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Summary

Investment treaty arbitration continues to grow as a mechanism to resolve cross-border disputes, and its prominence and use in Latin America continues and is increasing. Disputes involving Latin American countries continue to occupy a significant portion of the caseload at the International Centre for Settlement of Investment Disputes (ICSID). In 2018, 23 per cent of the 56 new investment arbitration cases registered before the institution (whether under the ICSID Convention or the ICSID Additional Facility Rules) included a South American country as a party, [1] while an additional 4 per cent included Spanish-speaking countries from the Caribbean and Central America. [2] In the past year, ICSID registered a total of 15 cases involving:

- Peru (four);
- Venezuela (three);
- Colombia (five);
- Bolivia (one);
- Guatemala (one); and
- Honduras (one). [3]

Additionally, 15 per cent of the arbitrators, conciliators and ad hoc committee members appointed in cases registered in 2018 were South American nationals (34 total), 2 per cent were from Central America (four total) and 16 per cent were from North America (36 total). [4] In 2018, five of the Permanent Court of Arbitration's 12 registered cases involved a party from the Americas. [5] Of the London Court of International Arbitration's cases, 4.3 per cent involved North American parties, 6.6 per cent involved parties from the Caribbean and 4.7 per cent involved parties from Central and South America. [6] As at the time of writing, the International Chamber of Commerce statistics for 2018 were not yet available.

This article discusses four legal developments and updates to last year's article that are expected to be important for arbitration practitioners, international investors and others interested in the investor-state dispute settlement system. First, we discuss the current status of the United States–Mexico–Canada Agreement (USMCA) and the future of investor-state arbitration under this new agreement. Second, we review developments in investment treaty arbitration cases against Venezuela and the complicated dynamics arising from Juan Guaidó's emergence as the disputed President of Venezuela. Third, we examine the relationship between environmental protection and investment protection in Latin American disputes through the lens of the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA). Lastly, we analyse recent efforts to increase transparency in investment arbitration.

USMCA: SIGNIFICANT LIMITATIONS TO INVESTOR-STATEDISPUTE SETTLEMENT

On 30 September 2018, the United States, Canada and Mexico agreed to the terms of a new trade deal to modify the North American Free Trade Agreement (NAFTA). [7] On 30 November 2018, the parties signed the new agreement. [8] The agreement has not yet entered into force and it will enter into force only if the legislative bodies in each of the three governments ratify it. [9] To date, none of the legislative bodies in the three countries have ratified USMCA. [10] The recent political tussle between Mexico and the United States over curbs on immigration and tariffs between the countries is raising fears in some circles that this will threaten ratification of USMCA. [11] If ratified, USMCA will result in remarkable changes to the investor-state dispute settlement (ISDS) regime among the three countries.

On 2 December 2018, US President Donald Trump announced that the United States would initiate the process to withdraw from NAFTA and that the parties to NAFTA would revert to the pre-NAFTA trade regime unless the US Congress ratifies USMCA. [12] Pending NAFTA claims are not affected by the proposed USMCA and will continue to be governed by NAFTA. [13] Moreover, even if USMCA enters into force, the agreement clarifies that 'legacy investments', that is, investments made while NAFTA was in effect, will continue to be governed by the dispute settlement provisions of NAFTA. [14] Thus, even after the termination of NAFTA, should that happen, investors may continue to bring new claims under it relating to investments made while NAFTA was in effect as long as those claims are brought within three years following NAFTA's termination. [15] After the three-year period, each state party's consent to arbitrate under NAFTA Chapter 11 expires and those claims would then be subject to the new USMCA regime. [16]

Chapter 14 of USMCA would replace Chapter 11 of NAFTA. [17] The proposed USMCA would eliminate investor-state dispute settlement (ISDS) for US investors with future investments in Canada (and vice versa) and for Mexican investors with future investments in Canada (and vice versa). [18] As noted, this measure would not affect claims related to legacy investments brought within three years after NAFTA's termination or arbitrations already initiated under NAFTA on the date of its termination. [19] Three years after USMCA's entry into force, US investors initiating new investments in Canada and Canadian investors initiating new investments in the United States will be forced to resort to local courts to resolve their disputes, absent any change in USMCA or the two countries' entrance into a new investment agreement. In other words, there will be no treaty arbitration for such investors and their new cross-border investments. Canadian investors in Mexico and Mexican investors in Canada would be able to rely on the ISDS provisions in the Comprehensive Progressive Trans-Pacific Partnership (CPTPP), which took effect at the end of December 2018. [20] For US investors in Mexico and Mexican investors in the United States, there will be a new regime for treaty claims with an initial domestic hurdle.

