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Arbitration of International Oil, Gas, and Energy Disputes in Latin America

Alexia Brunet & Juan Agustin Lentini***

I. INTRODUCTION

An increase in global reliance on fossil fuels has prompted greater discussion on energy security. For the United States, interest has focused on ensuring that countries in the Western Hemisphere, which currently supply roughly half of U.S. imports of crude oil and petroleum products, remain stable sources of energy.¹ While concerns have focused on political instability and a rising interest in the hemisphere's energy resources by China and India, the conversation centers on a hemispheric trend toward resource nationalism.² Resource nationalism is exemplified by the global trend of placing the world's oil reserves under the control of national oil companies and out of reach of the international oil companies, except on a low-margin, service-contract basis. This trend is prompting some Latin American countries to make deliberate attempts to limit foreign investment in their energy sector. For countries that continue to welcome foreign investment, other legal policies, such as rules governing international arbitration, are hampering foreign investment. Deliberate or not, these policies lead investors to locate multimillion dollar energy investments

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¹ Mark P. Sullivan & Clare M. Ribando, *Latin America: Energy Supply, Political Developments, and U.S. Policy Approaches*, CONGRESSIONAL RESEARCH SERVICE, REPORT NO. RL33693 (Oct. 17, 2006).

² Peter Hakim, *Is Washington Losing Latin America?*, 85 FOREIGN AFF. 39 (2006).

elsewhere.

This article considers Latin American attitudes towards rules governing international arbitration. Latin American countries had traditionally rejected arbitration as a means of settling disputes citing the “Calvo Doctrine,” a widely-adopted, anti-interventionist doctrine formulated in the Nineteenth Century. This doctrine inspired widespread use of contractual clauses limiting legal redress for foreigners in domestic courts. For decades, Latin American used the doctrine to refuse ceding jurisdictional control to foreign or domestic arbitral tribunals. This isolation from international arbitration, however, would not last long.

The last fifteen years introduced a new economic order in Latin America, prompting countries to pursue foreign direct investment as a new path of economic development. As a result, countries enhanced measures for protection of foreign investments including policies for fair and equitable treatment of investments, non-discrimination and adequate compensation for expropriated property. Within the realm of arbitration, countries enacted changes in national and international policies to promote the development of international arbitration as an effective means of dispute settlement.

However, the implementation of an adequate legal framework was not sufficient to guarantee the development of international arbitration in Latin America. Policies discouraging the use of international arbitration and enforcement of arbitral awards are re-surfacing to impede foreign investment in energy sectors throughout Latin America. This is particularly troubling at a time when concerns for resource nationalization and energy security are mounting.

This article traces the development of international arbitration as a means of settling international disputes in Latin America, lending a historical perspective to the problems that international arbitration practitioners face when dealing with international arbitration in Latin America, particularly in the energy sector. We focus on four themes: (1) the influence of foreign direct investment in the energy sectors of Latin America on the development of international arbitration in Latin America; (2) the rise of energy-related international arbitration disputes after Latin American adoption of international arbitration; (3) the problems encountered by international energy companies while enforcing arbitration agreements or foreign arbitral awards before the national courts of selected Latin American countries; and (4) the future of international arbitration in Latin America in the context of the hemispheric movement toward resource nationalization and national concerns over energy security. For the purposes of this study, Latin America is defined by twenty countries identified in the tables found in the Appendices to this article. The energy sector includes companies engaged in the exploration, production, marketing, refining and/or transportation of oil and gas products, plus coal.

Section II begins with a discussion of Latin American attitudes towards international arbitration, noting both the motivations behind Latin America's historic rejection of international arbitration, and factors leading to gradual embracing of international arbitration. Section III describes efforts to encourage the use of international arbitration and the enforcement of arbitration awards, respectively. Section IV presents the subsequent result of these efforts—the proliferation of actions against Latin American countries, particularly in the energy sector. This is followed by a discussion of the difficulty of developing an arbitration culture in Latin America and problems encountered with international arbitration in Latin America for select countries in Section V. Section VI places the problems discussed in previous sections within the context of concerns for resource nationalization and more generally, concerns for energy security. Section VII provides concluding remarks.

II. LATIN AMERICAN COUNTRIES' ATTITUDES TOWARDS INTERNATIONAL ARBITRATION

Historically, Latin American countries have been reluctant to accept international arbitration as a means of dispute settlement.³ Decades of abstention from major international commercial arbitration conventions led to a seemingly irreparable bias against international commercial arbitration.⁴ Yet, over the last fifteen years, this situation has changed radically.⁵

The increase of privatization of utility and energy companies throughout Latin America, particularly in Brazil and Argentina, has attracted considerable foreign direct investment to the continent. To encourage further investment many developing countries have adopted a legal framework that complies with demands made by capital exporting states—such as the provision of a private right of action for investors against host states through international arbitration. The following sections describe the basis for initial Latin American rejection of international arbitration and the economic forces which emerged to alter the situation.

³ Bernardo Cremades, *Current Status of International Commercial Arbitration in Latin America*, in ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA: PAPERS PRESENTED AT THE 1998 VANCOUVER IBA CONFERENCE, 1, 5 (Bernardo Cremades ed., Kluwer Law International 1999) [hereinafter Cremades, *Commercial Arbitration*].

⁴ Claudia Frutos-Peterson, *International Commercial Arbitration in Latin America: As Healthy as It Could Be?*, State Bar of Texas, Alternative Dispute Resolution Section, available at <http://www.texasadr.org/intlarb.html> (last visited Feb. 3, 2007).

⁵ Horacio A. Grigera-Naón, *Latin America: Overcoming Traditional Hostility Towards Arbitration*, 477 PLI/COMM 375, 377 (1988).

A. The Rejection of Arbitration Under the "Calvo Doctrine"

Latin American's historic hostility to international arbitration has been based on the "Calvo Doctrine."⁶ The Calvo Doctrine was formulated by Carlos Calvo, an Argentine diplomat and jurist, in the late Nineteenth Century, as a reaction to foreign armed interventions in Latin America, principally the French interventions in Mexico in 1838 and 1861.⁷ Two fundamental principles constitute the core of his doctrine: "First, that sovereign states, being free and independent, enjoy the right, on the basis of equality, to freedom from 'interference of any sort' . . . by other states, whether it be by force or diplomacy, and second, that aliens are not entitled to rights and privileges not accorded to nationals, and that therefore they may seek redress for grievances only before the local authorities."⁸ Many Latin American countries incorporated aspects of the Calvo Doctrine in their domestic and constitutional law.⁹

This doctrine led Latin American countries to incorporate the so-called 'Calvo clause' in many contracts with foreigners. This clause provides that any dispute with the host country or its companies shall be submitted to domestic courts and forbids recourse to diplomatic protection by the aggrieved party.¹⁰ As we later reveal in greater detail, remnants of this doctrine still remain today and some lower courts in Latin America refuse to cede their jurisdictional control over to foreign or domestic arbitral tribunals.¹¹

B. The New Economic Order and Gradual Acceptance of International Arbitration

The Calvo Doctrine flourished for decades and most Latin American

⁶ See Robert Briner, Chairman, Int'l Court of Arbitration of the Int'l Chamber of Commerce, Address at the 40th Anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1998), in ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION, EXPERIENCE AND PROSPECTS, UNITED NATIONS PUBLICATION NO. E.99.V.2 (1998) at 8, available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>.

⁷ Jeanne M. Cook, *International Arbitration in the Latin American Context—A Comparative Look at Arbitration in Mexico and the United States*, 3 V.J. 41, 48 (1999).

⁸ Denise Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*, 26 LAW & POL'Y INT'L BUS. 1169, 1171–72 (1995) (citing DONALD R. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY 19–20 (1955)).

⁹ Doak Bishop, *The United States' Perspective Toward International Arbitration With Latin American Parties*, 8 INT'L L. PRACTICUM 63, 63–64 (1995).

¹⁰ Bernardo M. Cremades, *Disputes Arising Out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues*, 59 DISP. RESOL. J. 78, 80 (2004) [hereinafter Cremades, *Foreign Investment*].

¹¹ Cook, *supra* note 7, at 48.

countries followed a path toward economic development focusing on government ownership of key industries, coupled with national policies favoring import substitution—a national economic strategy to build up a domestic economy by emphasizing the replacement of imports by domestically produced goods.¹² However, changes in the economy persuaded Latin American countries to embrace international arbitration. The fall of the Soviet Union and multiple debt crises in Latin America in the 1980s created severe economic difficulties for Latin American countries.¹³ Faced with limited financing, rising inflation and economic stagnation, the general perception was that the import substitution model for development had failed.¹⁴ Most Latin American countries had no alternative but to open up their economies to global markets and procure capital through foreign direct investment. They accepted the new economic order, subscribing to market oriented reforms and directives designed to promote economic growth in Latin America, otherwise known as the “Washington Consensus.”¹⁵

Formulated to refer to the policy advice being addressed by Washington-based institutions, such as the Inter-American Development Bank and the International Bank for Reconstruction and Development (“World Bank”), to Latin American countries as of 1989, the Washington Consensus included a bundle of reforms aimed at increasing foreign investment, encouraging privatization, promoting alternative dispute resolution, furthering trade liberalization, redirecting investment towards infrastructure, and protecting property rights.¹⁶ However, the regularly cited benefits of arbitration—informality, confidentiality, neutrality, cost

¹² Jeswald W. Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 INT’L LAW. 875, 877–80 (1999).

¹³ Edward A. Fallone, *Latin American Laws Regulating Foreign Investment*, SB04 ALI-ABA 323, 327 (1996).

¹⁴ Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT’L L. & POL’Y 157, 178 (2005).

¹⁵ Salacuse, *supra* note 12, at 883 (noting that this set of new policies was advocated by the World Bank, the International Monetary Fund, western bilateral aid agencies and international commercial banks, and that these policies included: (i) Fiscal policy discipline; (ii) Redirection of public spending toward education, health and infrastructure investment; (iii) Tax reform; (iv) Interest rates that are market determined and positive (but moderate) in real terms; (v) Competitive exchange rates; (vi) Trade liberalization—replacement of quantitative restrictions with low and uniform tariffs; (vii) Openness to foreign direct investment; (viii) Privatization of state enterprises; (ix) Deregulation; and (x) Legal security for property rights). Socialist political leaders in Latin America such as Venezuelan President Hugo Chávez, Cuban President Fidel Castro, Bolivian President Evo Morales, and Brazilian President Luiz Inácio Lula da Silva are vocal and well-known critics of the Washington Consensus.

¹⁶ See Center for Int’l Trade & Dev., Harvard University, *The Washington Consensus*, available at <http://www.cid.harvard.edu/cidtrade/issues/washington.html> (last visited Mar. 31, 2007).

effectiveness, international enforceability¹⁷ and the elimination of biases in favor or against a local or foreign party as benefits to using arbitration to settle international disputes—were not sufficient to convince Latin American countries to abandon the Calvo Doctrine.¹⁸ For Latin American countries, international arbitration came as an external imposition supported mainly by the international business community and the new economic order. Latin American countries learned that increasing foreign investment would require reconsidering their longstanding hostility towards international arbitration.¹⁹ Suddenly, the concept of legal certainty assumed overwhelming significance, giving weight to the formation of the contract as the cornerstone of trading relationships and reinforcing the importance of methods for dispute resolution.²⁰

The Washington Consensus and other efforts to encourage alternative dispute mechanisms in Latin America were motivated in part by the condition of national judiciary systems. In the 1990s, the judiciaries in many parts of Latin America experienced a crisis which manifested itself through lengthy case delays, extensive case backlogs, limited judicial access by the population, lack of transparency and predictability in court decisions, and weak public confidence in the judicial system.²¹ The Inter-American Bank faulted judiciary systems for their lack of alternative dispute mechanisms.²² Other inherent problems were identified such as lack of independence of the judiciary, inadequate administrative capacity of the courts, deficient case management, a shortage of judges and lack of training, noncompetitive personnel practices, expenditure control systems lacking transparency, inadequate legal training and education, weak enforcement and reprimand for unethical behavior, and burdensome laws

¹⁷ Kenneth T. Ungar, *The Enforcement of Arbitral Awards under UNCITRAL's Model Law on International Commercial Arbitration*, 25 COLUM. J. TRANSNAT'L L. 717 (1987).

