally for Uruguay[106] and Australia, being both arbitral procedures still pending.

As mentioned, other countries of the region have taken a stronger stance against treaty-based Investor-State arbitration. This is the case of the Plurinational State of Bolivia, the Republic of Ecuador and the Bolivarian Republic of Venezuela, which have denunciated the ICSID Convention, and terminated several investment treaties. Nevertheless it is interesting to analyse what these States are proposing as alternative. The more obvious one is domestic courts. This has been expressly stated by Bolivia, Ecuador and Venezuela, but interestingly these countries are not automatically proposing to go back to a sole domestic jurisdiction for foreign investment disputes, as in times when the "Calvo Doctrine" prevailed in Latin America.

In fact, Ecuador has been leading the proposal to create a regional investment court with an appeal facility, and the promotion of ADR mechanisms (like mediation) in the framework of UNASUR (Union of South American Nations) – a proposal also endorsed by ALBA (Bolivarian Alliance for the Peoples of Our America).[107] On the other hand, these three countries have not rejected international arbitration based on contracts, which is playing an increasing important role in the region.[108]

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[106] Jonas Bergstein and Alicia Gambetta, *Uruguay*, *in* LATIN AMERICAN INVESTMENT PROTECTIONS: COMPARATIVE PERSPECTIVES ON LAWS, TREATIES, AND DISPUTES FOR INVESTORS, STATES AND COUNSEL 535, 552 (Jonathan C. Hamilton eds., Martinus Nijhoff Publishers 2012).
[107] Silvia Karina Fiezzoni, *The Challenge of UNASUR Member Countries to Replace ICSID Arbitration*, 02 BEIJING LAW REVIEW 134 (2011).
[108] See: Rodrigo Polanco Lazo, *Is There a Life for Latin American Countries After Denouncing the ICSID Convention?*, 11 TRANSNATIONAL DISPUTE MANAGEMENT (TDM) (2014).

Opposition to Investor-State arbitration and to domestic courts as tools to solve investor–State disputes is not exceptional. The United Nations Conference on Trade and Development (UNCTAD) has found that both domestic courts and Investor-State arbitration are unduly costly and dilatory mechanisms to settle investment disputes, and have started to promote conflict prevention and avoidance measures as alternatives.[109]

On the other hand, developed countries' reliance on domestic courts to resolve a conflict with foreign investors not necessarily provide the public policy protection that they are seeking. Foreign investors may well present expensive claims against developed countries before domestic courts, as they would through investor–State arbitration, and host States do not have reasonable assurance of prevailing over foreign investors before a domestic court, or that its national investors would succeed before the domestic court of a host partner State. [110]

As Trakman points out with respect to Australia's rejection of Investor-State Arbitration in the negotiations of the Trans-Pacific Partnership (TPP), developed countries dismissal of investor–State arbitration may well expose its investors abroad to foreign courts of host States with deficient standards of transparency. [111] Kantor has calculated that approximately 76% of the cases in which investment treaty awards were rendered up (until June 2006) involved countries that ranked at or below 50 on Transparency International's 2008 Corruption

[109] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), INVESTOR-STATE DISPUTES, at xvi (United Nations Publications 2010).
[110] Leon E. Trakman, *Investor-State Dispute Settlement Under the Trans-Pacific Partnership Agreement*, *in* TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 179, 194–95 (Tania Voon ed., Edward Elgar Publishing 2013).
[111] *Id.* at 201.

Perception Index (CPI), and that 68% of those countries were in the bottom 60% of the "rule of law" indicator of the World Bank's Worldwide Governance Indicator (WGI).[112]

Foreign investors might have good reasons not to trust all domestic courts, even from developed countries. In the famous award of the Loewen case, relating to the conduct of the Mississippi trial court and the Mississippi Supreme Court, and if their acts constituted a violation of NAFTA with respect to a foreign investor, the arbitral tribunal found that:[113]

> *"Having 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**."*

Over the past decade there has been a "revival" of the movement of Law & Development, with a resurgence of interest in using law to promote development, with an ongoing debate about fundamental questions such as whether law is an important factor in determining social or economic outcomes in development, or if there are insurmountable economic, political or culture obstacles to effective legal reform. However, again on the part of both academics and practitioners, the focus of this resumption has been the promotion of development in Asia, Eastern Europe, sub-Saharan Africa and Latin America. [114]

Maybe it is time to be open to the possibility that developed countries could also learn about development from developing countries. The long experience of Latin America with foreign investor-State disputes is a good example of that.

[112] Mark Kantor, The Transparency Agenda for UNCITRAL Investment Arbitrations: Looking in All the Wrong Places 10 (Institute for International Law and Justice, New York University School of Law 2011).
[113] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (Jun. 26, 203), §54.
[114] Kevin E. Davis and Michael J. Trebilcock, *The Relationship Between Law and Development*, 56 AMERICAN JOURNAL OF COMPARATIVE LAW 895 (2008).