Annex 14-D of the proposed USMCA will govern investment disputes between US investors and Mexico and Mexican investors and the United States. [21] Specifically, Annex 14-D provides that claimants must first try to resolve their disputes through the domestic courts (for 30 months or until they have received a final decision) before they can resort to arbitration under USMCA. [22] Furthermore, investors would have four years from the date of the offending governmental measures to launch a claim under the treaty, after which they will become time-barred. [23] If the domestic proceedings are ongoing as the statute of limitations nears, investors face a choice. If claimants choose to initiate arbitration, they must waive the right to continue any domestic court proceedings with respect to any measure alleged to constitute a breach of the treaty. [24] Otherwise, they can continue with their domestic proceedings, but they likely will be found to be barred from future treaty arbitration if such proceedings are initiated after the four year-bar has expired.

USMCA also limits the types of claims that US and Mexican investors may bring under the treaty. Under USMCA, US investors in Mexico and Mexican investors in the United States would still be allowed to assert claims based on:

- direct expropriation (article 14.8);

- a denial of national treatment once the investment has been established (article 14.4) (ie, that the state provided preferential treatment to a domestic investor in like circumstances); and
- violations of the 'most favoured nation' obligation once the investment has been established (article 14.5) (ie, that the state provided preferential treatment to a foreign investor from a third-party country in like circumstances).

However, most investors would no longer be able to assert claims alleging:

- indirect expropriation (ie, measures tantamount to expropriation);
- violations of the obligation to accord fair and equitable treatment under international law; or
- violations of national treatment or most favoured nation treatment that occurred during the process of acquiring or establishing the investment in the host country. [25]

Some limited categories of investments under USMCA would continue to have substantially the same protections as in NAFTA Chapter 11. For example, Annex 14-E of USMCA specifically states that government contracts in 'covered sectors' – including oil and natural gas, power generation services, telecommunications services, transportation services – would still be able to assert claims alleging indirect expropriation and violations of the obligation to accord fair and equitable treatment. Additionally, there is no requirement that these investors pursue local remedies before resorting to arbitration. [26] Investors in these categories may still pursue arbitration claims under this section providing six months have elapsed from the events giving rise to the claim and not more than three years have elapsed since the claimant first knew or should have known of the breach, as also required under NAFTA.

Annex 14-E of USMCA also contains a provision that allows the annex to be modified or eliminated at the USMCA parties' discretion, suggesting that the protections for specific categories of investments could be curtailed even more in the future or alternatively that the protections afforded to these designated categories could be expanded to new ones. Further, as a requirement for bringing a treaty claim for a government contract in a covered sector under Annex E, the respondent state must be a party to another international trade or investment agreement that permits investors to initiate dispute settlement procedures to resolve an investment dispute with a government. [27] In other words, if the United States or Mexico were to retreat from ISDS in their other trade or international investment agreements, the United States or Mexico could avoid liability for future government-contract-based treaty claims under USMCA.

Chapter 14 of USMCA would represent a major change to the ISDS landscape among the United States, Canada and Mexico, upending decades of ISDS practice between these three trading partners. It would impose many new limitations on the parties' substantive obligations with respect to investments. Parties considering cross-border investments and potential claims under USMCA will need to carefully consider the impact of these new restrictions.

VENEZUELA UPDATE: DEVELOPMENTS AND POLITICAL CHALLENGES

Despite Venezuela's denunciation of the ICSID Convention in 2012, which we examined in last year's article, Venezuela has continued to dominate headlines with new cases, political upheaval, social crises, developments in pending arbitrations and advancing enforcement actions.

Three new treaty arbitrations are publicly known to have been initiated against Venezuela in the past year by Smurfit Kappa, Kimberly-Clark and Dick Abanto. ExxonMobil also reinitiated an arbitration against Venezuela after an ICSID annulment committee partially annulled a US$1.6 billion award and reduced it to US$188 million.