¹⁸ Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 869 (1996). Moreover, "[a]rbitration also provides a choice of industry experts to resolve disputes. In litigation, the parties are normally assigned a judge who follows their case from start to finish. Judges usually have legal training, but not specific industry knowledge." Paul E. Mason, *The Corporate Counsel's View: International Commercial Arbitration*, 49 DISP. RESOL. J. 22 (1994).

¹⁹ Cremades, *Foreign Investment*, *supra* note 10, at 81.

²⁰ See Emilio J. Cardenas, Ambassador to Arg., Address at the 40th Anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1998), in ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION, EXPERIENCE AND PROSPECTS, UNITED NATIONS PUBLICATION NO. E.99.V.2 (1998) at 14, available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>.

²¹ See Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean*, World Bank Technical Paper No. 319 (1996), www.bancomundial.org.br/content/_downloadblob.php?cod_blob=546.

²² See *id.*

and procedures.²³ To remedy these judicial ills, international organizations financed judicial reform programs.²⁴

1. Energy-Related Investments in Latin America

Latin American countries implemented Washington Consensus reforms, and nearly every country in Latin America embraced the free market process.²⁵ A common perception was that widespread privatizations occurring in energy-related industries throughout Latin America would lure foreign investors, and countries that increased investor confidence by embracing international arbitration would benefit to a greater extent.

At first, foreign direct investment was mainly directed toward upgrading public utilities and infrastructure, with investment focusing on telecommunications, water projects, roads and the energy sector.²⁶ Most of this investment was acquired by government-owned companies.²⁷ Yet, many governments gradually privatized hydropower plants, thermo power plants, transmission lines and other electricity and natural gas utilities.²⁸ For instance, Argentina began privatizing its oil sector in 1990 and ended in 1999 with the government sale of the state-owned oil company to Spanish-owned Repsol. As with the oil sector, the natural gas and electricity industries have also been deregulated and generation, transmission, and distribution are now open to the private sector.²⁹ The Peruvian government partly privatized the state-owned oil company, Petroperu, in 1993 and the state-owned electricity company, Electroperu, in the 1990s.³⁰ Short of privatization, other countries promoted the creation of independent power

²³ See *id.*

²⁴ Frutos-Peterson, *supra* note 4.

²⁵ The exception is Cuba. See generally Salacuse, *supra* note 12, at 884.

²⁶ Nigel Blackaby & Sylvia Noury, *International Arbitration in the Mercosur— Is Harmonisation the Solution?*, 9 L. & BUS. REV. AM. 445, 445–46 (2003).

²⁷ See Mark R. Yzaguirre, *Project Finance and Privatization: The Bolivian Example*, 20 Hous. J. INT'L L. 597, 603–10 (1998); David J. Pascuzzi, *International Trade and Foreign Investment in Colombia: A Sound Economic Policy Amidst Crisis*, 9 FLA. J. INT'L L. 443, 468–69 (1994).

²⁸ See generally Cody Miller, *Petroleum Exports from Latin America to the United States*, 10 L. & BUS. REV. AM. 819 (2004).

²⁹ U.S. Energy Info. Admin. [U.S. EIA], *Country Analysis Briefs: Argentina*, <http://www.eia.doe.gov/emew/cabs/Argentina/Full.html> (last visited Mar. 31, 2007). See also Jay G. Martin, *Privatization of Latin American Energy*, 14 NAT. RESOURCES & ENV'T 103, 105–06 (1999).

³⁰ U.S. EIA, *Country Analysis Briefs: Peru*, <http://www.eia.doe.gov/emew/cabs/peru.html> (last visited Mar. 31, 2007). Colombia has also liberalized the oil sector in order to attract the investment of foreign oil companies, including the possibility for foreign companies to own 100 percent stakes in oil ventures. For more information, see U.S. EIA, *Country Analysis Briefs: Colombia*, <http://www.eia.doe.gov/emew/cabs/Colombia/Full.html> (last visited Mar. 31, 2007).

producers³¹ or encouraged the construction of new power plants by the private sector.³²

Although many of the oil companies remain fully owned by the government or partially controlled by the government, the oil and gas industry received important investments through the granting of new oil concessions or the execution of service contracts with national oil companies. In Brazil, where the oil sector is dominated by state-owned Petrobras,³³ legislation passed in 1997 allowed joint ventures between Petrobras and foreign oil companies.³⁴ The Ecuadorian government followed a similar path allowing joint ventures with state-owned Petroecuador. In 2005, Petroecuador's production represented only 38% of national crude oil output, with the remainder coming from private projects between the Ecuadorian government and foreign oil producers.³⁵ Finally, private investment was introduced in Venezuela in the 1990s through the use of service contracts in upstream oil industries.³⁶

Yet, privatization undertaken by Latin American countries would attract multinational oil and energy corporations, but only to the context of other national policies. As one investor stated, the world petroleum industry is globally interdependent,³⁷ and international energy companies considering multiple competing global investment opportunities will compare their options taking into account *inter alia*, investment protections, tax incentives and the level of regulation by the state.³⁸ Given capital

³¹ See Adilson de Oliveira et al., *The IPP Experience in the Brazilian Electricity Market* 37 (Program on Energy and Sustainable Dev., Working Paper No. 53, 2005), available at http://iis-db.stanford.edu/pubs/20995/Brazil_IPP.pdf. In the electricity sector, while most generation and transmission is controlled by the government, distribution is mainly in private hands.

³² As in the case of Mexico. See Martin, *supra* note 29, at 107.

³³ See generally Marilda Rosado de Sá Ribeiro, *The New Oil and Gas Industry in Brazil: An Overview of the Main Legal Aspects*, 36 TEX. INT'L L.J. 141 (2001).

³⁴ U.S. EIA, *Country Analysis Briefs: Brazil*, <http://www.eia.doe.gov/emeu/cabs/Brazil/Full.html> (last visited Mar. 31, 2007). This law also created the National Petroleum Agency ("ANP"). According to the Regulation of Petroleum Industry in Brazil, Law No. 9,478 art.8.IV, available at http://www.anp.gov.br/doc/conheca/lei_do_petroleo_ingles.pdf (last visited Mar. 31, 2007), ANP has the responsibility to "elaborate the bidding rounds announcements and promote the bidding processes for the concession of exploration, development and production activities, signing the relevant contracts and inspecting their performance."

³⁵ U.S. EIA, *Country Analysis Briefs: Ecuador*, <http://www.eia.doe.gov/emeu/cabs/Ecuador/Full.html> (last visited Mar. 31, 2007).

³⁶ U.S. EIA, *Country Analysis Briefs: Venezuela*, <http://www.eia.doe.gov/emeu/cabs/Venezuela/Full.html> (last visited Mar. 31, 2007). Under these contracts, foreign companies operate the fields while PDVSA purchases the crude oil and pays a fee for the services.

³⁷ Thomas W. Waelde, *International Energy Investment*, 17 ENERGY L.J. 191, 192 (1996).

³⁸ *Id.* at 192.

investments in the oil, gas and energy sectors are in the order of millions of dollars, and that most investors are unwilling to relinquish protection of multimillion dollar investments to domestic courts,³⁹ efforts to encourage alternative dispute resolution would increase investor confidence.⁴⁰ The existence of a framework for resolution of disputes provides a degree of certainty and protection that investors seek.⁴¹ The desire to embrace arbitration would need to be met with concrete actions to further domestic reforms and international initiatives.

III. EFFORTS TO ENCOURAGE INTERNATIONAL ARBITRATION

The flow of foreign capital to energy sectors in Latin America produced an increased internationalization of Latin American economies and demand for greater investor protection for foreign investment. Protection was sought not only in substantive rights (fair and equitable treatment, non discrimination, etc.) but in the availability of international fora to seek redress or assert claims. To be sure, investors commanding substantial monetary investments in oil and energy projects would demand assurances to prevent the host country from altering rules to impair (or at worst, expropriate) foreign investment once it had been made.⁴² Most Latin American countries realized that in order to attract foreign investment, they would need to embrace arbitration by ratifying international conventions encouraging international arbitration and amending their domestic legislation. Over the last fifteen years, Latin American countries have taken such steps.

A. The ICSID Convention for the Settlement of Investment Disputes

In order to provide investors with assurances that would outlive any future unilateral changes in the legal framework, most Latin American countries signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). The ICSID Convention was formulated by the Executive Directors of the World Bank and entered into force in 1966 when it had been ratified by

³⁹ Blackaby & Noury, *supra* note 26, at 445.

⁴⁰ Horacio A. Grigera-Naón, *Arbitration in Latin America: Overcoming Traditional Hostility*, 22 U. MIAMI INTER-AM. L. REV. 203, 257 (1991) [hereinafter Grigera-Naón, *Arbitration*].

⁴¹ Jonathan Hamilton, *Featured Q&A: Latin American Investment Treaties*, LATIN AMERICA ENERGY ADVISOR (Oct. 4, 2006), available at http://www.whitecase.com/publications_10042006/

⁴² Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 316 (2004) (explaining the United States's fear of nationalizations and expropriations like those that occurred in Mexico and Venezuela in the 1920s and 1970s, respectively).

twenty countries.⁴³ As of April 2006, 143 countries had ratified the Convention to become Contracting States.⁴⁴

The ICSID Convention created an international forum to resolve investment disputes between host states and nationals of another state,⁴⁵ which has been adopted by nearly all Latin American countries.⁴⁶ Paraguay was the first Latin American country to ratify the ICSID Convention (1983), Guatemala was the last (2003), and there are some countries that have yet to ratify it (e.g., Brazil, Haiti, Cuba, Dominican Republic, and Mexico).⁴⁷ Among other benefits, the ICSID Convention allows countries to provide their consent in advance to submit disputes with investors of the other contracting party to international arbitration before the International Centre for Settlement of Investment Disputes (“ICSID Centre”), other institutions, or even under the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules.⁴⁸ The ICSID Convention and the jurisdiction of the tribunal established under it (the ICSID Centre) were conceived as a system of adjudication of legal disputes arising directly out of an investment, a premise articulated in Article 25(1).⁴⁹ This definition excludes two kinds of disputes. First, it excludes non-legal questions, and second, it excludes disputes not arising directly from the investment concerned, i.e., general economic legislation not directly impacting the investor involved.⁵⁰ Although recourse to ICSID Centre conciliation and arbitration is entirely voluntary, once the parties have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw consent⁵¹ and awards are not only recognized, but enforced.⁵²

⁴³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Introduction, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 4 I.L.M. 524, available at <http://www.worldbank.org/icsid/basicdoc/intro.htm> [hereinafter ICSID Convention].

⁴⁴ *See id.*

⁴⁵ Anoosha Boralessa, *Enforcement in the United States and United Kingdom of ICSID Awards Against the Republic of Argentina: Obstacles that Transnational Corporations May Face*, 17 N.Y. INT’L L. REV. 53, 53–65 (2004).

⁴⁶ *See infra* APPENDIX I for a list of Latin American countries that have ratified the ICSID Convention.

⁴⁷ *See id.*

⁴⁸ Jason Webb Yackee, *Are BITs Such a Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm*, 12 U.C. DAVIS J. INT’L L. & POL’Y 195, 221 (2005).

⁴⁹ *See* ICSID Convention, *supra* note 43, art. 25.

⁵⁰ *See* Ileana M. Blanco, Lessons Learned from ICSID Arbitration over Investment Disputes Involving Argentina’s Privatization Program and Economic Emergency Law No. 25561, http://www.bracewellgiuliani.com/files/tbl_s16Publications%5CFileUpload77%5C1173%5CPRESENTATION_TO_IAPG.pdf (last visited Apr. 14, 2007).

⁵¹ *See* ICSID Convention, *supra* note 43, art. 25.

⁵² *See id.* arts. 53–54.

To encourage and protect the investment of their own nationals in the territory of the other party, many treaties being signed by Latin American countries with capital-exporting countries⁵³ contain arbitration provisions similar, if not identical, to those found in the ICSID Convention. Latin American states are now parties to at least 300 treaties with investment protection provisions that contain arbitration clauses.⁵⁴ Regional trade agreements strive to decrease trade barriers in several areas, and usually contain unique investment provisions which provide for international arbitration as a means of resolving trade disputes.⁵⁵ Arbitration under the auspices of ICSID is similarly one of the main mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties⁵⁶: the North American Free Trade Agreement,⁵⁷ the Energy Charter Treaty,⁵⁸ the Cartagena Free Trade Agreement⁵⁹ and the Colonia Investment Protocol of Mercosur.⁶⁰ Latin American countries also concluded multilateral free trade agreements and treaties of economic integration such as the Andean Community,⁶¹ Central American Common Market,⁶² and numerous other free trade agreements.⁶³

⁵³ Raúl Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience*, 8 L. & BUS. REV. AM. 501, 504–05 (2002).

