The Arbitration Review of the Americas

2018

Investment Treaty Arbitration in the Americas

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Generated: February 8, 2024

Investment Treaty Arbitration in the Americas

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Summary

The Americas have experienced a strong uptick in investment treaty arbitration activity over the past year. In 2016, 17 per cent of the 47 new investment arbitration cases registered before the International Centre for Settlement of Investment Disputes (ICSID) under the ICSID Convention and Additional Facility Rules included a South American country as a party, while an additional 6 per cent included Spanish-speaking countries from the Caribbean and Central America.[1] ICSID registered a total of 14 cases, involving Colombia (three), Venezuela (three), Panama (three), Peru (one), Uruguay (one), Mexico (one), Canada (one) and the United States (one).[2] Thirteen per cent of the arbitrators, conciliators and ad hoc committee members appointed in cases registered in 2016 were South American nationals (21 total), 2 per cent were from Central America (three total), and 18 per cent were from North America (28 total).[3] Claimants initiated cases under the UNCITRAL Rules against Bolivia,[4] Colombia,[5] the Dominican Republic,[6] Ecuador,[7] Mexico[8] and Peru.[9] At the opposite end of the arbitration 'life cycle', the past 12 months saw an increasing number of cases involving countries in the Americas come to a close. Between 1 June 2016 and 21 June 2017, Venezuela[10] and Costa Rica[11] each had two ICSID awards rendered against them; ICSID awards were also rendered against Panama,[12] Peru,[13] Uruguay,[14] El Salvador,[15] Argentina[16] and Canada.[17] The region continues to see foreign investment from all over the world, suggesting that it will likely continue to see investment treaty disputes for the foreseeable future.[18]

In the past year, several new international investment treaties involving the Americas have been in negotiations or were signed, but only three were ratified: (i) the Canada-Hong Kong Foreign Investment Promotion and Protection Agreement (FIPA), (ii) the Canada-Mongolia FIPA, and (iii) the United States-Argentina Trade and Investment Framework Agreement (TIFA). Of these three, only the Canadian FIPAs provide for investor-state dispute resolution. The Canada-Hong Kong FIPA provides for UNCITRAL arbitration, and the Canada-Mongolia FIPA provides for ICSID or UNCITRAL arbitration. The United States and Argentina already have a BIT in force (since 1994) that provides for investor-state dispute resolution, so the new TIFA understandably does not have such a provision.

The past year also saw the termination of many international investment treaties in the Americas, as a result of Ecuador's termination of all 16 of its BITs that remained in force. By presidential decree on 16 May 2017, Ecuador terminated its BITs with Argentina, Bolivia, Canada, Chile, China, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, the United States and Venezuela. Ecuador's termination of these BITs followed the May 2017 report of a national commission (CAITISA, by its Spanish acronym), finding that the BITs failed to give the promised level of foreign direct investment, were contrary to developmental objectives, and disproportionately favoured investors at significant expense to Ecuador.[19] The 108-page report discussed various international arbitral awards in detail, including the award issued in the ***Burlington*** case addressed below. The report recommended the termination of all BITs, which Ecuador did on 16 May 2017. Notably, however, many of the terminated BITs have sunset clauses that will allow existing investors to continue to rely on them for years to come with respect to investments made prior to the termination of the applicable BITs.

With these developments as backdrop, this article briefly 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 investment dispute settlement system.

First, three tribunals issued decisions on counterclaims brought by respondent states. Of these three decisions, ***Burlington v Ecuador*** was the only one to award damages on a counterclaim; the counterclaim failed on the merits in ***Urbaser v Argentina***, and the tribunal in ***Rusoro Mining v Venezuela*** dismissed the counterclaim for lack of jurisdiction.

Second, as an update to last year's article on time limitations and submissions from non-disputing parties, this year saw another trio of decisions on this topic: ***Eli Lilly v Canada***, ***Berkowitz v Costa Rica*** and***Rusoro Mining v Venezuela***.