In the past year, Venezuela achieved a trio of victories and suffered a significant loss in investment treaty arbitrations. As to the victories, in Anglo American, Venezuela defeated the claim of a UK mining investor on grounds that the mining assets in question were due to revert to the state without compensation upon the 2012 expiration of the concessions. [28] In Clorox, Venezuela defeated a US$185 million claim on grounds that the investor's mere acquisition of shares without consideration did not constitute an investment. [29] In Rusoro, Venezuela achieved a partial set-aside of a US$1.3 billion award for lack of jurisdiction ratione temporis. [30] In March 2019, however, ConocoPhillips obtained an US$8.7 billion award against Venezuela – the largest award against Venezuela to date. [31]

On the enforcement end, there have been several important Venezuela-related developments as well. As discussed in last year's article, the United States is one of the most sought-after jurisdiction to enforce investment treaty arbitration awards, including for award creditors seeking to enforce against Venezuela. In the past year, several award creditors, unable to secure voluntary payment by Venezuela, have initiated enforcement proceedings in the United States; including:

- ConocoPhillips and its US$9 billion award; [32]
- Valores Mundiales and Consorcio Andino (award of US$430 million); [33] Vestey Group (award of US$98 million); [34]
- Tenaris (award of US$137 million); [35] and
- Saint-Gobain Performance Plastics Europe (award of US$30 million). [36]

In an unusual case, Tidewater obtained a default judgment on an award of US$36 million after Venezuela failed to respond to the petition for confirmation. [37] Some award creditors, including ConocoPhillips, Rusoro and Crystallex, have reached settlements with Venezuela. However, Venezuela's compliance with its settlement agreements has been incomplete at best, forcing these creditors to maintain their judicial enforcement efforts.

As the number of award creditors and amounts owed to them increase and as the potentially executable assets decrease or are placed beyond reach, enforcement actions have intensified. In the past year, enforcement cases against Venezuela in the United States have become more promising following Crystallex's relative success. Specifically, Crystallex has made significant progress enforcing its US$1.2 billion award against Venezuela by arguing that PDVSA, Venezuela's state-owned oil company and the owner of Citgo, is Venezuela's alter ego. In August 2018, a federal court in Delaware held that Crystallex had shown PDVSA is Venezuela's alter ego and that Crystallex could, therefore, pursue enforcement against PDVSA. [38] Mirroring Crystallex's approach, other award creditors, such as Rusoro, [39] ConocoPhillips [40] and OI European Group, [41] have also been pursing alter ego claims against Venezuela and PDVSA.

Perhaps the most significant development related to Venezuelan treaty arbitration is the emergence of Juan Guaidó, who has been recognised by dozens of governments as the acting President of Venezuela. In January 2019, when President Nicolas Maduro was sworn into his second term in Venezuela, the Venezuelan National Assembly and its President, Mr Guaidó, declared Mr Guaidó as President of Venezuela on grounds that Mr Maduro's election was illegitimate. Crisis ensued as the Venezuelan Supreme Court backed Mr Maduro while the National Assembly backed Mr Guaidó – all while the country's economic woes have deepened and its population suffers from critical shortages. Venezuela has been selling its sizeable gold reserves and engaging in other short-term transactions to relieve some of the economic pressure imposed by the faltering Venezuelan economy and US sanctions, including restrictions on sales of crude oil to the United States.

The crisis and the divided recognition of Mr Guaidó give rise to complications for claimants and award creditors seeking to recover money from Venezuela. Though Mr Guaidó is recognised as the proper representative of Venezuela in the United States, he is not recognised as such in Venezuela and other countries that may exert actual control over much of the country's assets. Thus, in the United States, award creditors must grapple with the fact that their adversary may lack actual control despite having titular authority over the assets against which they wish to enforce their awards.

Amplifying these complications, Mr Guaidó has asked the Trump administration – one of his foremost backers on the world stage – to help Venezuela maintain control over Citgo, the US-based oil refinery that is PDVSA's primary asset, for use by Mr Guaidó's administration if and when it obtains power. [42] If the Trump administration takes action to protect Citgo from creditors, much of the efforts of Venezuela's award creditors will be undone.