⁵⁴ See Hamilton, *supra* note 41.

⁵⁵ See, e.g., Central America-Dominican Republic-United States Free Trade Agreement, May 28, 2004, 43 I.L.M. 514 [hereinafter CAFTA].

⁵⁶ See ICSID Convention, *supra* note 43.

⁵⁷ Agreement on North American Free Trade, U.S.–Can.–Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

⁵⁸ Energy Charter Treaty, *opened for signature* Dec. 17, 1994, 34 I.L.M. 373, *available at* http://www.encharter.org/fileadmin/user_upload/document/EN.pdf. The Energy Charter Treaty was originally based on integrating the energy sectors of the former Soviet Union and Eastern Europe at the end of the Cold War into the broader European and world markets.

⁵⁹ The Cartagena Free Trade Agreement is between the United States, Colombia, Peru, Ecuador and Bolivia.

⁶⁰ Protocol of Colonia for the Reciprocal Promotion and Protection of Investments in Mercosur [hereinafter Colonia Protocol], Jan. 17, 1994, Mercosur/CMC / Dec. No. 11/93. Mercosur references the Mercado Común del Sur (“Southern Common Market”), established by a treaty on economic integration entered into among Argentina, Brazil, Paraguay and Uruguay. Treaty Establishing a Common Market, Mar. 26, 1991, 30 I.L.M. 1041 [hereinafter Treaty of Asunción], *amended by* Protocol of Ouro Preto, Dec. 17, 1994, 34 I.L.M. 1248 (1995).

⁶¹ Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910. Originally formulated between Bolivia, Colombia, Chile, Ecuador and Peru, Chile has since left and Venezuela has joined and subsequently withdrawn itself from the Agreement. An updated version is available at http://www.comunidadandina.org/ingles/normativa/ande_trial.htm.

⁶² General Treaty on Central American Economic Integration, Dec. 13, 1960, 455 U.N.T.S. 3, *available at* <http://www.sice.org/trade/camertoc.asp>.

Other types of treaties focus exclusively on investment and are also likely to incorporate ICSID arbitration rules. Investment treaties began to proliferate after World War II when capital-exporting nations sought to create an international law of investment. Customary international law had proven inadequate to protect foreign investments.⁶⁴ Bilateral investment treaties ("BITs") began to emerge in the late 1950s when West Germany concluded the first BIT with Pakistan.⁶⁵ Latin American countries, with some exceptions, began negotiating these agreements in the 1990s.⁶⁶ Today, every Latin American country, including Cuba, has at least one BIT in force.⁶⁷ For instance, Argentina is a party to fifty-three BITs; Peru, twenty-six; Chile, thirty-six; Venezuela, twenty-one; and Ecuador, twenty-one.⁶⁸ BITs generally provide similar substantive protections to other treaties, such as fair and equitable treatment, non-discrimination, most favorable nation and national treatment, and the prohibition of direct or indirect expropriation without prompt, adequate and effective compensation.⁶⁹ BITs also address and define the scope of application (including the definition of protected investment and nationality).⁷⁰

⁶³ Among others, the following free trade agreements have been executed: Bolivia-Mexico, Canada-Chile, Canada-Costa Rica, Central America-Chile, Central America-Dominican Republic-U.S. (CAFTA), Central America-Dominican Republic, Central America-Panama, Chile-European Union, Chile-Korea, Chile-Mexico, Chile-United States, Costa Rica-Mexico, Group of Three (Colombia-Mexico-Venezuela), Mexico-European Community, Mexico-Israel, Mexico-Japan, Mexico-Nicaragua, Mexico-Northern Triangle (El Salvador-Guatemala-Honduras), Panama-Taiwan and Peru-Thailand. See WTO Regional Trade Agreements Gateway, Facts and Figures, http://www.wto.org/english/tratop_e/region_e/region_e.htm#facts (last visited Apr. 10, 2007).

⁶⁴ Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 71 (2005).

⁶⁵ Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23. The West Germany-Pakistan BIT entered into force on April 28, 1962.

⁶⁶ Costa Rica executed a BIT with Switzerland on September 1, 1965, which entered into force on August 18, 1966. Acuerdo entre la República de Costa Rica y la Confederación Suiza para la Protección y Promoción de Inversiones [Agreement between Costa Rica and Switzerland for the Protection and Promotion of Investments], Sept. 1, 1965, *updated on* Aug. 1, 2000, http://www.unctad.org/sections/dite/ia/docs/bits/costarica_switzerland_sp.pdf. Others, including Bolivia and Costa Rica executed BITs in the 1980s. See UNCTAD.org Country-specific Lists of BITs, <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1> (select a country to download a list of its BITs, with signature dates).

⁶⁷ See *infra* APPENDIX I for a list of Latin American countries that have signed and ratified BITs.

⁶⁸ See Hamilton, *supra* note 41.

⁶⁹ Vinuesa, *supra* note 53, at 506. See also Salacuse & Sullivan, *supra* note 64, at 79–90.

⁷⁰ Guido Santiago Tawil, *The Role of Arbitration and International, Regional, Subregional and Bilateral Treaties in Latin America*, THE BOMCHIL GROUP NEWSL. (The Bomchil Group, Buenos Aires, Arg.), Dec. 2002, available at <http://www.bomchilgroup.org/argdec02.html>.

Notably, these bilateral treaties incorporate ICSID arbitration rules.⁷¹

The first adoption of the ICSID Convention by Latin American countries in 1983 represented a shift in public sentiment towards arbitration. For over a century, most Latin American countries had rejected the possibility of resolving their disputes with foreign nationals before an international tribunal. From the adoption of the ICSID Convention to the ratification of treaties incorporating ICSID rules, investors gained confidence in their ability to settle disputes, and particularly energy disputes, using international arbitration.

B. International Rules Governing the Enforcement of Arbitration Agreements and Awards

In addition to the ICSID Convention, Latin American countries searched for other international mechanisms to signal their commitment to international arbitration. Measures that would ensure the enforcement of arbitration agreements and awards were paramount. For, although the majority of the arbitral awards are carried out voluntarily,⁷² the effectiveness of international arbitration *vis-à-vis* national litigation is measured in terms of successful enforcement. Specific to arbitration, this represents the existence of binding procedures to recognize and enforce awards internationally (*i.e.*, having the possibility of enforcing the award not only in the place where the arbitration took place but in any country where the losing party may have assets).⁷³

With enforcement as a key concern among international investors, most Latin American countries decided to follow the steps of other developing and developed countries and ratify two instruments governing the enforcement of arbitration awards—the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “New York Convention”),⁷⁴ and the Panama Inter-American Convention on International Commercial Arbitration of 1975 (the “Panama Convention”).⁷⁵ The acceptance of foreign adjudication also included the ratification of the Inter-American Convention on Extraterritorial Validity of

⁷¹ Yackee, *supra* note 48, at 221.

⁷² ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY & CONSTANTINE PARTASIDES, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 511 (4th ed. 2004).

⁷³ *Id.* at 27 (explaining that one of the principal reasons of choosing international arbitration is the international enforceability of the awards since international conventions that govern recognition and enforcement of arbitral awards have been accepted by a majority of states. Conversely, there are very few treaties on reciprocal recognition of foreign judgments).

⁷⁴ See *infra* APPENDIX I for a list of Latin American countries that have signed and ratified the New York Convention.

⁷⁵ Frank E. Nattier, *International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements and Awards*, 21 TEX. INT’L L.J. 397, 402 (1986).

Foreign Judgments and Arbitral Awards of 1979 (the “Montevideo Convention”),⁷⁶ the consent to arbitration under the Convention Establishing the Multilateral Investment Guarantee Agency (the “MIGA Convention”),⁷⁷ and investment agreements executed with the Overseas Private Investment Corporation (OPIC).⁷⁸ With respect to international conventions, all Latin American countries have ratified either or both the Panama Convention and the New York Convention facilitating the recognition and enforcement of arbitration agreements and foreign arbitral awards in their territories.⁷⁹

The New York Convention is the “cornerstone of current international commercial arbitration”⁸⁰ and has gained extraordinary acceptance within the international community. For Latin America, the New York Convention is more than an advantage—it is an essential tool for competing in the increasingly liberalized environment of international trade between private individuals.⁸¹ As of April 2007, 142 countries, and all Latin American countries, have ratified the New York Convention.⁸²

The primary purpose of the New York Convention is to limit the grounds under which national courts can refuse to recognize and enforce arbitration agreements and arbitral awards. Recognition should not be

⁷⁶ Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, 18 I.L.M. 1224 [hereinafter *Montevideo Convention*]. The *Montevideo Convention* is the most recent regional convention relating to arbitration. It provides for enforcement procedures for judgments and arbitral awards in civil, commercial and labor proceedings in the contracting states. According to the Organization of American States (OAS), as of May 2006, the *Montevideo Convention* has been ratified by the following countries: Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. Organization of American States (“*Montevideo Convention Signatories*”), <http://www.oas.org/juridico/english/sigs/b-41.html> (last visited Mar. 31, 2007).

⁷⁷ Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, 24 I.L.M. 1605 [hereinafter *MIGA Convention*]. As of October 2005, the following Latin American countries were members of the *MIGA Convention*: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Paraguay, Panama, Peru, Uruguay, Venezuela. World Bank Group, (“*MIGA Member Countries*”), <http://www.miga.org/sitelevel2/level2.cfm?id=1152> (last visited Mar. 31, 2007).

⁷⁸ OPIC has executed Investment Incentive Agreements with Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay. OPIC Home Page, <http://www.opic.gov> (last visited Mar. 31, 2007).

⁷⁹ See APPENDIX I.

⁸⁰ Volz & Haydock, *supra* note 18, at 877 (citing ALBERT J. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* 1 (1981)).

⁸¹ See Cardenas, *supra* note 20, at 15.

⁸² UNCITRAL Texts and Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited May 18, 2007).

confused with enforcement, however. An award may be recognized but not necessarily enforced.⁸³ Recognition deals with the *res judicata* effect given to a valid and binding award.⁸⁴ As one commentator writes, “the purpose of recognition on its own is generally to act as a shield,”⁸⁵ in order to block any subsequent attempt by one of the parties to the arbitration to re-litigate the matter before a court.⁸⁶

Enforcement entails not only the recognition of the award but also the request to the competent authority to apply the legal sanctions “to compel the party against whom the award was made to carry it out.”⁸⁷ As far as the enforcement of the arbitration agreement is concerned, the New York Convention establishes that, when dealing with a matter that the parties have agreed to submit to arbitration, the courts of a contracting state must “refer the parties to arbitration, unless they find that the said agreement is null and void, inoperative, or incapable of being performed.”⁸⁸ In contrast, with respect to enforcement of arbitral awards, the New York Convention provides that contracting states “shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon,”⁸⁹ under certain conditions specified in the Convention.

The New York Convention makes clear that enforcement of an arbitral award can be refused only if the party against whom the award is being enforced submits proof of any of the following five grounds: (i) incapacity;⁹⁰ (ii) lack of notice of the appointment of the tribunal or the proceedings, or inability to present a case;⁹¹ (iii) lack of jurisdiction by the tribunal or a tribunal that acted in excess of the conferred jurisdiction;⁹² (iv) any procedural irregularity;⁹³ or (v) the non-binding nature of the award or the fact that it was set aside or suspended.⁹⁴ Moreover, the New York Convention allows the competent authority to refuse the enforcement of a foreign arbitral award if the subject matter of the dispute cannot be settled by arbitration under the laws of that country⁹⁵ or if the award is contrary to

⁸³ REDFERN ET AL., *supra* note 72, at 516.

⁸⁴ Ungar, *supra* note 17, at 723.

⁸⁵ REDFERN ET AL., *supra* note 72, at 516.

⁸⁶ Ungar, *supra* note 17, at 723.

⁸⁷ REDFERN ET AL., *supra* note 72, at 517.

⁸⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

⁸⁹ *Id.* art. III.

⁹⁰ *Id.* art. V.1(a).

⁹¹ *Id.* art. V.1(b).

⁹² *Id.* art. V.1(c).

⁹³ *Id.* art. V.1(d).