Third, in ***García v Venezuela***, a Paris court hearing set-aside proceedings rejected Venezuela's jurisdictional objection against dual nationals pursuing claims under the Spain-Venezuela BIT.

Finally, President Trump formally notified the US Congress of his intention to renegotiate the North America Free Trade Agreement (NAFTA). Although officials in his administration have offered few specifics, they have suggested that there may be changes to the investor-state dispute settlement mechanism under Chapter 11 of NAFTA. Any changes to the investment arbitration mechanism under NAFTA may have cascading effects on other BITs and FTAs in Latin America and across the globe. As a result of uncertainties over the direction of US economic policymaking, the United Nations forecasts that, in 2017, foreign direct investment in the region will be adversely affected.[20]

COUNTERCLAIMS

As the CAITISA report circumspectly recognised, not all of Ecuador's cases have ended in losses for the state.[21] In fact, in the recent ***Burlington*** case, Ecuador won an award of $41.8 million for counterclaims against an investor.[22] Though this is a significant victory for Ecuador, it does little to assuage the concerns laid out in the CAITISA report, as the same tribunal awarded the investor much larger damages of $379.8 million in the same case.

In***Burlington v Ecuador***, an ICSID tribunal exercised jurisdiction over counterclaims based on the investor's and Ecuador's direct agreement that the arbitration was the appropriate forum for resolution of counterclaims arising out of certain investments. After finding a jurisdictional basis in the parties' direct agreement, the tribunal also found that jurisdiction was proper under Article 46 of the ICSID Convention, which allows for jurisdiction over counterclaims 'arising directly out of the subject-matter of the dispute', subject to consent and other requirements for ICSID jurisdiction.[23] The tribunal held that Ecuador's counterclaims satisfied the independent requirements for ICSID jurisdiction, and awarded Ecuador approximately $41.8 million for environmental and infrastructure counterclaims.[24] This sum is significant, though a fraction of the approximately $380 million that the tribunal awarded the investor.[25] The tribunal also noted the parallel but still-pending ***Perenco*** arbitral proceedings for the point that Ecuador should not recover twice for the same counterclaims.[26]

Ecuador was not alone in this regard, as Argentina also won a jurisdictional decision on counterclaims. In ***Urbaser v Argentina***, the tribunal found jurisdiction over the state's counterclaims but rejected them on the merits.[27] In finding jurisdiction, the tribunal analysed the broadly worded Argentina-Spain BIT, which provided for ICSID arbitration over 'disputes arising between a Party and an investor of the other Party in connection with investments'.[28] Argentina argued that the investors had violated the residents' right to water by failing to invest funds or carry out various aspects of the investment. For the tribunal, this was close

enough of a relation to the investments and the dispute to satisfy the BIT's jurisdictional scope as well as that of Article 46 of the ICSID Convention. After finding jurisdiction, however, the tribunal rejected Argentina's counterclaims on the merits, finding that although the investor was bound by a negative duty to not 'engage in activity aimed at destroying [human] rights', there was no basis to hold the investors responsible for Argentina's positive obligations to uphold the residents' right to water.[29]

On the other hand, in ***Rusoro Mining v Venezuela***, the tribunal held it had no jurisdiction over Venezuela's counterclaim. Venezuela argued that the investor had inadequate mining practices that damaged the mine and impaired its value.[30] The tribunal looked to the text of the Canada-Venezuela BIT, which restricted the scope of arbitrable disputes to those based on a 'claim by the investor that a measure taken or not taken by the [host State] is in breach of this Agreement', and allowed only investors to submit disputes to arbitration.[31] Accordingly, the tribunal dismissed Venezuela's counterclaim for lack of jurisdiction.[32]

These cases show that while counterclaims in investment treaty arbitrations remain rare, successful ones remain even rarer. Though ***Burlington*** and ***Urbaser*** surmounted the significant jurisdictional hurdles that states often face - usually in the form of restrictive BIT text (such as in ***Rusoro***) or the lack of investor consent to submit counterclaims to arbitration - both cases resulted in what some may dismiss as pyrrhic victories for the respondent state.