US courts have recognised Mr Guaidó's authority and he has intervened in various award creditors' proceedings to take over Venezuela's defence from Mr Maduro's lawyers, including in Rusoro's, Crystallex's and OI European Group's award enforcement proceedings. Following the decision of the DC Circuit in the Rusoro case, [43] US courts have generally recognised Mr Guaidó as the proper representative to take positions for Venezuela. For example, OI European Group's award was confirmed after Mr Guaidó appeared and submitted arguments about the post-judgment interest rate, which the court adopted. [44] In other US enforcement proceedings, Mr Guaidó has sought brief stays, [45] but his appearance in itself is not expected to have a substantive effect on confirmation of the awards, as he continues to mount the same or similar challenges as Mr Maduro's administration did.

Mr Guaidó's emergence has also affected pending treaty arbitrations, though to a lesser extent than enforcement proceedings. In April 2019, Mr Guaidó asked ICSID to stay all ICSID proceedings against Venezuela to allow Mr Guaidó's team to take over the representation of Venezuela. [46] The World Bank and ICSID have not yet decided whether to recognise Mr Guaidó as the proper representative of Venezuela. Apart from potential delays, it remains to be seen whether Mr Guaidó's emergence will have substantive effects on pending cases. Again, Mr Guaidó's lawyers have largely followed the approach of Mr Maduro's administration, for example, announcing their intention to submit an application to annul ConocoPhillips' award for error in the calculation of damages. [47]

As noted above, the more significant consequences of Mr Guaidó's emergence are likely to be on the enforcement side: if Mr Guaidó is able to parlay his friendlier relationship with the United States into the protection and preservation of Citgo for Venezuela, despite Mr

Guaidó's current lack of domestic power, Venezuela's award creditors could suffer a serious setback unless the United States requires commitments from Venezuela for existing and future judgment creditors in exchange for that protection. Either way, Venezuela will likely continue to be a top source of significant developments in Latin American treaty arbitration as its political leadership and creditors alike search for stability amid a shrinking pool of assets.

THE RELATIONSHIP BETWEEN INVESTMENT PROTECTION AND ENVIRONMENTAL PROTECTION

One of the central questions that have occupied debate on the appropriate scope of investment treaty protection – including in Latin America – is the proper balance to be drawn in providing, on the one hand, effective legal protection to foreign investments and, on the other hand, sufficient regulatory flexibility to governments to act in the public interest, including to protect the environment and vulnerable communities. DR-CAFTA obligates parties to accord to covered investments fair and equitable treatment in accordance with customary international law, among other obligations typical of modern investment treaties. [48] DR-CAFTA's investment protection chapter also includes a provision on environmental considerations in its article 10.11:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. [49]

Similarly, DR-CAFTA's Chapter 17, which is a dedicated chapter on the environment, provides in article 17.1:

> Levels of Protection. Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that its laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies. [50]

The trade agreement is silent as to how the two quoted provisions interact with the scope of investment protections – to what extent they subordinate investment protections offered by Chapter 10 to the state's sovereign prerogative to ensure and improve environmental protection (as respondent states might be inclined to argue) and to what extent these provisions require environmental measures to be 'otherwise consistent' with investment protections, meaning that they do not diminish the levels of investment protection guaranteed (as claimant investors may argue). The tribunal in David Aven et al v Costa Rica recently faced this question in a dispute between a group of investors and Costa Rica concerning the Las Olas residential and commercial real estate development project. [51]

The Aven tribunal held that DR-CAFTA's treaty scheme 'subordinate[s]' the rights of investors to protection to the state's right to ensure that investments are 'carried out in a manner sensitive to environmental concerns' to some extent. [52] However, while the DR-CAFTA treaty scheme gives 'preference' to standards of environmental protection, the subordination is 'not absolute' and does not imply that the state has an 'absolute right' to implement environmental laws in any manner desired. [53] Thus, both the adoption and enforcement of environmental laws must be conducted in a 'fair, non-discriminatory fashion' following 'principles of due process'. [54]