⁹⁴ New York Convention, *supra* note 88, art. V.1(e).

⁹⁵ *Id.* art. V.2(a).

public policy.⁹⁶

The Panama Convention was modeled after the New York Convention⁹⁷ and reproduces similar language regarding grounds for refusal. The only notable difference is that the Panama Convention provides that “[i]n the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.”⁹⁸ No similar provision was included in the New York Convention. Another feature of the Panama Convention is the validation of arbitration agreements so long as they are “set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications,”⁹⁹ making this provision broader than that of the New York Convention.¹⁰⁰

C. Domestic Adoption of the UNCITRAL Model Law

Given current global acceptance of the New York Convention, one would hardly believe the initial reluctance to adopt it. In the 1980s, the UNCITRAL Working Group found that constitutional restrictions or other reasons may have prevented countries from ratifying the New York Convention.¹⁰¹ Furthermore, inconsistencies in national laws were leading to different interpretations of the Convention in similar enforcement actions.¹⁰² The problems encountered were not sufficiently grave to amend the New York Convention however, and UNCITRAL concluded that those inconsistencies could be addressed through changes in the national laws.

According to UNCITRAL, the adoption of a model law would not only reduce interpretative difficulties with the New York Convention but would also help modernize and increase uniformity of the arbitration laws of many countries based on well-established principles.¹⁰³ In 1985, UNCITRAL formulated a Model Law on International Commercial Arbitration (“Model Law”), thereby codifying a set of model legislative provisions that states could adopt by enacting into national law. The General Assembly of the United Nations recommended that all States consider the Model Law in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial

⁹⁶ *Id.* art. V.2(b).

⁹⁷ Volz & Haydock, *supra* note 18, at 884.

⁹⁸ Inter-American Convention on International Commercial Arbitration art. 3, Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 [hereinafter Panama Convention].

⁹⁹ *Id.* art. 1.

¹⁰⁰ Bishop, *supra* note 9, at 73.

¹⁰¹ UNCITRAL, UNCITRAL REPORT: EXCERPTS ON THE MODEL LAW, *reprinted in* 24 I.L.M. 1302, 1364 (1985) [hereinafter UNCITRAL Report].

¹⁰² Ungar, *supra* note 17, at 727.

¹⁰³ *Id.* at 728.

arbitration practice.¹⁰⁴ Many Latin American countries ratified it soon thereafter.

Some countries find it easier to adopt the provisions on recognition and enforcement as part of the Model Law than to ratify the New York Convention.¹⁰⁵ However, in many ways, the Model Law provisions regarding recognition and enforcement of arbitral awards¹⁰⁶ are nearly identical to those in the New York Convention.¹⁰⁷ No provision allows a review of the award on the merits and the grounds for refusal are exhaustive (*i.e.*, no other grounds may be invoked to deny recognition and/or enforcement). Model Law provisions recognize common principles such as separability, direct enforceability of the arbitration agreement, the *kompetenz-kompetenz* principle in which the arbitrator is qualified to decide on his/her own competence, and the autonomy of the parties. Some regulate the procedure in such detail that it gives very little flexibility to the arbitrators.¹⁰⁸ The Model Law, following the trend of the New York Convention, shifts the burden of proof to the party seeking refusal, clearly stating that recognition and enforcement may be refused “at the request of the party against whom it is invoked, if that party furnishes to the competent court” the necessary proof to support the grounds relied upon.¹⁰⁹ Lastly, even if the enforcing court finds that some of the grounds for refusal have merit it is not obliged to deny recognition or enforcement; it is only authorized to do so.¹¹⁰ The text of the Model Law is clear in this respect, stating that “recognition or enforcement of an arbitral award . . . *may* be refused”¹¹¹ (emphasis added). The wording of the New York Convention is nearly identical.¹¹² The Model Law, by including an enforcement mechanism almost identical to that of the New York Convention, aimed to provide a uniform treatment of all awards irrespective of their country of origin.

Latin American countries began to recognize the use of international arbitration as a means of dispute settlement¹¹³ by adopting many, if not all,

¹⁰⁴ G.A. Res. 40/72 (1985), available at <http://www.un.org/documents/ga/res/40/a40r072.htm> (last visited May 18, 2007).

¹⁰⁵ UNCITRAL Report, *supra* note 101, at 1314.

¹⁰⁶ UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use, arts. 35–36 (1985) [hereinafter Model Law].

¹⁰⁷ New York Convention, *supra* note 88, art. V.

¹⁰⁸ Frutos-Peterson, *supra* note 4 (referring to some problems encountered under the arbitration laws of Costa Rica, Bolivia and Venezuela).

¹⁰⁹ Model Law, *supra* note 106, art. 36.

¹¹⁰ REDFERN ET AL., *supra* note 72, at 528.

¹¹¹ Model Law, *supra* note 106, art. 36.

¹¹² New York Convention, *supra* note 88, art. V.1.

¹¹³ See, for example, article 16 of Peru’s Foreign Investment Law, Decree-Law 662 of 1991, which provides that “[t]he State may submit controversies derived from legal stability

Model Law provisions into their own law.¹¹⁴ Model Law provisions have been adopted in Chile,¹¹⁵ Guatemala,¹¹⁶ Mexico,¹¹⁷ Paraguay¹¹⁸ and Peru.¹¹⁹ Short of adopting the Model Law, other countries adopted new legislation incorporating its basic principles.¹²⁰ Countries such as Brazil,¹²¹ Bolivia,¹²² Colombia,¹²³ Costa Rica,¹²⁴ Ecuador,¹²⁵ El Salvador,¹²⁶ Honduras,¹²⁷ Panama,¹²⁸ and Venezuela¹²⁹ modernized their arbitration laws, taking some or most of the principles embodied in the Model Law and adapting them to their needs.

IV. THE PROLIFERATION OF ICSID FILINGS AGAINST LATIN AMERICAN COUNTRIES

Latin American countries enacted national laws and international conventions to attract foreign direct investment and unsurprisingly, the number of ICSID filings rose, but gradually. For U.S. and foreign

agreements to arbitral tribunal established by virtue of international agreements entered into by Peru"; article 15 of El Salvador's Investment Law, Decree No. 732 of 1999, which provides in pertinent part that "[i]n case controversies arising between foreign investors and the Government, regarding their investments in El Salvador, the investors may remit the controversy to . . . [ICSID]".

¹¹⁴ See *infra* APPENDIX I for a list of the countries that have adopted the UNCITRAL Model Law.

¹¹⁵ International Commercial Arbitration Law, Law No. 19,971, Sept. 29, 2004 (Chile).

¹¹⁶ Arbitration Law, Decree No. 67-95, Nov. 16, 1995 (Guat.).

¹¹⁷ Decree of July 22, 1993, which amended Title Four—Commercial Arbitration—of the Commercial Code (Mex.).

¹¹⁸ Arbitration and Mediation Law, Law 1879/02, Apr. 24, 2002 (Para.).

¹¹⁹ General Arbitration Law, No. 26,572, Jan. 3, 1996 (Peru).

¹²⁰ Bishop, *supra* note 9, at 65.

¹²¹ Arbitration Law, No. 9,307, Sept. 23, 1996 (Braz.).

¹²² Arbitration and Conciliation Law, No. 1770, Mar. 10, 1997 (Bol.). See Ramiro Moreno-Baldivieso, *Medios Alternativos de Solución de Controversias*, in REVISTA IBEROAMERICANA DE ARBITRAJE Y MEDIACIÓN, Aug. 3, 2005, http://www.servilex.com.pe/arbitraje/colaboraciones/conferencia_acj2.html (explaining that Bolivia's new law was based on the UNCITRAL Model Law and adapted to the domestic reality) (last visited Apr. 26, 2006).

¹²³ Statute of Alternative Dispute Resolution Mechanisms, Decree No. 1818, Sept. 7, 1998 (Colom.).

¹²⁴ Alternative Dispute Resolution and Promotion of Social Peace, Law No. 7727, Dec. 9, 1997 (Costa Rica).

¹²⁵ Law on Arbitration and Mediation, Official Register 145, Sept. 4, 1997 (Ecuador).

¹²⁶ Decree No. 914, enacted July 2002, approving the Law on Mediation, Conciliation and Arbitration (El Sal.).

¹²⁷ Arbitration and Conciliation Law, Decree No. 161-2000, Oct. 17, 2000 (Hond.).

¹²⁸ Decree Law No. 5 of July 8, 1999, which establishes the general regime for arbitration, conciliation and mediation (Pan.).

¹²⁹ General Commercial Arbitration Law, Apr. 7, 1998 (Venez.).

companies, ICSID jurisdiction offers the dual benefits of providing a forum for companies to pursue investment claims against a host country and providing enforceability of awards under the New York Convention.¹³⁰ Yet, although the ICSID Convention entered into force in 1966, it was not until 1972 when the first case was filed with the Centre¹³¹ and even through the 1980s few cases were submitted to the Centre.¹³² This is mainly because consent to ICSID jurisdiction was given in investment contracts (contracts between governments of member countries and investors from other member countries) or similar instruments and few of those contracts were in existence at the time, particularly with Latin American countries.¹³³ Since 1980, however, governments are increasingly granting advance consent to submit investment disputes to ICSID arbitration in investment treaties, especially in BITs.¹³⁴

The first case brought against a Latin American country under the ICSID occurred in 1996, six years after Latin American countries began negotiating BITs.¹³⁵ Since 1996, the number of ICSID cases brought against Latin American countries has escalated in general, and particularly in the energy sector. As of April 2006, there were 104 concluded cases and 103 pending cases within the ICSID. Out of the 104 concluded cases, only twenty-one cases were filed against Latin American countries (fifteen of which were filed since 1998).¹³⁶ However, a larger fraction of cases are pending against Latin American countries. Fifty-seven of the 103 were filed against Latin American countries.¹³⁷ Of the fifty-seven, thirty-five were filed against Argentina alone and can be explained by the Argentine financial crisis of 2001.¹³⁸ The remaining arbitrations could be explained by the liberalization of Latin American economies and the increased protections granted by BITs, which have resulted in an increase in foreign

¹³⁰ See Blanco, *supra* note 50.

¹³¹ *Holiday Inns S.A. and Others v. Morocco* (ICSID Case No. ARB/72/1). See Pierre Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco) – Some Legal Problems*, 50 BRIT. YB. INT'L L. 123 (1980).

¹³² ICSID Cases: Introduction, <http://www.worldbank.org/icsid/cases/cases.htm> (last visited Mar. 31, 2007).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1). Yet Costa Rica's consent to the jurisdiction of the Centre was given ad-hoc and not established under a BIT.

¹³⁶ See ICSID, List of Concluded Cases, <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited Mar. 31, 2007). See *infra* APPENDIX II for a more detailed description of the cases brought against Latin American countries before ICSID.

¹³⁷ *Id.*

¹³⁸ Omar E. Garcia-Bolivar & Jon Schmid, *The Rise of International Investment Arbitration in Latin America*, 4 LATIN AM. L. & BUS. REP. (Dec. 2004).

investment, which in turn fueled the potential for arbitration claims.¹³⁹

A. Energy-Related ICSID Filings

The remarkable growth of energy-related investment in Latin America has kindled growth in the number of ICSID filings concerning energy-related disputes. According to Table 2 in the Appendix, as of April, 2006, forty percent (thirty-one out of seventy-eight) of the ICSID cases that are concluded and pending against Latin American countries are energy-related. Most of the energy related disputes are filed against Argentina, Ecuador, Peru and Venezuela. Perhaps not coincidentally, Argentina is the country with the most BITs in place, followed by Chile, Cuba and Peru. The Argentine case is one worth discussion. Argentina signed the ICSID Convention on May 21, 1991 and ratified it on October 19, 1994. To date, Argentina has been grappling with nearly thirty claims from foreign-owned companies in the ICSID. In every case it has challenged ICSID jurisdiction. The bulk of the complaints are from utilities due to the government's 2002 decision to convert rates into devalued pesos and freeze them.¹⁴⁰ Companies with claims against Argentina include: LG&E Energy Corp., Enron Corporation, CMS Gas Transmission Company, Camuzzi International, S.A., AES Corporation, El Paso Energy International Company, Enersis, S.A., Pan American Energy LLC, and others.¹⁴¹

V. THE DIFFICULTY OF DEVELOPING A CULTURE OF INTERNATIONAL ARBITRATION IN LATIN AMERICA

One cannot measure in definite terms the extent to which adoption of the ICSID and New York Conventions has contributed to an increase in foreign direct investment in Latin America, or even if it has brought a level of uniform standards for the enforcement of arbitral awards in national courts.¹⁴² We do have evidence, however, that while most Latin American countries adopted national rules and international conventions to recognize arbitration agreements and arbitral awards, there is no deeply-engrained business arbitration culture in Latin America.¹⁴³ While the practice of arbitration has advanced in some Latin American countries, as evidenced at

¹³⁹ *Id.*

¹⁴⁰ See Blanco, *supra* note 50.