TIME LIMITS

In last year's article, we discussed non-disputing parties' interpretations of time limitations in free trade agreements, noting Judge Brower's concern that non-disputing parties 'club together' to support the respondent state's restrictive position.[33] In the cases discussed - ***Eli Lilly v Canada***, ***Corona Materials v Dominican Republic*** and***Mercer International v Canada*** - non-disputing parties argued that 'neither a continuing course of conduct nor the occurrence of subsequent acts or omissions can renew or interrupt the three-year limitation period once it has commenced to run.'[34] Time limits remained a live issue in the past year, in the form of the awards in ***Eli Lilly v Canada***, ***Berkowitz v Costa Rica*** and ***Rusoro Mining v Venezuela***. And in both***Eli Lilly*** and ***Berkowitz***, the tribunals considered submissions from non-disputing parties as to the limitation period issue.

In ***Eli Lilly***, the claimant alleged breaches of the NAFTA based on the Canadian courts' invalidation of certain patents.[35] The three-year limitation period under NAFTA Articles 1116(2) and 1117(2) had commenced on 12 September 2010; the claimant initiated arbitration on 12 September 2013, within that time frame. Though the final Supreme Court decisions were issued within the limitation period in December 2011 and May 2013, the claimant alleged that the basis of the decisions was the courts' adoption of an arbitrary and discriminatory legal doctrine in the mid-2000s - which, Canada argued, meant that the limitations period should have begun to count in 2010, which in turn would have made claimant's NAFTA action time-barred.[36]

As discussed in last year's article, Mexico and the United States filed non-disputing party submissions, arguing that the three-year limitation period of NAFTA should not be suspended, prolonged, or renewed by a continuing course of conduct. The tribunal noted this position but avoided it altogether, holding instead that the 'Claimant has not advanced a theory of continued breach or otherwise advocated the suspension or extension of the limitation period'.[37] The tribunal appeared to deliberately avoid the legal issue, resting its decision on its factual determination that 'the alleged breach for each investment . . .

occurred at a single point in time within the three-year period.'[38] The tribunal did note, citing the ***Mondev*** and ***Feldman*** decisions, that it would consider 'earlier events that provide the factual background to a timely claim'.[39]

In ***Berkowitz***, in contrast to ***Eli Lilly***, the tribunal squarely addressed the claimants' allegations of a continuing breach or composite act straddling the commencement of the limitation period.[40] The claimants had invested in beachfront properties that were subject to expropriation orders several years before the limitation period commenced (and before the CAFTA's entry into force). The claimants argued that they did not know about the expropriation orders when they were issued, and that the continued failure of Costa Rica to provide adequate compensation constituted an independently actionable breach.

El Salvador and the United States made submissions as non-disputing parties, not explicitly in defence of Costa Rica, but supporting the strict interpretation of the three-year limitation period under CAFTA that formed part of Costa Rica's defence.[41] El Salvador also observed that where a treaty calls for a six-month negotiation period before initiating arbitration, as does CAFTA, this effectively shortens the three-year limitation period to two years and six months, as an investor will not be able to initiate a timely arbitration unless it begins negotiations six months before filing.

The tribunal, in line with the non-disputing parties' submissions and in agreement with Corona Materials and other similar cases, adopted a strict interpretation of the three-year limitation period and held that the majority of the claims fell beyond the limitation period.[42] The tribunal only left open a question the potential survival of claims concerning three properties affected by judgments issued more than a year after the arbitration was initiated.[43] The investors withdrew those claims, however, cementing Costa Rica's victory in the case.[44]

Finally, though based on a BIT and not a free trade agreement, the tribunal in Rusoro Mining v Venezuela applied a three-year time limitation in the same manner.[45] The tribunal noted the similarity of the three-year limitation period in the NAFTA and the Canada-Venezuela BIT, which formed the basis of the parties' consent.[46] The parties agreed that the limitation period commenced on 17 July 2009, three years before the investor filed its request for arbitration.[47] The investor argued that certain measures before 17 July 2009 should be considered because they formed a 'chain of actions' and were 'part of a composite breach that crystallized after the time bar became applicable'.[48] The tribunal found that there was not a sufficient connection between the pre- and post-period acts, and, therefore, held that the investor's claims based on those earlier measures were time-barred.[49] The investor prevailed on its expropriation claim for the later acts only.[50]