The Aven tribunal may be seen as adopting a middle-ground position between the respondent's and claimants' positions, though the line is not clear between a lawful environmental measure and one transgressing investment guarantees. Moreover, although the Aven tribunal referred to principles of contextual interpretation embodied in the Vienna Convention on the Law of Treaties (VCLT), it did not clearly explain how these provisions bear on one another. In particular, questions remain as to whether, and to what extent, DR-CAFTA's environmental provisions provide interpretive colour to the meaning of 'minimum standard of treatment' under DR-CAFTA. The Aven tribunal's ambiguity may, however, be attributable to DR-CAFTA's ambiguous structure itself, throwing into the spotlight how treaty drafting techniques can alter the balance between regulatory autonomy and investment protection.

Ultimately, due to the nature of the facts involved, this theoretical debate did not need to be resolved with academic precision. For the Aven tribunal, the claimant investors had committed clear violations of Costa Rica's environmental laws – the investors did not appear to have 'sought and received proper advice to develop the Las Olas Project', or worse, that they 'chose to ignore' such advice. [55] Costa Rica was accordingly justified under its environmental laws and regulations to shut down the development project.

According to the Aven tribunal, the claimants' Las Olas Project site included within its area at least one 'wetland' and 'forest' within the definition of Costa Rican environmental laws. [56] Consequently, among other permits that the claimants had to acquire to commence development of a real estate project, they had to obtain an environmental viability permit from the national environmental agency. [57] However, the claimants attempted to evade this environmental permitting regime and failed to disclose certain environmental information to the authorities – in the precise area of their development project where the wetland existed. [58]

The Aven tribunal found the wetland had been impacted by works undertaken by the claimants. [59] In particular, evidence suggested that the wetlands had been drained and filled. All of these construction works were performed without the proper permits as required under Costa Rican law. [60]

Accordingly, for the tribunal, Costa Rica's response, which included filing criminal charges against the claimant investors, was merited under the laws of Costa Rica, which were consistent with international law and Costa Rica's obligations under DR-CAFTA. [61] Because Costa Rica had not breached its treaty obligations, no damages were due to the claimants. [62]

This demonstrates the importance of abiding by all local environmental permitting requirements when pursuing a foreign investment project, especially in light of the regulatory discretion that investment treaties such as DR-CAFTA grant to host states. Failure to comply with environmental and other permitting regulations can put an investment at risk, giving the host state justification to take adverse action against the investment. On the other hand, states cannot use environmental concerns as a guise to expropriate foreign investments. The relationship between investment protection and environmental protection will undoubtedly continue to feature in disputes in the Americas.

INCREASED TRANSPARENCY IN INVESTMENT ARBITRATION

Many voices have called for increased transparency in international investment arbitration. The primary rationale is that increased visibility in the decision making processes of investment arbitration increases trust and satisfaction in the system and decreases the likelihood of corruption, both in the making of the investment and in the arbitral decision-making process. [63] In line with this rationale, states, arbitral institutions, users of the investment arbitration system and institutions that administer these disputes have sought to foster greater transparency. For example, the proposed amendments to the ICSID Rules, released this year, would increase transparency in arbitral proceedings through the availability of arbitral documents, the publication of arbitral awards and the disclosure of certain funding arrangements by parties to the proceedings. [64] The proposed text of USMCA would also provide for greater transparency. And Argentina, through its domestic legal system, has also sought to increase the transparency of arbitral awards. These efforts towards increased transparency will have an effect on arbitration in the Americas and place the system of ISDS under a stronger microscope worldwide.

In August 2018, ICSID released its proposed amendments to the ICSID Rules (the Proposed ICSID Rules). One of the primary concerns behind these amendments is increased public access to the arbitral process. Proposed Rules 44 and 45 would make publication of awards and other arbitration documents more widespread. The Proposed ICSID Rules would also allow tribunals to admit observers to hearings and allow ICSID to publish hearing recordings and transcripts on its website. [65] In discussions surrounding the amendments to the ICSID Rules, Latin American countries, including Argentina and Costa Rica, suggested reforms that increase transparency requirements for proceedings. [66]