¹⁴¹ *Id.*

¹⁴² Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L. L. & POL. 175 (1996) (arguing that the conventions have not been entirely successful in achieving their goal of uniform enforcement of arbitral awards).

¹⁴³ Horacio A. Grigera-Naón, *Recent Trends Regarding Commercial Arbitration in Latin America*, in ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA, *supra* note 3, at 109.

a minimum by the proliferation of arbitration centers, many factors have delayed this process. This section draws upon examples in three areas which have slowed the development of international arbitration in Latin America: (1) laws are sometimes insufficient to support international arbitration, (2) judicial decisions continue to impede efficient and flexible arbitration in Latin America,¹⁴⁴ and (3) although many of these decisions are overturned on appeal, the lack of certainty and speed reduces the willingness of parties to submit their disputes to arbitration.

Drawing from experiences of a select group of Latin American countries, the following paragraphs provide examples of the types of difficulties these countries face in enforcing arbitration agreements and awards. In most of the countries noted international arbitration laws have been passed and international treaties providing for respect for international arbitration clauses and enforcement of awards have been ratified.

A. Role of Legislation

While most countries have adopted the Model Law, rules are often insufficient to support international arbitration. Similarly, rules governing international arbitration may be too new for their success to have been assessed.

1. Select Country Examples of Lack of Legislation

Argentina and Chile are examples of countries that have enacted domestic legislation in support of international arbitration whose legislation is either insufficient to further a culture of international arbitration or too nascent to have made a measurable impact.

The main difficulty in enforcing arbitration agreements in Argentina is that under Argentine law, the arbitration agreement or arbitration clause is not operative.¹⁴⁵ The Argentine Procedural Code requires that once a dispute arises the parties execute a submission agreement or *compromiso*¹⁴⁶ in which the parties agree to submit the dispute to arbitration and specify, *inter alia*, the name of the arbitrators, the matters to be settled by arbitration and the events or circumstances causing the controversy.¹⁴⁷ Similar to Argentina, Uruguay's law requires the parties in an arbitration proceeding to execute a submission agreement or *compromise*.¹⁴⁸

¹⁴⁴ Horacio Grigera-Naón, Lecture, *International Arbitration in Latin America* (Special Section Seminar Proceeding), 6 WORLD ARB. & MEDIATION REP. 219, 222–23 (1995).

¹⁴⁵ REDFERN ET AL., *supra* note 72, at 162.

¹⁴⁶ Blackaby & Noury, *supra* note 26, at 460.

¹⁴⁷ Grigera-Naón, *Arbitration*, *supra* note 40, at 225. See generally, Osvaldo Marzoratti, *Enforcement of Arbitration Agreement in Latin America: Argentina*, in ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA, *supra* note 3, at 9, 15.

¹⁴⁸ Blackaby & Noury, *supra* note 26, at 466; Daniel M. Ferrere, *Enforcement of*

Notwithstanding this legal limitation, Argentine courts have attempted to overcome the problems created by the lack of legislation supporting arbitration.¹⁴⁹ In an international arbitration seated in Buenos Aires, the Commercial Court of Appeals of the City of Buenos Aires acknowledged that certain provisions of the Procedural Code were “relatively inadequate to govern international arbitration proceedings.”¹⁵⁰ The court in this case based its decision on the internationally recognized principles and provisions of the Model Law and not upon Argentine Procedural Code. It further stated that while national courts retain powers to oversee the arbitration proceedings, in the case of international arbitrations, these powers should be exercised with utmost care.¹⁵¹ Since then, the majority of judicial decisions have followed this trend;¹⁵² some courts, including the Supreme Court, have decided against those internationally recognized principles.¹⁵³

Chile has also been a leader in the process of privatization and implementation of free market reforms, becoming the most dynamic and

Arbitration Agreements in Uruguay, in ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA, *supra* note, 3 at 81–82.

¹⁴⁹ Alessandro Spinillo & Emilio Vogelius, *Argentina*, in INTERNATIONAL ARBITRATION IN LATIN AMERICA 17, 22 (Nigel Blackaby et al. eds., 2002).

¹⁵⁰ Camara Nacional de Apelaciones en lo Comercial de la Capital Federal [CNCom.] [Commercial Court of Appeals of the City of Buenos Aires], Section E, 09/26/1989, “Welbers S.A., Enrique C. v. Extraktionstechnik Gesellschaft für Anlagenbau M.B.M.,” *Le Ley* [L.L.] (1989-E-730) (Arg.), *translated by* Spinillo & Vogelius, *supra* note 149, at 38–39 n.71.

¹⁵¹ Spinillo & Vogelius, *supra* note 149, at 28.

¹⁵² See, e.g., Corte Suprema de Justicia [CSJN], 04/05/2005, “Bear Service S.A. v. Cerveceria Modelo S.A.,” (Arg.), *available at* <http://www.csjn.gov.ar> (confirming the decision of the Court of Appeals in declaring the incompetence of the Argentine courts to entertain the case because the parties had validly agreed to submit their disputes to ICC arbitration in Mexico despite the fact that the petitioner had filed for bankruptcy (*concurso preventivo*) before the national courts); Commercial Court of Appeals of the City of Buenos Aires, Section D, 11/22/2004, “Stubrin, Max v. Inversiones Morice S.A.,” *available at* <http://www.csjn.gov.ar> (rejecting the request to nullify the arbitral award for not having complied with the mandatory pre-judicial mediation imposed by Argentine procedural law even though the arbitration was governed by Argentine law).

¹⁵³ Blackaby & Noury, *supra* note 26, at 460–61 & n.53. E.g., Corte Suprema de Justicia [CSJN], 06/01/2004, “Jose Cartellone Construcciones Civiles S.A. v. Hidronor S.A.,” *available at* <http://www.csjn.gov.ar> (last visited Mar. 31, 2006) (declaring the partial nullity of an arbitral award based on the grounds that arbitral awards may be subject to challenge before the courts when they are illegal, unreasonable or unconstitutional and even if the parties had agreed that the award would be final and not subject to any appeal); Corte Suprema de Justicia [CSJN], 11/10/1988, “Nidera Argentina v. Rodriguez Alvarez de Canale,” *La Ley* [L.L.] (1990-A-419) (Arg.), *available at* <http://www.kluwerarbitration.com/arbitration/arb/caselaw/courtdecisions/Other/Argentina/> (holding that the validity of the arbitration agreement has to be decided by the courts once the validity of the entire contract is in question).

competitive economy in Latin America.¹⁵⁴ As such, Chile was one of the first Latin American countries to ratify both the New York and Panama Conventions.¹⁵⁵ Chile is also a party to the ICSID Convention and has entered into free trade agreements with Mexico, the United States and Canada. It has signed more than 50 BITs and ratified more than 30.¹⁵⁶ In short, Chile has exhibited a modern approach embracing international arbitration.¹⁵⁷ Chile “ranks as one of the Latin American countries with the strongest arbitration traditions, and arbitration is generally seen as the preferred method of commercial dispute resolution”¹⁵⁸ As such, arbitration clauses are found in complex commercial instruments as well as documents such as sales of residential properties and credit agreements.

Until recently, the regulation of international arbitration was governed by antiquated arbitration legislation. The Code of Civil Procedure and the Judiciary Code contain specific provisions applicable to arbitration, but this does not prevent the parties from establishing their own rules.¹⁵⁹ The Chilean Congress enacted a new law on International Commercial Arbitration based on the Model Law in 2004.¹⁶⁰ Legislation was aimed at facilitating the use of international arbitration and used to create a seat for domestic companies to settle international disputes. To illustrate, the presidential message preceding the bill introducing Chile’s Arbitration Law referred to the high costs facing Chilean companies when litigating abroad and how its approval would foster the holding of international commercial arbitration in Chile.¹⁶¹ To be sure, the delay in adopting a modern arbitration law may explain why Chile has not been the seat of many international arbitrations.¹⁶² Now that Chile has complied with all the

¹⁵⁴ Carlos Eugenio Jorquiera & Karin Helmlinger, *Chile*, in INTERNATIONAL ARBITRATION IN LATIN AMERICA, *supra* note 149, at 89.

¹⁵⁵ See APPENDIX I.

¹⁵⁶ *Id.* See also, Arturo Alessandri, *The Arbitration Agreement in Chile*, in ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA, *supra* note 3, at 29. For updated information about the treaties ratified by Chile, see APPENDIX I.

¹⁵⁷ Blackaby & Noury, *supra* note 26, at 467.

¹⁵⁸ Andres Jana & Angie Armer Rios, *Chile: Legislation Regarding Arbitration*, GLOBAL ARBITRATION REVIEW (2007), available at http://www.globalarbitrationreview.com/ara/09_chile.cfm.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (noting the introduction of Chile’s International Arbitration Law, Law No. 19.971 on International Commercial Arbitration). For a discussion of the law, see Gonzalo Biggs, *Breakthrough for International Commercial Arbitration in Chile*, DISP. RESOL. J., Feb.–Apr. 2004, available at http://findarticles.com/p/articles/mi_qa3923/is_200402/ai_n9392190.

¹⁶¹ Recent approval of Chilean International Commercial Arbitration Law, available at <http://www.wpchile.cl/demo/claro/htdocs/modules/contents/files/unit0/file/cb21cad05246f8c8c24cea421f1a9c7b.DOC?PHPSESSID=e8469e5a4fd170c90949979cf19bc854> (last visited Mar. 31, 2007).

¹⁶² *Id.* (stating that in the last years Chile has been the seat of only one ICC arbitration; in

necessary steps in the modernization of international arbitration, it is expected that it will become an attractive seat for Latin American international arbitration disputes.¹⁶³

B. Role of Judiciary

Even when the Model Law has been adopted in part or in full, the judiciary is partially to blame for the slow adoption of arbitration because it has failed to apply the new legislation in accordance with its intended purpose and policy set forth by the legislator (i.e., favoring commercial arbitration as a means of dispute settlement).¹⁶⁴ Other times, the legislation is applied, but inconsistently. In either case, justification for these actions can be found in the pervasive sentiment of suspicion towards arbitration and a lack of experience in arbitration.

Where arbitration is relatively new, there is a sense that arbitration is a process "in which secret tribunals undermine national sovereignty and legitimate governmental regulations."¹⁶⁵ Local practitioners remain suspicious of the benefits of arbitration and continue to rely on the formalistic approaches of litigation, recommending to their clients that they follow judicial proceedings instead of arbitration, even if the parties have agreed to submit the disputes to arbitration.¹⁶⁶ Undeniably, factors such as judicial corruption and lack of judicial independence from political interference also may play a role in perpetuating resistance to arbitration. However, suspicion is also due to the strong influence of the continental law tradition in Latin America, especially in the area of procedural law and judicial practice.¹⁶⁷ Procedural law requires that certain formalities must be followed, not allowing the parties to freely agree on how the proceedings will be conducted. These formal requirements are an essential part of the judicial process and deviating from them can nullify proceedings.¹⁶⁸ For instance, restrictions remain in place limiting the representation of clients by foreigners and to the language of proceedings.¹⁶⁹ Arbitration is viewed with suspicion because it is essentially non-formalistic and flexible, allowing the proceeding to accommodate the parties according to their particular needs.¹⁷⁰

Given their discomfort with arbitration, lawyers and judges find no

turn, Argentina has been the seat of eighteen).

¹⁶³ Jana & Rios, *supra* note 158.

¹⁶⁴ *Id.* at 223.

¹⁶⁵ See Blanco, *supra* note 50.

¹⁶⁶ Frutos-Peterson, *supra* note 4, at IV.A.

¹⁶⁷ Tawil, *supra* note 70, at 1.

¹⁶⁸ *Id.*

¹⁶⁹ Frutos-Peterson, *supra* note 4, at IV.A.