Though***Eli Lilly*** decided this issue in favour of the investor and ***Berkowitz*** and ***Rusoro*** decided the issue in favour of the respondent state, all three tribunals were careful to emphasise the factually specific nature of their decisions. Even under a strict interpretation of a limitation period, each case will be assessed on its own facts as to whether post-period measures are truly independent from pre-period events. Tribunals, however, appear to be growing in agreement, under multilateral and bilateral treaties alike, that time limitations generally cannot be bypassed with allegations of a continuing course of conduct, further limiting the ***UPS v Canada*** holding that 'continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly.'[51]

PARIS COURT AFFIRMS DUAL NATIONALS CAN PURSUE CLAIMS UNDER BIT

Practitioners in the arbitration community have watched with interest the set-aside proceedings for the jurisdictional award in the ***García v Venezuela*** case, where an UNCITRAL tribunal allowed claimants with dual Spanish-Venezuelan nationality to bring claims against Venezuela under the Spain-Venezuela BIT.

Dual nationals holding the citizenship of the host state cannot bring investment claims under the ICSID Convention. In particular, Article 25 of the ICSID Convention limits the jurisdiction of ICSID to disputes between a 'Contracting State' and a 'national of another Contracting State', defined as 'any natural person who had the nationality of a Contracting State other than the State Party to the dispute' but excluding 'any person who . . . also had the nationality of the Contracting State party to the dispute'. The claimants in the ***García*** case, however, brought investment claims not under the ICSID Convention, but under the UNCITRAL Arbitration Rules, which, like the applicable treaty, are silent on dual nationals' standing to bring investment claims.

Both claimants had dual nationality. García Armas was born in Spain and moved to Venezuela in the 1960s. He lost his Spanish nationality in 1972 when he became a Venezuelan national, but re-acquired it in 2004. He possessed both nationalities at the time the contested governmental measures were adopted and the treaty claim was filed. García Gruber is a Venezuelan national by birth and acquired Spanish citizenship in 2003, keeping her Venezuelan nationality at all times.

On 15 December 2014, the arbitral tribunal issued a decision on jurisdiction holding that the Spain-Venezuela BIT did not exclude claims by dual nationals, and accordingly found that it had jurisdiction over the Garcías' claims against Venezuela. The tribunal examined the BIT's language and found that the BIT did not contain express restrictions against dual nationals bringing claims against either contracting state. The tribunal reasoned that the specific provisions of the Spain-Venezuela BIT constituted lex specialis, overriding general rules of customary international law and other implied principles. This decision attracted great interest in the arbitration community, in part because it upheld jurisdiction over the claims of dual nationals against a state of their own nationality.

Although the tribunal was unanimous in the standing of dual nationals to bring claims under the Spanish-Venezuela BIT, the arbitrators split on the question of when a claimant must hold Spanish nationality. Two arbitrators, Professors Eduardo Grebler and Guido Tawil, formed a majority, concluding that it was sufficient for the claimants to hold Spanish nationality (i) on the date of the alleged treaty breaches, and (ii) on the date of the commencement of the arbitration. In a dissenting opinion, arbitrator Rodrigo Oreamuno argued that the nationality requirement must also be satisfied on the date of making the investment in Venezuela.

While the arbitration proceeded to the merits phase, Venezuela applied to set aside the jurisdictional award before courts in Paris, the seat of the arbitration. Venezuela asserted that the tribunal wrongly upheld jurisdiction because customary international law does not allow dual nationals to bring claims against their own state.

On 25 April 2017, the Paris Court of Appeal issued a decision partly upholding Venezuela's challenge. Importantly, however, while the court partially annulled the jurisdictional award, it affirmed the central tenet that dual nationals can bring claims under the Spain-Venezuela BIT against either contracting state.