Furthermore, the Proposed ICSID Rules would require parties to disclose funding arrangements for the proceedings and the identities of funders. [67] These proposed amendments address concerns regarding arbitrator links to funders that have arisen in a number of cases, including in South American Silver v Bolivia, where the tribunal ordered disclosure of the identity of the funder. [68] The Proposed ICSID Rules stop short of requiring disclosure of the funding agreement itself, as was required in García Armas v Venezuela. [69]

The Proposed ICSID Rules would also make express a power that tribunals have had to allow tribunals to order security for costs in the right circumstances upon the request of a party, as was also required in García Armas v Venezuela. [70] To determine whether to order a party to post security, the Proposed ICSID Rules provide the following factors:

- the party's ability and willingness to comply with an adverse costs decision;
- the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim;
- the conduct of the parties; and
- all other relevant circumstances. [71]

The Proposed ICSID Rules are consistent with prior jurisprudence holding that the existence of third-party funding in itself is not sufficient to warrant an order requiring security for costs. [72]

Other new investment agreements also provide for increased transparency of arbitral proceedings. Specifically, under the proposed USMCA (discussed in more detail above), the respondent must make the following documents available to the public:

- the notice of intent;
- the notice of arbitration;
- pleadings, memorials and briefs submitted to the tribunal by a disputing party;
- written submissions regarding the conduct of the arbitration or consolidation;
- minutes or transcripts of hearings of the tribunal, if available; and
- orders, awards and decisions of the tribunal. [73]

This is consistent with the transparency provisions that same state parties agreed to in NAFTA and their Free Trade Commission interpretation of 2001.

States have also used domestic law to increase transparency surrounding arbitral proceedings. One important example occurred in Argentina in 2018, when an appeals court ruled that decisions issued in cases at ICSID involving Argentina are public information and must be released under Argentina's freedom-of-information law. In November 2017, an Argentine national, Mr Perez Aznar, asked that Argentina give him access to certain unpublished arbitral decisions. In January 2018, Argentina released the requested decisions to Mr Perez Aznar, but stated that the release 'does not constitute consent to publication' of the decisions, that the decisions remained confidential and that Mr Perez Aznar would be liable for any damages flowing from further disclosure. [74]

Mr Perez Aznar challenged this ruling. Ultimately, the court ruled that article 48(5) of the ICSID Convention (which states that ICSID shall not publish an award without the consent of the parties) applied only to ICSID itself and did not prevent parties to ICSID cases from disclosing materials on their own. [75] In making its ruling, the court found that:

> the harmonious interplay of the domestic and international rules and the principles established in the material examined above require the state agency . . . to adopt an attitude tending towards transparency, in order to ensure the effective exercise of the right of access to information. [76]

The Argentine court ordered the publication of three previously unavailable decisions – a decision on the merits in Mobil Exploration and Development Inc v Argentina, a decision on jurisdiction in EDF v Argentina and a final award in Houston Industries v Argentina. The court also ordered the release of two short decisions on stay of enforcement of the EDF v Argentina final award.

As the demand for transparency in investment treaty arbitration continues, one should expect similar developments as rules are amended, treaties are signed and domestic law develops.

Notes
[1] ICSID Caseload Statistics Issue 2019-1, ICSID at 26 (2019).
[2] ICSID Caseload Statistics Issue 2019-1, ICSID at 26 (2019).
[3] ICSID Caseload Statistics Issue 2019-1, ICSID at 27 (2019).
[4] ICSID Caseload Statistics Issue 2019-1, ICSID at 34 (2019).