¹⁷⁰ REDFERN ET AL., *supra* note 72, at 1.

reason to invest time and money in training themselves in this area of practice.¹⁷¹ Lack of arbitration experience is pervasive in Latin America, and lawyers and judges tenaciously retain their traditional way of settling disputes, that is, before the local courts and under well known local rules. Due to a lack of understanding of the way rules of international arbitration work, courts have been incapable of distinguishing the particularities of international disputes *vis-à-vis* local litigation.¹⁷² Moreover, as there is usually no limit as to the filing of appeals, lawyers often carry their challenges up to the Supreme Court with the result being that appeals may take many years to resolve.¹⁷³

1. Select Country Examples of Court Intervention in International Arbitration

The following country examples examine the extent to which the judiciary applies arbitration legislation in accordance with its intended purpose set by the legislator and highlights instances of inconsistent application of the law. Examples are drawn from Uruguay, Brazil, Colombia, Panama and Peru.

The Uruguayan arbitration procedure is overregulated and closely supervised by the local courts.¹⁷⁴ Until the late 1980s, courts in Uruguay strictly applied the disposition of its Civil Code that forbade the parties to contract out of the judicial jurisdiction established by the same Code.¹⁷⁵ While Uruguay had ratified both the New York and Panama Conventions, courts often ruled against the submission of disputes to international arbitration when, under the Civil Code, those disputes could be settled by the judiciary in Uruguay. While this parochial position appears to have been abandoned after a 1992 Court of Appeals decision upheld the validity of those agreements to arbitrate,¹⁷⁶ the lack of a modern legislation and inconsistent decisions regarding issues such as the validity of choice of law clauses in contracts providing for international arbitration incited skepticism concerning Uruguayan commitment to arbitration.¹⁷⁷

Brazil ratified the New York Convention in 2002 after its Supreme

¹⁷¹ Guido Santiago Tawil, *Arbitration in Latin America: Current Trends and Recent Developments*, (Mar. 2003) [hereinafter Tawil, *Current Trends*], available at <http://www.bomchil.com/cas/articulos/Arbitration%20in%20Latin%20America.pdf>.

¹⁷² See Cremades, *Commercial Arbitration*, *supra* note 3, at 6. See also *infra* some of the decisions adopted by the courts of Argentina, Mexico, Panama and Venezuela.

¹⁷³ Tawil, *Current Trends*, *supra* note 171, at 2.

¹⁷⁴ Blackaby & Noury, *supra* note 26, at 466; Daniel M. Ferrere, *Enforcement of Arbitration Agreements in Uruguay*, in *ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA*, *supra* note, 3, at 81–82.

¹⁷⁵ Ferrere, *supra* note 174, at 83–84.

¹⁷⁶ *Id.* at 83–84.

¹⁷⁷ *Id.* at 85.

Court upheld the constitutionality of its 1996 Arbitration Law.¹⁷⁸ Brazil has not yet ratified any BIT or any other investment treaty providing for international arbitration except for regional agreements relating to Mercosur.¹⁷⁹ However, given the size and importance of its economy, as well as favorable tax incentives in place, Brazil has been one of the principal recipients of foreign investment in Latin America. Brazil's Arbitration Law limits court intervention, yet national courts still retain substantial powers with respect to the enforcement of the arbitration agreement, the challenge of the arbitral award and the recognition and enforcement of the award. Therefore, the support of the Brazilian courts is pivotal not only for achieving the goals set forth in the new Arbitration Law, but also for the development and promotion of arbitration in general.¹⁸⁰

As with the majority of Latin American states, Colombia initiated the liberalization of its economy, enacted new legislation to promote foreign investment and concluded several multilateral, regional and bilateral agreements.¹⁸¹ However, unlike many Latin American countries, the Colombian judiciary has never been hostile to arbitration; rather, the development of arbitration has been highly influenced by judicial procedure.¹⁸² The result is that "arbitrators rely on the provisions of the Code of Civil Procedure and behave as if they were judges."¹⁸³ Although a new arbitration law was enacted in 1998,¹⁸⁴ it may take some time for the old interventionist culture to adapt to a more modern one based on the autonomy of the parties and freedom to choose the rules of procedure.

To illustrate this dichotomy, the new Colombian arbitration law not

¹⁷⁸ Charles W. Cookson II, *Long-Term Direct Investment in Brazil*, 35 U. MIAMI INTER-AM. L. REV. 345, 352 n.28 (2004) ("[t]he Court voted unanimously to accept the appeal and certify the arbitration decision, having rejected arguments submitted by Justices Pertence, Sanches and Moreira Alves which declared the unconstitutionality of the following sections of Law 9.307/96: arts. 6 and 7; art. 41 . . . and art. 42," translating S.T.F., No. 5206-7, Relator: Ministro Sepulveda Pertence, 10/10/96 (Brazil)).

¹⁷⁹ Although some of them have not yet been ratified. Among others, the Brasilia Protocol for Dispute Resolution executed on December 17, 1991, the Colonia Protocol on Reciprocal Encouragement and Protection of Investments in the MERCOSUR signed on January 17, 1994, the Protocol on Encouragement and Protection of Investments from Non-members Countries of the MERCOSUR executed in Buenos Aires on August 5, 1994, and the Las Leñas Protocol on Jurisdictional Cooperation and Assistance on Civil, Commercial, Labor and Administrative Matters executed on June 27, 1992.

¹⁸⁰ Blackaby & Noury, *supra* note 26, at 465.

¹⁸¹ Fernando Mantilla-Serrano, *Colombia*, in INTERNATIONAL ARBITRATION IN LATIN AMERICA, *supra* note 149, at 111–12.

¹⁸² Erika P. Schultz, *Latin American Commercial Arbitration: The Colombian Approach*, 9 WORLD ARB. & MEDIATION REP. 295, 297 (1998).

¹⁸³ Mantilla-Serrano, *supra* note 181, at 114.

¹⁸⁴ Statute of Alternative Dispute Resolution Mechanisms, Decree No. 1818 (Col).

only invests arbitrators with the authority to grant interim measures of protection, but it also empowers them to enforce those measures without requiring the assistance of a local court, giving them a sort of limited *imperium*.¹⁸⁵ Yet, in the same year, the Colombian Supreme Court refused the recognition of a foreign partial award based on the grounds that partial awards do not constitute final disposition of the issues concerned.¹⁸⁶

Like most Latin American countries, Peru has ratified all major conventions on international commercial arbitration and passed a modern law partially based on the Model Law, regarding both domestic and international arbitration.¹⁸⁷ Furthermore, Peru amended its Constitution acknowledging the jurisdictional nature of arbitration.¹⁸⁸ Notwithstanding the clear and seemingly unambiguous language of the enacted legislation, some courts do not observe the importance of respecting the parties' freedom to submit their disputes to arbitration. At the request of the party unwilling to arbitrate, courts have been known to interfere with the arbitral proceeding in contradiction to the rules and regulations, denying the independence of the arbitral proceedings.¹⁸⁹

Panama provides the final and most striking example of a country where courts play a strong role in influencing the role of international arbitration. Arbitration has not been widely accepted as a means of dispute settlement in Panama.¹⁹⁰ Many practitioners hesitate to submit their disputes to arbitration under Panamanian law or in Panama as a seat of an international arbitration, since arbitral awards are vulnerable to challenge before the local courts.¹⁹¹ This is due to the Panamanian Supreme Court's holding on December 13, 2001, that the *kompetenz-kompetenz* principle, one of the cornerstones of modern international arbitration, was

¹⁸⁵ Mantilla-Serrano, *supra* note 181, at 122.

¹⁸⁶ Mantilla-Serrano, *supra* note 181, at 128 (citing Supreme Court of Justice, Civil Chamber, 11/12/1998, Exp. 7394).

¹⁸⁷ Section one and section two of General Arbitration Law No. 26572, respectively. See generally, Adrian Simon & John H. Ronney, *The Law and Practice of International Arbitration in Peru*, 10 WORLD ARB. & MEDIATION REP. 48 (1999).

¹⁸⁸ Article 63 of the 1993 Constitution provides, in pertinent part: "The government and other public law entities may submit disputes arising from contractual relationships to tribunals established by virtue of existing treaties. They may also submit their disputes to national or international arbitration in the manner provided by law." See Ulises Montoya A., *Enforcement of Arbitration Agreements in Latin America: Peru*, in ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA, *supra* note 3, at 73.

¹⁸⁹ PAOLO DEL AGUILA RUIZ DE SOMOCURCIO, EL PODER JUDICIAL Y LOS CONTRATOS: APUNTES SOBRE LA DEFENSA DEL FUERO ARBITRAL (2006) (in Spanish only), available at http://www.camaralima.org.pe/arbitraje/boletin/voz_secretaria.htm.

¹⁹⁰ Rogelio de la Guardia, *The Arbitration Agreement in Panama*, in ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA, *supra* note 3, at 65.

¹⁹¹ *Id.*

unconstitutional under Panamanian law.¹⁹² The court affirmed that the issue of jurisdiction was a question for the local courts, and not the arbitrators, to decide. The court simply explained that the “arbitrators had no legal standing to decide the propriety of their jurisdiction.”¹⁹³

2. Select Country Examples of Inconsistent Precedent Regarding International Arbitration

Inconsistent decisions plague the development of consistent rules governing international arbitration. As one author suggests, there should be “a campaign promoting arbitration within the judiciary” in order for the judiciary to better understand how international arbitration works and what benefits it could bring to the judicial system, principally in reducing case load.¹⁹⁴ Examples are provided for the countries of Mexico and Venezuela.

While Mexico differs from the other country examples provided in this section, in that Mexico has not ratified the ICSID Convention, Mexican courts have favored enforcement of arbitral awards,¹⁹⁵ altering a history of denying awards.¹⁹⁶ Recent cases have shown this trend as Mexican Courts enforced agreements that provide for international arbitration notwithstanding the unwillingness of the Mexican parties to abide by their prior commitments.¹⁹⁷ Despite this unwillingness, in some cases the courts unduly agree to hear disputes between parties who have validly agreed to settle those disputes through arbitration.¹⁹⁸ For instance, not long ago, a

¹⁹² Supreme Court of Justice, 12/13/2001, *PYCSA PANAMÁ, S. A. s/demanda de inconstitucionalidad*, available at <http://bd.organojudicial.gob.pa/rjhtml/pleno/sn200112055.htm>.

¹⁹³ *A Setback in Latin American Arbitration*, 13 WORLD ARB. & MEDIATION REP. 152, 152 (2002).

¹⁹⁴ Claus von Wobeser, *Enforcement of Arbitration Agreements in Latin America: Mexico*, in ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA, *supra* note 3, at 55, 63 [hereinafter Wobeser, *Enforcement*].

¹⁹⁵ Volz & Haydock, *supra* note 18, at 891 (referring to two landmark cases decided in 1977, *Malden Mills, Inc. v. Hilaturas Lourdes S.A.* and *Presse Office S.A. v. Centro Editorial Hoy S.A.*).

¹⁹⁶ See generally, Jeffrey J. Mayer, *Recent Mexican Arbitration Reform: The Continued Influence of the “Publicistas,”* 47 U. MIAMI L. REV. 913 (1993).

¹⁹⁷ See e.g., *Mitsui de Mexico S.A. and Mitsui & Co. v. Alkon Textil S.A.*, Corte Superior de Justicia, [C.S.J.] [Higher Court of Appeals] (Fourth Chamber), 06/21/1986, 16 Y.B. COM. ARB. 594, 598 (1991) (Mex.) (enforcing an arbitration clause that provided for international arbitration in Japan under the Japanese Commercial Arbitration Association’s rules); Wobeser, *Enforcement supra* note 194, at 62–63 (citing *Nordson Corporation v. Industrias Camer S.A. de C.V.* (where a lower court decided to enforce the award and the Constitutional Court in a separate action, *juicio de amparo*, denied reversing the judgment because the enforcing court is not allowed to review substantive issues of the award)).