According to the Paris court, the nationality requirement also must be satisfied at the time when claimants make their investment, agreeing with the dissenting view of Mr Oreamuno.

In the court's view, because the majority of the tribunal erred on this point, part of the jurisdictional award had to be annulled. However, the court confirmed the rest of the award, agreeing that the Spain-Venezuela BIT did not expressly bar dual nationals from bringing claims. The court also rejected Venezuela's view that customary international law prohibits nationals from pursuing international claims against their own state.

Dual nationals planning on bringing investment claims against one of their states of nationality will now find strong support in the Paris Court of Appeal's decision. Indeed, there are a number of ongoing arbitrations involving dual nationals, such as ***Pugachev v Russian Federation***[52] (UNCITRAL arbitration involving a French-Russian national under the France-Russia BIT) and ***Dawood Rawat v Republic of Mauritius***[53] (UNCITRAL arbitration involving a French-Mauritian national under the France-Mauritius BIT). Practitioners, however, should carefully evaluate the limits to a tribunal's jurisdiction ratione temporis in light of the Paris court's view that foreign nationality must be held at the date of the making of the investment.

RENEGOTIATION OF THE NAFTA

President Donald Trump campaigned on a platform of renegotiating the United States' trade deals, describing the NAFTA in particular as 'the worst trade deal ever'. In tune with what he has dubbed his 'America First' policy, President Trump formally withdrew from the Trans-Pacific Partnership negotiations. Within days of taking power, Trump's White House announced that, '[i]f our partners refuse a renegotiation that gives American workers a fair deal, then the President will give notice of the United States' intent to withdraw from NAFTA.'[54]

President Trump has followed through on his campaign promise. On 18 May 2017, the Trump administration formally notified Congress that it plans to renegotiate the NAFTA.[55] The notice triggers a 90-day notice period before trade negotiations may be initiated. Although the notice was light on specifics, it advocated for the 'modernization' of the NAFTA to address topics including intellectual property rights, regulatory practices, state-owned enterprises and customs procedures.[56] The notice did not make specific mention of the future of investment arbitration under NAFTA, however. The silence regarding arbitration notwithstanding, labour and environmental rights groups have promised to lobby for the elimination of investment arbitration under a new trade agreement.[57] Public Citizen, for example, has derided the investor-state dispute settlement process as a 'corporate power grab' that creates 'new rights for multinational corporations to sue the US government in front of a tribunal of three corporate lawyers.'[58]

Under Chapter 11, NAFTA provides a mechanism for investor-state dispute resolution, which some commentators believe led to a proliferation of investments in all three countries.[59] There have been at least 59 investment arbitrations under NAFTA.[60]

Despite his stated positions, President Trump's 'America First' policy has not been entirely hostile to foreign investors. In March, President Trump approved TransCanada's Keystone XL Pipeline, a project that the Obama Administration had previously rejected. TransCanada had initiated arbitration against the United States under Chapter 11 of NAFTA, arguing that the refusal to grant a presidential permit violated the substantive protections that NAFTA affords investors.[61] However, in light of President Trump's approval order, TransCanada discontinued the NAFTA arbitration on 24 March 2017.[62]

This openness to foreign investors, however, may be merely incidental and not part of a broader, considered plan toward liberal relations with foreign investors. President Trump's broader posture on NAFTA could well have the opposite effect in the investment community, creating uncertainty as to the fate of investor-state disputes under the NAFTA.

The upcoming negotiations of NAFTA are likely to focus on contentious issues such as tariffs, trade barriers, and rules of origin. They could also impact the availability and scope of investor-state arbitration under Chapter 11, however. President Trump, for example, could seek to limit the ability of Canadian or Mexican companies to sue the US government or could seek renegotiation of the substantive protections afforded under NAFTA, though there is no express indication at this time that these proposals are being contemplated. US Trade Representative Robert Lighthizer has said that the US intends to 'rebalance', but not remove, investor-state dispute settlement under NAFTA.[63] Meanwhile, Democratic legislators, such as Senator Sherrod Brown[64] and Representative Peter DeFazio,[65] have advocated for the complete removal of the investor-state dispute settlement provision, arguing that it favours multinational corporations and undermines US sovereignty.