[5] Permanent Court of Arbitration, Cases, available at https://pca-cpa.org/en/cases/.
[6] LCIA 2018 Annual Casework Report, p 9, available at file:///C:/Users/JulianneJaquith/Downloads/LCIA%202018%20Annual%20Casework%20Report.pdf.
[7] ‘U.S. and Canada Reach Trade Deal to Salvage Nafta’, The New York Times (30 September 2018), available at https://www.nytimes.com/2018/09/30/us/politics/us-canada-nafta-deal-deadline.html.
[8] ‘USMCA: Trump Signs New Trade Agreement With Mexico And Canada To Replace NAFTA’, NPR (30 November 2018), available at https://www.npr.org/2018/11/30/672150010/usmca-trump-signs-new-trade-agreement-with-mexico-and-canada.
[9] Id.
[10] ‘New NAFTA deal “in trouble”, bruised by elections, tariff rows’, Reuters (7 April 2019), available at https://www.reuters.com/article/us-trade-nafta-analysis/new-nafta-deal-in-trouble-bruised-by-elections-tariff-rows-idUSKCN1RJ0BS.
[11] ‘Mexico, Canada plow ahead with trade pact ratification plan despite Trump threats’, Reuters, (31 May 2019), available at https://www.reuters.com/article/us-usa-trade-mexico-usmca/mexico-canada-plow-ahead-with-trade-pact-ratification-plan-despite-trump-threats-idUSKCN1T12FW.
[12] ‘Trump Says He’ll Give Notice of Nafta Exit in Bid to Pass USMCA’, Bloomberg (1 Dec. 2018), available at https://www.bloomberg.com/news/articles/2018-12-02/trump-to-notify-congress-soon-that-he-s-terminating-nafta-accord.
[13] UMCA Section 14-C.
[14] ‘Legacy investment’ is defined in Section 14-C as an investment of an investor of another party in the territory of the party established or acquired between 1 January 1994 (when NAFTA came into force), and the date of termination of NAFTA 1994, and which existed on the date of USMCA’s entry into force.
[15] UMCA Chapter 14, article 14.2(3); Annex 14-C.
[16] UMCA Annex 14-C.
[17] USMCA Chapter 14.
[18] USMCA article 14.2.
[19] UMCA Annex 14-C.
[20] ‘Countering Global Protectionism, Pacific Trade Pact Nears Takeoff’, Reuters (30 October 2018), available at https://www.reuters.com/article/us-trade-tpp/trans-pacific-trade-deal-to-come-into-force-on-dec-30-nz-minister-idUSKCN1N42QV.
[21] USMCA Annex 14-D.
[22] USMCA Annex 14.D.5.
[23] USMCA Annex 14-D.5.
[24] USMCA Annex 14-D.5.
[25] USMCA Annex 14-D.
[26] USMCA Annex 14-E.
[27] USMCA Annex 14-E.
[28] Anglo American PLC v Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019.
[29] Clorox España SL v Bolivarian Republic of Venezuela, PCA Case No. 2015-30, Award, 20 May 2019.
[30] Rusoro Mining Ltd v Bolivarian Republic of Venezuela, Paris Court of Appeals, No. RG 16/20822 - No. Portalis 35L7-V-B7A-BZ2EA, Decision, 29 January 2019.
[31] ConocoPhillips v Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Award, 8 March 2019.
[32] ConocoPhillips v Bolivarian Republic of Venezuela, No. 19-cv-00683, Dkt 1 (DDC, 11 March 2019).
[33] Valores Mundiales and Consorcio Andino v Bolivarian Republic of Venezuela, No. 19-cv-00046, Dkt 1 (DDC, 8 January 2019).