¹⁹⁸ Claus von Wobeser, *Mexico*, in INTERNATIONAL ARBITRATION IN LATIN AMERICA, *supra* note 149, at 155, 169–70 n.36 [hereinafter Wobeser, *Mexico*] (citing a case from the Fourth Collegiate Circuit Court of Mexico where the High Court ignored the doctrine of

Mexican court found it had jurisdiction to hear a case, even though the parties had validly agreed to submit their disputes to arbitration.¹⁹⁹ In that case, a Mexican company filed a suit against an American company before the Mexican courts.²⁰⁰ The American company raised an objection to the jurisdiction of the court based on the grounds that the parties had agreed to arbitrate those disputes.²⁰¹ The court also decided to answer the claim *ad-cautelam* in case the Mexican court decided that it had jurisdiction over the case.²⁰² The court viewed this answer as a waiver to arbitrate the disputes since Mexican law did not recognize the possibility of alternative pleading.²⁰³

Venezuela, too, is a party to all major conventions on international commercial arbitration. It has also passed legislation adopting many of the principles embodied in the Model Law. Venezuela's new Constitution expressly recognizes arbitration as an alternative dispute resolution method that shall be promoted by the state.²⁰⁴ Prior to passage of the new Arbitration Law and the enactment of the new Constitution, the Venezuelan Supreme Court was not consistent in its decisions regarding the enforcement of arbitration agreements. In many cases, the court upheld its jurisdiction even though the parties had agreed to submit their controversies to arbitration.²⁰⁵ The same occurred with respect to the doctrine of separability—determining that the invalidity of the main contract rendered the arbitration clause contained therein unenforceable.²⁰⁶ Nevertheless, since passage of the new arbitration law, the Superior Tribunal of Venezuela (that replaced the Supreme Court) ratified the modern principles incorporated in the arbitration law. For instance, in 2001, the Superior Tribunal held that arbitral awards could not be appealed other than having

separability, stating that the decision to refer the parties to arbitration depended on the validity of the underlying agreement).

¹⁹⁹ Von Wobeser, *Mexico supra* note 149, at 59 (citing *Operadora de Tintorerías Dona Linda S.A. de C.V. v. Dryclean USA Franchise Co.*).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Article 258 of the 1999 Venezuelan Constitution provides, in pertinent part: "The law shall promote arbitration, conciliation, mediation and any other alternative means of settling disputes." For a general discussion of the constitution, see Gregory Wilpert, *Venezuela's New Constitution*, *VenezuelaAnalysis.com*, available at <http://www.venezuelanalysis.com/articles.php?artno=1003> (last visited Mar. 31, 2007).

²⁰⁵ See Bernardo Weininger & David Lindsey, *Venezuela, in* INTERNATIONAL ARBITRATION IN LATIN AMERICA, *supra* note 149, at 223, 229 & n.22.

²⁰⁶ *Id.* at 233 n.30 (citing the Supreme Court's decision in *Compañía Anónima de Seguros La Occidental v. Stetzel, Thomson & Co. Ltd.*, 07/08/1993; as the authors remark, the Supreme Court later held the opposite in *Embotelladora Caracas v. Pepsi Cola Pan Americana S.A.*, 10/9/1997).

them set aside.²⁰⁷ The question is whether this recent trend will continue or whether judicial independence will be affected when certain sensitive interests are at stake.

VI. THE FUTURE OF INTERNATIONAL ARBITRATION IN THE CONTEXT OF ENERGY SECURITY

As noted, the implementation of an adequate legal framework embracing international arbitration—adoption of international conventions and the Model Law—was not sufficient to guarantee the development of a culture of international arbitration in Latin America. There is no deeply-rooted culture of arbitration in Latin America and policies discouraging the use of international arbitration and enforcement of arbitral awards are resurfacing to impede foreign investment in energy sectors throughout the region. This reduction in the legal certainty of the investment climate in Latin American is particularly troubling at a time when concern for the security of energy resources in Latin America is mounting in the United States.

Energy security has several dimensions. One perspective is that the United States' share of Latin American energy imports is threatened by growing global competition for these resources. Latin America continues to be a leading producer of oil and natural gas and a leading supplier to the United States. In 2005, the United States consumed practically 20.7 million barrels of oil per day ("mbd") with net oil imports accounting for 12.1 mbd or fifty-eight percent of the total oil consumption, and 21.8 trillion cubic feet ("tcf") of natural gas with net gas imports of nearly 3.6 tcf or seventeen percent of total U.S. natural gas consumption.²⁰⁸ In the same year, countries in the Western Hemisphere supplied the United States with forty-nine percent of oil and petroleum product imports, nearly fifty percent of U.S. crude oil imports and a good percentage of natural gas imports.²⁰⁹ Even while most Latin American countries are net energy importers,²¹⁰ the countries of Mexico, Venezuela, Ecuador, Colombia, Brazil, Argentina, and Bolivia are significant oil, gas, and ethanol producers and net energy exporters in the Western Hemisphere.²¹¹ Yet, concerns for the security of our supply of energy resources from Latin America are in part fueled by competition for these resources from China and India. Approximately one-third of the increase of world demand for oil in 2004 is attributable to

²⁰⁷ *Id.* at 250 & n.62 (citing the Superior Tribunal's decision in Grupo Inmensa, C.A. v. Soficredito Banco de Inversión, C.A., 05/23/2001).

²⁰⁸ See Sullivan & Riband, *supra* note 1 at 1.

²⁰⁹ *Id.*

²¹⁰ See International Energy Agency, Map Energy Indicators, Latin America, Net Imports, <http://www.iea.org/Textbase/country/maps/LAMERICA/imports.htm>.

²¹¹ *Id.*

China,²¹² and China will supersede the United States as the world's largest oil consumer. However, there are no shortages of global oil and natural gas reserves. Table 3 in Appendix III presents the reserves held by countries in Latin America and illustrates that the largest oil and natural gas reserves are in Argentina, Venezuela, and Mexico. The challenge is to match investment with the location of the reserves, and there are other countries that remain unexplored.²¹³ At least forty years of conventional oil supply and an additional forty years of unconventional supplies (in places largely unexplored) exist.²¹⁴ The challenge is to open up the places where those reserves are available—to match the available technology and the investment capital which is available to the places where the oil and gas can be extracted. This is where concerns for nationalization are focused.

Concerns for energy security are principally rooted in hemispheric developments surrounding resource nationalism. Resource nationalism has raised concerns about access to energy resources and political interference with the level of energy production and investment in the region.²¹⁵ Resource nationalism describes the global shift placing the world's oil reserves under the control of national oil companies and out of reach of the international oil companies, except on a low-margin, service-contract basis. As noted in the Wall Street Journal, "ninety percent of the world's untapped conventional oil reserves are in the hands of governments or state-owned oil companies, exceeding the percentage recorded decades ago."²¹⁶ Other analysts cite that moves toward resource nationalism made by countries like Chad, Algeria, Great Britain, Bolivia, and Argentina will result in a full resource nationalization.²¹⁷ What is the extent of this phenomenon? Does it affect the Western Hemisphere? And what is the connection between resource nationalism and international arbitration?

Examples of resource nationalism have emerged in all the principal areas of oil and natural gas production—in the Middle East, the former

²¹² See David Victor, Director Center for Environmental Science and Policy Program on Energy and Sustainable Development, Stanford University, Remarks at the Council on Foreign Relations Corporate Conference: *The Global Energy Challenge* (Mar. 11, 2005), available at http://www.cfr.org/publication/7961/global_energy_challenge.html.

²¹³ See Nicholas Butler, Group Vice President of Strategy and Policy Development, British Petroleum Co., Remarks at the Council on Foreign Relations Corporate Conference: *The Global Energy Challenge* (Mar. 11, 2005), available at http://www.cfr.org/publication/7961/global_energy_challenge.html.

²¹⁴ *Id.*

²¹⁵ See Sullivan & Riband, *supra* note 1.

²¹⁶ Joshua Kurlantzick, *The Coming Resource War: Crude Awakening*, THE NEW REPUBLIC (Oct. 2, 2006), available at http://uscpublicdiplomacy.com/index.php/newsroom/pdblog_detail/060928_can_public_diplomacy_counter_resource_nationalism.

²¹⁷ See Cyril Widdershoven, *OPEC's Future Unclear: Production Costs and Resource Nationalization Ahead?*, THE RESOURCE INVESTOR, (Sept. 15, 2006) available at <http://www.resourceinvestor.com/pebble.asp?relid=23854>.

Soviet Union, and Latin America. In Russia, resource nationalism emerged with the acquisition of Gazprom and when Russia revoked an environmental permit for a Royal Dutch Shell oil and gas project off the country's Pacific coast. In Iran, President Ahmadinejad tightened state control over the oil industry, promising to favor domestic investors and placing close allies and former Revolutionary Guards in principal positions.²¹⁸ In 2006, Chad confronted international operators Chevron, Exxon Mobil, and Petronas, who have all shown the willingness to negotiate their revenue share.²¹⁹ The Algerian government followed suit as it decided, nearly a year after implementing a seemingly liberal and transparent Hydrocarbon Law, to retreat from its liberal course implementing a windfall tax (five to fifty percent) and lower production shares resulting in major financial setbacks for three petroleum companies—British Petroleum, Shell, and Total.²²⁰ In Latin America, examples of resource nationalism can be found in Venezuela, Bolivia, and Ecuador. In Venezuela, President Hugo Chavez took control over the formerly independent Petr leos de Venezuela; in Bolivia, President Evo Morales mobilized army forces into Bolivian gas fields and nationalized Bolivia's industry;²²¹ in Ecuador, the government assumed control of the holdings of the U.S. oil company Occidental.²²²

As the leading oil and natural gas consumer in the world and a significant importer of oil and natural gas from Latin America, the United States is concerned with the hemispheric proliferation of resource nationalism. Yet, one view is that resource nationalism will not endure in some countries (where it is not written in the constitution as it is in Venezuela and Mexico). One consideration is that resource nationalism is a rent-seeking phenomenon fueled by price trends—countries consider resource nationalism to make a profit from exploitation of their countries' natural resources and then denounce resource nationalism when prices fall. To be sure, resource nationalism in several Latin American energy-producing countries has occurred concurrently with rising oil prices (from ten dollars a barrel in 1999 to fifty dollars in 2006).²²³ Unsurprisingly, resource nationalism has contributed to economic growth in the countries

²¹⁸ See Kurlantzick, *supra* note 216.

²¹⁹ See Widdershoven, *supra* note 217.

²²⁰ *Id.* (noting that in the last year, the Algerian Minister of Energy and Mines, Chakib Khelil, has informed all operators in the country that it has toughened terms for foreign energy investors. The new arrangement requires the Algerian-owned Sonatrach to take a mandatory fifty-one percent share of all exploration and production ventures. At the same time, a windfall tax between five and fifteen percent will be placed on revenues if crude oil exceeds thirty dollars a barrel).

²²¹ See Kurlantzick, *supra* note 216.

²²² *Id.*

²²³ See Sullivan & Riband, *supra* note 1.

which have adopted it, and the abnormal profits earned have been perceived as offsetting the inefficiencies.²²⁴

In 2006, Iran earned \$45 billion in oil profits, marking the largest profit amount since 1974.²²⁵ Russia's gross domestic product has climbed from nearly \$200 billion in 1999 to approximately \$1 trillion today.²²⁶ Lastly, Venezuela has recorded some of the largest economic growth rates around the globe—over nine percent in 2005.²²⁷ Given the level of these earnings, the short term view is that, as additional oil and natural gas production becomes available and prices fall, nationalism will diffuse. Already in China there is evidence that rising demand for diesel fuel has sparked an influx of capital and building of new power plants.²²⁸

Others view resource nationalism as a longer-term phenomenon. According to some analysts, the age of privatization of oil and natural gas production is gone,²²⁹ many of the world's attractive resources are in one way or another "locked up by a state company or a company that behaves a little bit like a state company,"²³⁰ and the United States has to work with state companies and seek the right relationships for doing so.²³¹ To be sure, energy policy is on the agenda of nearly every country around the globe showing that consuming countries are no longer willing to allow the energy business to be run just on a free-market basis.²³² Investors seeking to invest in countries where resource nationalism is taking place need to find partnerships with state companies or various kinds of hybrid companies. Some policy analysts also look to the potential role that low-cost sugarcane producers can play in U.S. energy security.²³³ There has been much congressional interest in the topic of hemispheric energy security in the United States and related legislative initiatives in the 109th Congress, to increase building partnerships with Latin America and to diversify energy

²²⁴ See Victor, *supra* note 212. (consider this as an example of the inefficiencies that arise from nationalizing energy resources: using the Russia example, the dominance of Gazprom in the Russia gas industry bodes poorly for investments in Russia because Russia is an inefficient country. For every cubic meter of gas they consume, the Russian economy produces \$0.85 of value added. Canadians produce eight dollars of value added for every cubic meter of gas that they consume and Fins produce thirty-five dollars of value added. When prices decrease, inefficient investments will decrease).