As mentioned, President Trump could, and has expressly threatened to, opt for the more radical option of withdrawing from NAFTA if his oft-touted negotiation skills don't yield the deal he wants. Withdrawal from NAFTA is quite straightforward. NAFTA Article 2205 requires only written notice to the other parties, with withdrawal becoming effective six months after the notice.

Withdrawal from NAFTA could have significant consequences for US investors with investment disputes against Mexico or Canada, and vice versa. In addition to doing away with the substantive protections and the dispute resolution mechanism afforded to investors under Chapter 11, withdrawal also would have practical implications for investors who have live disputes against one of the member states. Specifically, withdrawal would create serious time constraints for investors wishing to submit investment disputes to arbitration. NAFTA Article 2205 can be interpreted to suggest that investors could bring new claims only during the six months between the notice of withdrawal and the date it becomes effective. NAFTA Article 1119 further complicates and may shorten investors' rights to submit claims to arbitration, as it includes a notice provision in which investors provide the state written notice of intent to submit a claim to arbitration at least 90 days before the claim is presented. In the same vein, Article 1120 provides for a six-month cooling-off period. Unlike most other investment protection agreements that typically guarantee investment protections for 10 to 15 years after the instrument has been terminated, under 'sunset clauses', NAFTA does not include any such provision. Thus, once the six-month withdrawal notification period is up, an investor who relied on the dispute settlement provisions and the substantive protections of NAFTA may be left without recourse other than suing the host country in domestic courts, with the usual sovereign immunity and attendant complications arising from suing a sovereign in its own courts.

Investors with already-pending claims, however, should not be concerned about the possibility of the United States' withdrawal, since their claims have already been perfected. It is a well-established principle of international law and treaty interpretation that withdrawal from an international instrument cannot have retroactive effects on pending proceedings. For example, cases initiated against Ecuador continued even after Ecuador's denunciation of the ICSID Convention had taken effect.[66] Likewise, cases brought against Venezuela following its denunciation of the ICSID Convention have also continued.[67]

Notes

1. ICSID Caseload Statistics Issue 2017-1, ICSID at 23 (2017). By comparison, in 2015, 4 per cent of the 52 new investment arbitration cases registered under the ICSID Convention and Additional Facility Rules included a South American country as a party, while 2 per cent included Spanish-speaking countries from the Caribbean and Central America.
2. Id. at 26.
3. Id. at 32-34.
4. *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, UNCITRAL.
5. *Cosigo Resources, Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v. Republic of Colombia*, UNCITRAL.
6. *Silverton Finance Service Inc. v. Dominican Republic*, UNCITRAL.
7. *Albacora S.A. v. Republic of Ecuador*, UNCITRAL.
8. *Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. United Mexican States*, UNCITRAL.
9. *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, UNCITRAL.
10. *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award (April 26, 2017); *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016).
11. *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award (March 7, 2017);*Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (January 18, 2017).
12. *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award (2 June 2016).
13. *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Final Award (9 November 2016).
14. *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016).
15. *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award (14 October 2016).
16. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016).
17. *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2, Award (16 March 2017).
18. 'World Investment Report 2017: Investment and the Digital Economy', UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (7 June 2017), pp. 57-58; available at: http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.
19. CAITISA stands for Comisión para la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje Internacional en Materia de Inversiones.