[34] Vestey Group Ltd v Bolivarian Republic of Venezuela, No. 18-cv-01456, Dkt 1 (DDC, 20 June 2018).
[35] Tenaris v Bolivarian Republic of Venezuela, No. 18-cv-01373, Dkt 1 (DDC, 8 June 2018).
[36] Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela, No. 18-cv-01963, Dkt 1 (D Del., 11 December 2018).
[37] Tidewater Investment v Bolivarian Republic of Venezuela, No. 17-cv-01457, Dkt 20 (DDC, 17 December 2018).
[38] Crystallex Int'l Corp v Bolivarian Republic of Venezuela, No. 17-mc-151, Dkt 83 (D Del, 10 August 2018).
[39] Rusoro Mining Ltd v Bolivarian Republic of Venezuela, No. 18-cv-01458, Dkt 1 (SD Tex, 7 May 2018).
[40] ConocoPhillips v Petróleos de Venezuela, SA, No. 17-cv-00028, Dkt 1 (D Del, 10 January 2017).
[41] OI European Group v Bolivarian Republic of Venezuela, No. 19-cv-00290, Dkt 1 (D Del, 11 February 2019).
[42] 'Exclusive: Guaido says Washington should help Venezuela keep U.S. refiner Citgo', Reuters, 22 May 2019, available at www.reuters.com/article/us-venezuela-politics-exclusive/exclusive-guaido-says-washington-should-help-venezuela-keep-u-s-refiner-citgo-idUSKCN1SS2WI.
[43] Rusoro Mining Ltd v Bolivarian Republic of Venezuela, No. 18-7044, Doc. 1785518 (DC Cir, 1 May 2019).
[44] OI European Group v Bolivarian Republic of Venezuela, No. 16-1533, Dkt 85 (DDC, 21 May 2019).
[45] See, eg, Crystallex Int'l Corp v Bolivarian Republic of Venezuela, Nos. 18-2797, 18-3124, Doc. 003113202359 (3d Cir, 3 April 2019).
[46] 'Guaido calls on ICSID to take sides', Global Arbitration Review, 2 May 2019, available at https://globalarbitrationreview.com/article/1190944/guaido-calls-on-icsid-to-take-sides.
[47] 'Venezuela's Guaido to seek to annul $8.7 bln Conoco award', Reuters, 16 April 2019, available at www.reuters.com/article/venezuela-politics-conocophillips/update-1-venezuelas-guaido-to-seek-to-annul-8-7-bln-conoco-award-idUSL1N21Y1H6.
[48] DR-CAFTA, article 10.5.
[49] DR-CAFTA, article 10.11.
[50] DR-CAFTA, article 17.1.
[51] David Aven et al v Costa Rica, Case No. UNCT/15/3, Final Award, 18 September 2018.

[52] Aven v Costa Rica, paragraph 412.
[53] Aven v Costa Rica, paragraphs 412, 413.

[54] Aven v Costa Rica, paragraph 413.

[55] Aven v Costa Rica, paragraph 450.
[56] Aven v Costa Rica, paragraphs 506, 518.

[57] Aven v Costa Rica, paragraph 520.
[58] Aven v Costa Rica, paragraphs 552, 569, 579.
[59] Aven v Costa Rica, paragraphs 584–587.
[60] Aven v Costa Rica, paragraphs 585–587.
[61] Aven v Costa Rica, paragraphs 585, 620, 630.

[62] Aven v Costa Rica, paragraph 688.
[63] Heunsik Park & John Blenkinsopp, 'The Roles Of Transparency And Trust In The Relationship Between Corruption And Citizen Satisfaction', 77(2) Int'l Rev of Admin. Sciences 254 (2011).
[64] Proposals for Amendment of the ICSID Rules – Working Paper, p 855.
[65] Proposals for Amendment of the ICSID Rules, March 2019, Rules 44–45.
[66] Ana Tornil Cervantes, and Alexander David Barnes, 'The Trajectory of International Arbitration in Latin America and Current Trends in ISDS', Kluwer Arbitration Blog,

http://arbitrationblog.kluwerarbitration.com/2019/02/26/the-trajectory-of-international-arbitration-in-latin-america-and-current-trends-in-isds/.
[67] Proposals for Amendment of the ICSID Rules, March 2019, Rule 21.
[68] South American Silver Limited v Plurinational State of Bolivia, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, paragraph 79.
[69] Manuel García Armas et al v Bolivarian Republic of Venezuela, UNCITRAL, PCA Case No. 2016-08, Procedural Order No. 9 (Decision on Request for Provisional Measures) (original in Spanish), 20 June 2018, paragraphs 2–3.
[70] Proposals for Amendment of the ICSID Rules, March 2019, Rule 51.
[71] Id.
[72] South American Silver v Bolivia, Procedural Order No. 10, 11 January 2016, paragraph 76 ('[t]he existence of [a] third-party funder alone does not evidence the impossibility of payment or insolvency. It is possible to obtain financing for other reasons. The fact of having financing alone does not imply risk of non-payment'); Garcia Armas v Venezuela, Procedural Order No 9, 20 June 2018, paragraphs 250–251, 261.
[73] USMCA article 14.D.8.
[74] Jarrod Hepburn, 'Argentine Court Rules That ICSID Decisions Involving Argentina Must Be Published Under Domestic Foi Law – Leading To Successful Acquisition Of Previously-Confidential Exxon-Mobil And Houston Industries Rulings', IA Reporter,

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[75] Id.
[76] Id.

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