²²⁵ See Kurlantzick, *supra* note 216.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See Victor, *supra* note 212.

²²⁹ See Sullivan & Riband, *supra* note 1.

²³⁰ See Victor, *supra* note 212.

²³¹ *Id.*

²³² See Sullivan & Riband, *supra* note 1. See also Alexia Brunet & Meredith Shafe, *Beyond Enron: Regulation in Energy Derivatives Trading*, 27 NW. J. INT'L L. AND BUS. 665, 669 (2007).

²³³ See Sullivan & Riband, *supra* note 1.

supplies.²³⁴ Similarly, there has been considerable interest among U.S. companies toward increasing hemispheric partnerships in Latin America as a means of advancing hemispheric energy security.²³⁵

International arbitration introduced a certain degree of predictability to international transactions and a degree of consistency. Most of all, it brought flexibility along with neutrality, which are paramount among business people all over the world, particularly in the oil and energy industries where investments are spread out all over the world, mainly in unstable countries. The proliferation of resource nationalism throughout Latin America may fuel a retreat to an era when arbitration was not an available mechanism for settling disputes. As the previous section showed, there is no deeply-rooted culture of arbitration in Latin America and there are examples of instances where the judiciary in some Latin American countries is not fulfilling the desires of the legislature in promoting international arbitration. Investors already use many mechanisms to spread risk—leveraging substantive size and the ability to invest simultaneously in places like Russia and Angola and the Middle East and the United States all at once, the ability to invest in this new technology and to take a long-term view.²³⁶ Requiring investors to submit their disputes to domestic courts would likely deter them from investing there, unless the rate of return grossly exceeded the risk.

VII. CONCLUSION

Beginning in the late 1980s, Latin American countries abandoned their traditional hostility towards international arbitration and began opening their economies to foreign direct investment in the upstream and downstream oil and natural gas sectors. With multiple investment opportunities all over the world, international energy companies demanded increased investment protections, not only insisting on substantive rights, such as fair and equitable treatment and non-discrimination, but also requiring that international *fora* be available to exercise those substantive rights. As Table 1 in Appendix I shows, Latin American countries signed and ratified all the necessary treaties to embrace international arbitration. The cumulative impact of the international treaties, investment and trade agreements that rely on arbitration to resolve international commercial disputes, and efforts to enact international commercial arbitration statutes, was increased foreign investment. To be sure, liberalization exposed Latin American countries to international disputes which added a heavy burden—both financially and politically—for many Latin American governments.

²³⁴ *Id.* at 18.

²³⁵ See Council of the Americas Report, *Energy in the Americas, Building a Lasting Partnership for Security and Prosperity*, Oct. 2005.

²³⁶ See Sullivan & Riband, *supra* note 1.

As Table 2 in Appendix II shows, beginning in 1990, there were an increasing number of ICSID arbitrations against Latin American countries. The increasing number of cases has had a negative impact in the evolution of the arbitration of international energy and oil disputes.

Unlike in many other regions where arbitration enjoys wide cultural acceptance, Latin America has been slow to develop a business arbitration culture and, as noted earlier, a deeply-rooted tradition of international arbitration has not developed. The judiciary has failed to apply the new legislation in accordance with its intended purpose. Many governments are currently reluctant to waive their domestic jurisdictions in favor of international tribunals, fearing a post-financial crisis scenario like that of Argentina, when arbitrations soared.²³⁷ While some Latin American countries, such as Argentina and Venezuela, have challenged the validity of ICSID arbitration under their national constitutions,²³⁸ many governments feel that the rights and guarantees accorded to foreign investors outnumber the benefits received from their investments. The proliferation of resource nationalism discussed in the prior section only impedes and does not further efforts to promote international arbitration.

For arbitration to develop in Latin America, certain steps need to be taken. Most local practitioners still remain suspicious of the benefits of arbitration and continue to rely on the formalistic approaches of litigation. Thus, there is very little arbitration expertise either among lawyers or judges. The change in culture is a slow process that will start to yield results only after local practitioners and judges are educated as to the benefits of supporting arbitration as a valid alternative to litigation. However, these changes alone without a change in the legal education leading to an acceptance of arbitration culture can do little to improve the practice of international arbitration in general and the chances of successfully enforcing arbitration agreements and awards in particular. The development of an arbitration culture calls for the insertion of international arbitration courses as a fundamental part of the legal education with the hope that academic training will provide local practitioners a familiarity with international conventions and internationally recognized principles which will in turn, allow practitioners to make informed decisions when determining whether to litigate or arbitrate a dispute.²³⁹ Furthermore,

²³⁷ Yackee, *supra* note 48, at 224; *see also* Carlos E. Alfaro & Pedro M. Lorenti, *The Growing Opposition of Argentina to ICSID Arbitral Tribunals: A Conflict Between International and Domestic Law?*, 6 J. WORLD INVESTMENT & TRADE 417 (June 2005); Carlos E. Alfaro, *Argentina: ICSID Arbitration and BITs Challenged by the Argentine Government* (Dec. 21, 2004), <http://www.mondaq.com/article.asp?articleid=30151&searchresults=1&login=true>.

²³⁸ *See* Blanco, *supra* note 50, for a discussion of the constitutional challenge for the case of Argentina.

²³⁹ *See generally* on arbitration culture, Tom Ginsburg, *The Culture of Arbitration*, 36

development of international arbitration in Latin America will also require efforts to develop applicable substantive and procedural laws, which must all be considered and addressed in the contract to avoid uncertainty caused by a process that allows the arbitrators to create rules during the process.²⁴⁰

VAND. J. TRANSNAT'L L. 1335 (2003).

²⁴⁰ See Blanco, *supra* note 50 (noting the development of laws such as: admission of documentary evidence and witness interrogation during the arbitration hearing, time allocations, pre-hearing discovery, allocation of attorneys' costs and fees, rules on privileges, and post-arbitration award enforcement mechanisms).

APPENDIX I

Table 1: Adoption Dates of International Conventions Fostering International Arbitration, BITs and UNCITRAL Model Law in Latin America as of April, 2006.

State	ICSID Convention	New York Convention	Panama Convention	BITs		UNCITRAL Model Law
	Date Ratified	Date Ratified	Date Ratified	Total Signed	Total Ratified	Adopted (Y/N)
Argentina	1994	1989	1994	58	53	N
Bolivia	1995	1995	1998	22	18	Y (with changes)
Brazil	No	2002	1995	14	0	Y (with major changes)
Chile	1991	1975	1976	51	37	Y
Colombia	1997	1979	1986	6	0	Y (with changes)
Costa Rica	1993	1988	1978	19	13	Y (with changes)
Cuba	No	1975	No	57	28	N
Dominican Republic	Not ratified	2002	Not ratified	13	5	N
Ecuador	1986	1962	1991	28	21	Y (with changes)
El Salvador	1984	1998	1980	24	20	Y (with changes)
Guatemala	2003	1984	1986	12	4	Y
Haiti	Not ratified	1984	No	5	3	No
Honduras	1989	2001	1976	5	2	Y (with changes)
Mexico	No	1971	1978	17	12	Y
Nicaragua	1995	2003	Not ratified	18	11	N
Panama	1996	1985	1975	16	11	Y (with changes)
Paraguay	1983	1998	1976	24	19	Y
Peru	1993	1988	1989	28	25	Y
Uruguay	2000	1983	1977	28	21	N
Venezuela	1995	1995	1985	25	21	Y (with changes)

Source: Prepared by the authors based on the information available at the websites of the following institutions: ICSID (<http://www.worldbank.org/icsid>), UNCITRAL (<http://www.uncitral.org>), UNCTAD (<http://www.unctad.org>) and SICE (<http://www.sice.oas.org>).

APPENDIX II

Table 2: ICSID cases filed against Latin American countries as of April 2006 (countries with largest number of disputes are in bold and italics)

State	BITs	ICSID Cases Concluded		ICSID Cases Pending	
	Ratified	Total	Energy Related	Total	Energy Related
<i>Argentina</i>	<i>53</i>	<i>6</i>	<i>4</i>	<i>35</i>	<i>18</i>
<i>Bolivia</i>	<i>18</i>	<i>1</i>	<i>0</i>	<i>1</i>	<i>1</i>
Brazil	0	0	0	0	0
Chile	37	0	0	3	0
Colombia	0	0	0	0	0
Costa Rica	13	1	0	0	0
Cuba	28	0	0	0	0
Dominican Republic	5	0	0	0	0
<i>Ecuador</i>	<i>21</i>	<i>1</i>	<i>0</i>	<i>5</i>	<i>5</i>
El Salvador	20	0	0	1	0
Guatemala	4	0	0	0	0
Haiti	3	0	0	0	0
Honduras	2	1	0	0	0
Mexico	12	6	0	7	0
Nicaragua	11	0	0	0	0
Panama	11	0	0	0	0
Paraguay	19	1	0	0	0
<i>Peru</i>	<i>25</i>	<i>1</i>	<i>1</i>	<i>2</i>	<i>1</i>
Uruguay	21	0	0	0	0
<i>Venezuela</i>	<i>21</i>	<i>3</i>	<i>0</i>	<i>3</i>	<i>1</i>
Totals	324	21	5	57	26

Source: Prepared by the authors based on the information available at the ICSID website as of April 26, 2006, <http://www.worldbank.org/icsid/cases/cases.htm>.

APPENDIX III

Table 3: Latin American Energy Sources and Imports, ICSID Energy-Related Cases and Arbitration Difficulties Cited (countries with arbitration difficulties cited in Section V. are noted in the right column; countries experiencing resource nationalism cited in Section VI. are in bold and italics).

State	U.S. Crude Oil Imports, 2005		Proven Reserves, 2005		ISCD Cases Pending, Energy Related 2006	Arbitration Difficulties Cited, 2006
	Annual (Thousand Barrels)	Percentage of Total U.S. Crude Oil Imports	Oil (Billion Barrels)	Natural Gas (Trillion Cubic Ft)		
<i>Argentina</i>	<i>20,608</i>	<i>1.67</i>	<i>2.320</i>	<i>18.866</i>	<i>18</i>	<i>Yes</i>
<i>Bolivia</i>	<i>264</i>	<i>0.021</i>	<i>0.002</i>	<i>0.005</i>	<i>1</i>	<i>-</i>
Brazil	34,459	2.79	11.243	11.515	-	Yes
Chile	-	-	0.150	3.460	-	Yes
Colombia	57,002	4.62	1.542	4.040	-	Yes
Costa Rica	-	-	-	-	-	-
Cuba	-	-	0.750	2.500	-	-
Dominican Republic	-	-	-	-	-	-
Ecuador	100,681	8.16	4.630	0.345	-	-
El Salvador	-	-	-	-	5	-
Guatemala	3,885	0.315	0.526	0.109	-	-
Haiti	-	-	-	-	-	-
Honduras	-	-	-	-	-	-
Mexico	565,919	45.879	12.882	15.985	-	Yes
Nicaragua	-	-	-	-	-	-
Panama	-	-	-	-	-	Yes
Paraguay	-	-	-	-	-	-
Peru	1,501	0.122	0.929	8.723*	1	Yes
Uruguay	-	-	-	-	-	Yes
<i>Venezuela</i>	<i>449,196</i>	<i>36.41</i>	<i>79.729**</i>	<i>151.395</i>	<i>1</i>	<i>Yes</i>
Total Latin America	1,233,515	33.6	115.114	282.056	-	-
Total U.S. Imports Worldwide	3,670,403	100.00	1,292.550	6,112.144	-	-

Source: Prepared by the authors based on the following information: U.S. Crude Oil Imports from Western Hemisphere Countries, 2005 from U.S. Department of Energy, Energy Information Administration; Proven Oil and Gas Reserves 2005 taken from Oil & Gas Journal, "Worldwide Look at Reserves and Production," December 2005; Pending ICSID Cases, Energy-Related prepared using ICSID website as of April 26, 2006, available at <http://www.worldbank.org/icsid/cases/cases.htm>; Arbitration Difficulties Cited Based on Discussion found in Section V.

Notes: *Peru's proven natural gas reserves reportedly could increase to 15-16 tcf upon completion of seismic work on a block of the Camisea Gas Project. See U.S. Department of Energy, Energy Information Administration, "Country Analysis Briefs: Peru," May, 2006. **This amount does not include as much as 270 billion barrels of extra heavy Venezuelan crude oil.