20. 'World Investment Report 2017: Investment and the Digital Economy', UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (7 June 2017), p. 63; available at: http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.
21. CAITISA Report, p. 32 (noting five cases in which tribunals rejected jurisdiction or found no treaty violations by Ecuador).
22. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017.
23. Id. paras. 60-62.
24. Id. para. 1075.
25. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017.
26. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims paras. 1080 86, 7 February 2017.
27. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016.
28. Id. para. 1143.
29. Id. para. 1199, 1210, 1220-21.
30. *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016.
31. Id. paras. 623-27 (citing Canada-Venezuela BIT, Art. XII.1).
32. Id. para. 629.
33. *Mesa Power Group, LLC v. Government of Canada*, Concurring and Dissenting Opinion of Judge Charles N Brower para. 30, 25 March 2016.
34. See, e.g., *Eli Lilly v. Canada*, Submission of Mexico para. 7, 18 March 2016.
35. *Eli Lilly v. Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017.
36. Id. paras. 5, 170.
37. Id. para. 170 n.159.
38. Id.
39. Id. paras. 172-73.
40. *Spence International Investments, LLC, Berkowitz, et al v. Republic of Costa Rica-*, ICSID Case no. UNCT/13/2, Interim Award, 25 October 2016.
41. Id. paras. 153-61.
42. Id. para. 308.1-2.
43. Id. para. 308.3.
44. *Spence International Investments, LLC, Berkowitz, et al v. Republic of Costa Rica-*, ICSID Case no. UNCT/13/2, Procedural Order on the Correction of the Interim Award and the Termination of the Proceedings, 30 May 2017.
45. *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016.

46. Id. para. 205.
47. Id. para. 209.
48. Id. para. 221.
49. Id. para. 229-32.
50. Id. para. 904.3.
51. ***United Parcel Service v. Canada***, UNCITRAL, Award para. 28, 24 May 2007.
52. ***Sergei Viktorovich Pugachev v. The Russian Federation***, UNCITRAL.
53. ***Dawood Rawat v. Republic of Mauritius***, PCA Case No. 2016-20, UNCITRAL.
54. 'America First Foreign Policy', THE WHITE HOUSE (10 March 2017), available at: www.whitehouse.gov/america-first-foreign-policy.
55. 'Trump Sends Nafta Renegotiation Notice to Congress', THE NEW YORK TIMES (18 May 2017); available at: www.nytimes.com/2017/05/18/us/politics/nafta-renegotiation-trump.html.
56. Office of the US Trade Representative to leaders in Congress (18 May 2017).
57. 'Trump Sends Nafta Renegotiation Notice to Congress', THE NEW YORK TIMES (18 May 2017); available at: www.nytimes.com/2017/05/18/us/politics/nafta-renegotiation-trump.html.
58. 'North American Free Trade Agreement (NAFTA)', PUBLIC CITIZEN; available at:- www.citizen.org/our-work/globalization-and-trade/north-american-free-trade-agreement-nafta.
59. NAFTA Investment Law and Arbitration, xxiv (Todd Weiler ed. 2004).
60. See http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicablelia.
61. TransCanada Corporation & TransCanada Pipelines Limited, Request for Arbitration (24 June 2016), para. 1; available at: www.keystone-xl.com/wp-content/uploads/2016/06/TransCanada-Request-for-Arbi-tratio-2n.pdf.
62. ***TransCanada Corporation and TransCanada PipeLines Limited v. United States of America***, ICSID Case No. ARB/16/21.
63. 'No cutoff to finish NAFTA talks as U.S. hunts for best deal: Trump's trade czar', THE CANADIAN PRESS (21 June 2017); available at: http://rdnewsnow.com/article/542458/us-not-committed-completing-nafta-talks-end-2017-trumps-trade-czar.
64. Letter from Senator Sherrod Brown to President Donald Trump (1 May 2017).
65. Rep. Peter DeFazio Introduces Resolution Outlining Principles for New Trade Agreement with Mexico and Canada (16 February 2017).
66. ***Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador***, ICSID Case No. ARB/06/11;***Burlington Resources, Inc. v. Republic of Ecuador***, ICSID Case No. ARB/08/5; ***Corporación Quiport S.A. and others v. Republic of Ecuador***, ICSID Case No. ARB/09/2; ***Murphy Exploration and Production Company International v. Republic of Ecuador***, ICSID Case No. ARB/08/4;

Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador), ICSID Case No. ARB/08/10.

67. *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22.

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