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New Developments in Latin America

1. Latin America continues to be an active region for arbitration.
2. Argentina and Uruguay have recently adopted the UNCITRAL model law.
3. Effects of the Venezuelan crisis on arbitration cases
4. Corruption and arbitration in Latin America
5. Challenges and opportunities



Latin America continues to be
an active region for arbitration



Commercial arbitration

- » The ICC opened a case management office in Sao Paulo in September 2017.
- » Latin America and the Caribbean represented approximately 15% of ICC cases in 2017 and 2018, and Brazil represented 32-35% of all Latin American parties.
- » The most frequent seats in Latin America for ICC arbitration in 2017 and 2018 were Brazil (28-27) and Mexico (18-18).
- » The most popular seats for Latin American arbitration in 2018 were London, Paris, Geneva and Sao Paulo. Also relevant were Miami and Rio de Janeiro.

Investment arbitration

Chart 6: Geographic Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules, by State Party Involved*:

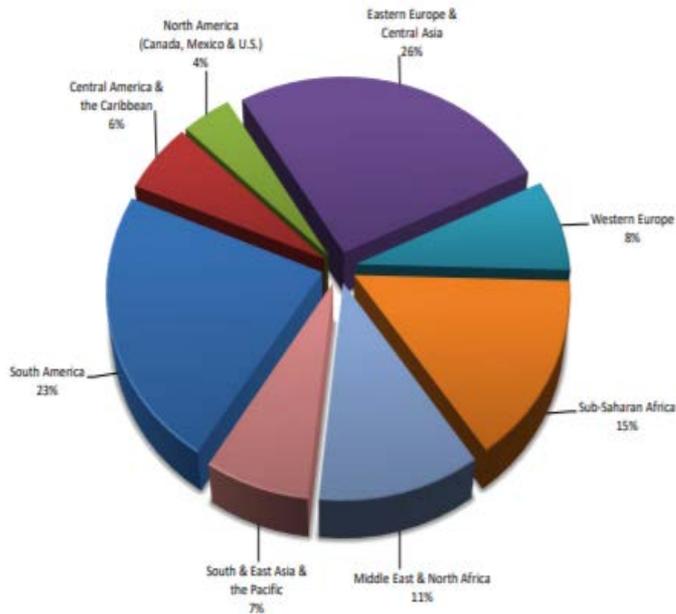
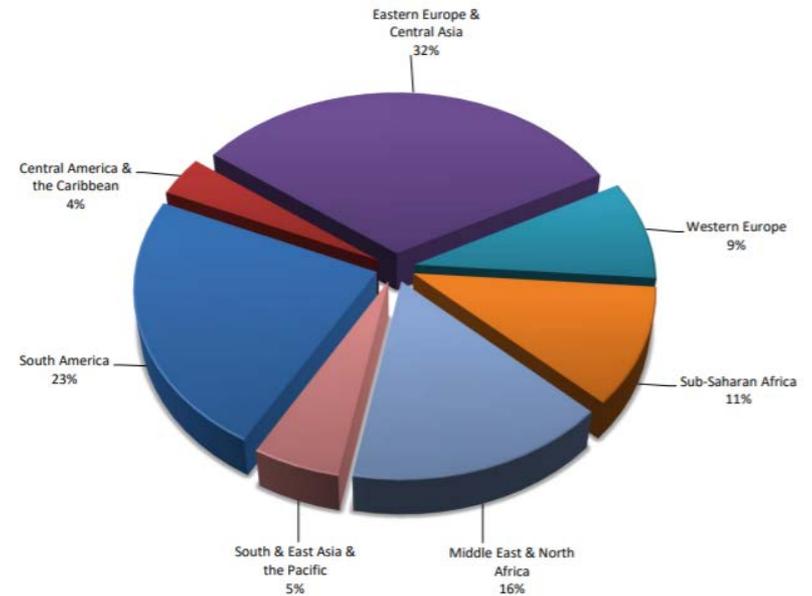


Chart 4: Geographic Distribution of New Cases Registered in 2018 under the ICSID Convention and Additional Facility Rules, by State Party Involved*:



» South America continues to constitute 23% of new ICSID cases.

Investment arbitration

Chart 12: Arbitrators, Conciliators and *ad hoc* Committee Members Appointed in Cases Registered under the ICSID Convention and Additional Facility Rules – Distribution of Appointments by Geographic Region*:

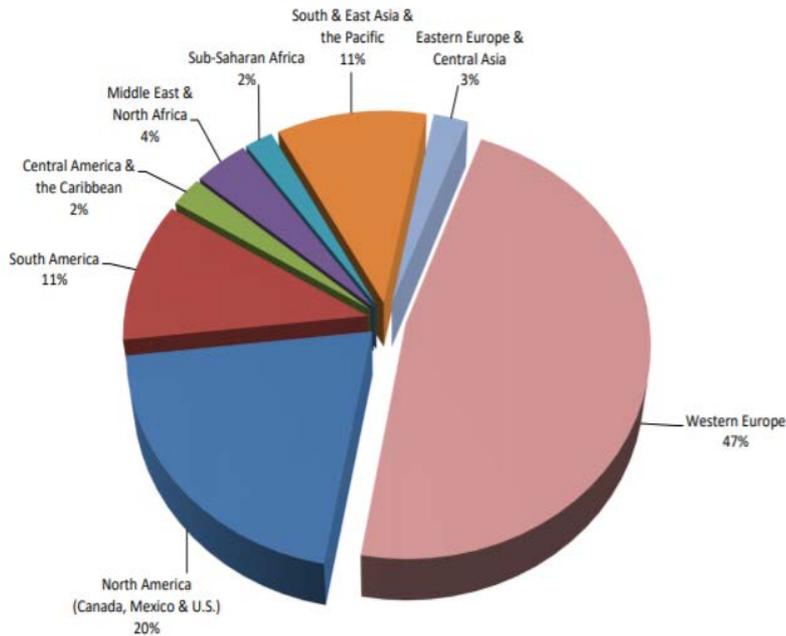
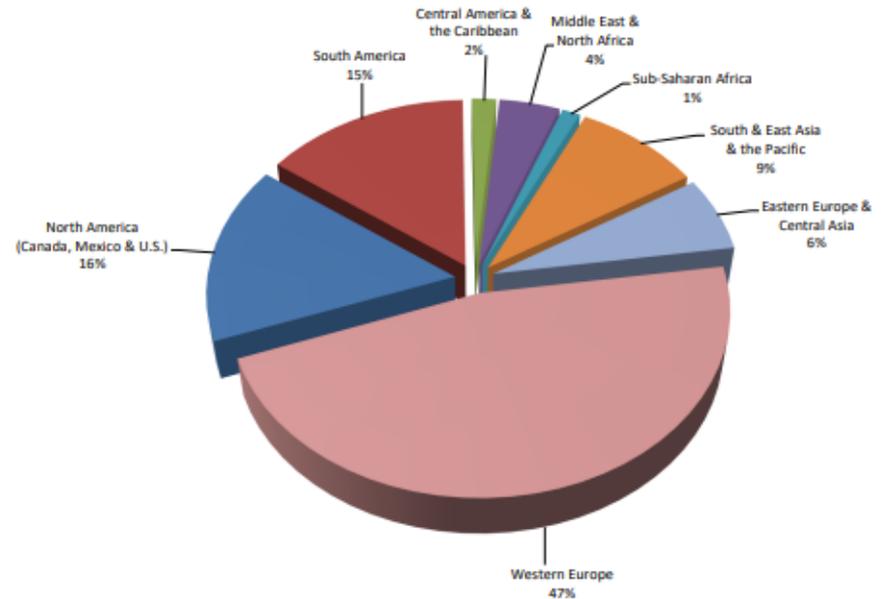


Chart 8: Arbitrators, Conciliators and *ad hoc* Committee Members Appointed in 2018 in Cases Registered under the ICSID Convention and Additional Facility Rules – Distribution of Appointments by Geographic Region*:



» South America showed a modest increase from 11% to 15% with respect to arbitrator appointments.

Investment arbitration: other developments

- » Mexico ratified the ICSID Convention (July 2018).
- » United States-Mexico-Canada Agreement (USMCA) was signed (November 2018).
- » Ecuador amended its investment promotion and protection laws and implemented new investment treaty practices (August 2018).



Argentina and Uruguay have
recently adopted the
UNCITRAL model law.

Argentina

- » On July 2018, Argentina passed Law 27449 on International Commercial Arbitration. This new law incorporates most of the provisions of the 2006 UNCITRAL model law.
- » Under this law an arbitration will be international when: (i) the parties have their place of business in different States or (ii) when either the seat of the arbitration, the place of performance of a substantial part of the contractual obligations or the place with the closest connection with the dispute is located outside of the State where the parties have their place of business. The agreement of the parties will not be sufficient to make a dispute international.
- » Certain provisions depart from the model law: awards must express reasons upon which it is based, except an award by consent of the parties.
- » Will this make Argentina an attractive seat for international arbitration?
 - Argentine Federal Supreme Court of Justice (*Estado Nacional Procuración del Tesoro Nacional s/recurso directo*, Nov. 2018) set aside is limited to specific grounds and if not an appeal. (*not under the new law*)
 - Federal Court in Civil and Commercial Matters No. 5 (*Agencia de Administración de Bienes del Estado v. Cencosud*, Apr. 2019) ordered a company not to initiate investment arbitration under a bilateral treaty as an interim measure.

Uruguay

- » On July 2018, Uruguay passed the Arbitration Act (Act No. 19.636). This new law incorporates 1985 UNCITRAL model law and some 2006 amendments.
- » The Arbitration Acts is only applicable to international arbitration. Under such act an arbitration is international when: (i) the parties had their places of business in different countries when the arbitration agreement was executed and (ii) the place of the performance of a substantial part of the commercial obligations, or the place with the closest relation to the subject matter of the dispute, are located outside the country where the parties have their places of business.
- » Certain provisions depart from the model law: provisions on costs, provides a 60-day term for the judiciary to decide on certain arbitration related issues, and provides that when a State or a public entity appoints a public official as an arbitrator in a proceeding to which it is a party, this shall not necessarily provide grounds for challenge.
- » Will this make Uruguay an attractive seat for international arbitration?
 - Uruguayan courts have been favorable to arbitration.
 - Uruguay and the Permanent Court of Arbitration signed a host country agreement (June 2018)

Evolution of arbitration legislation in Latin America

- » Argentina (2018)
- » Uruguay (2018)
- » Brazil (2015)
- » Bolivia (2015)
- » Panama (2013)
- » Colombia (2012)
- » Costa Rica (2011)
- » Peru (2008)
- » Dominican Republic (2008)
- » Ecuador (2006)
- » Nicaragua (2005)
- » Chile (2004)
- » Paraguay (2002)
- » Honduras (2000)
- » Venezuela (1998)
- » Guatemala (1995)
- » Mexico (1993)



Effects of the Venezuelan crisis on arbitration cases

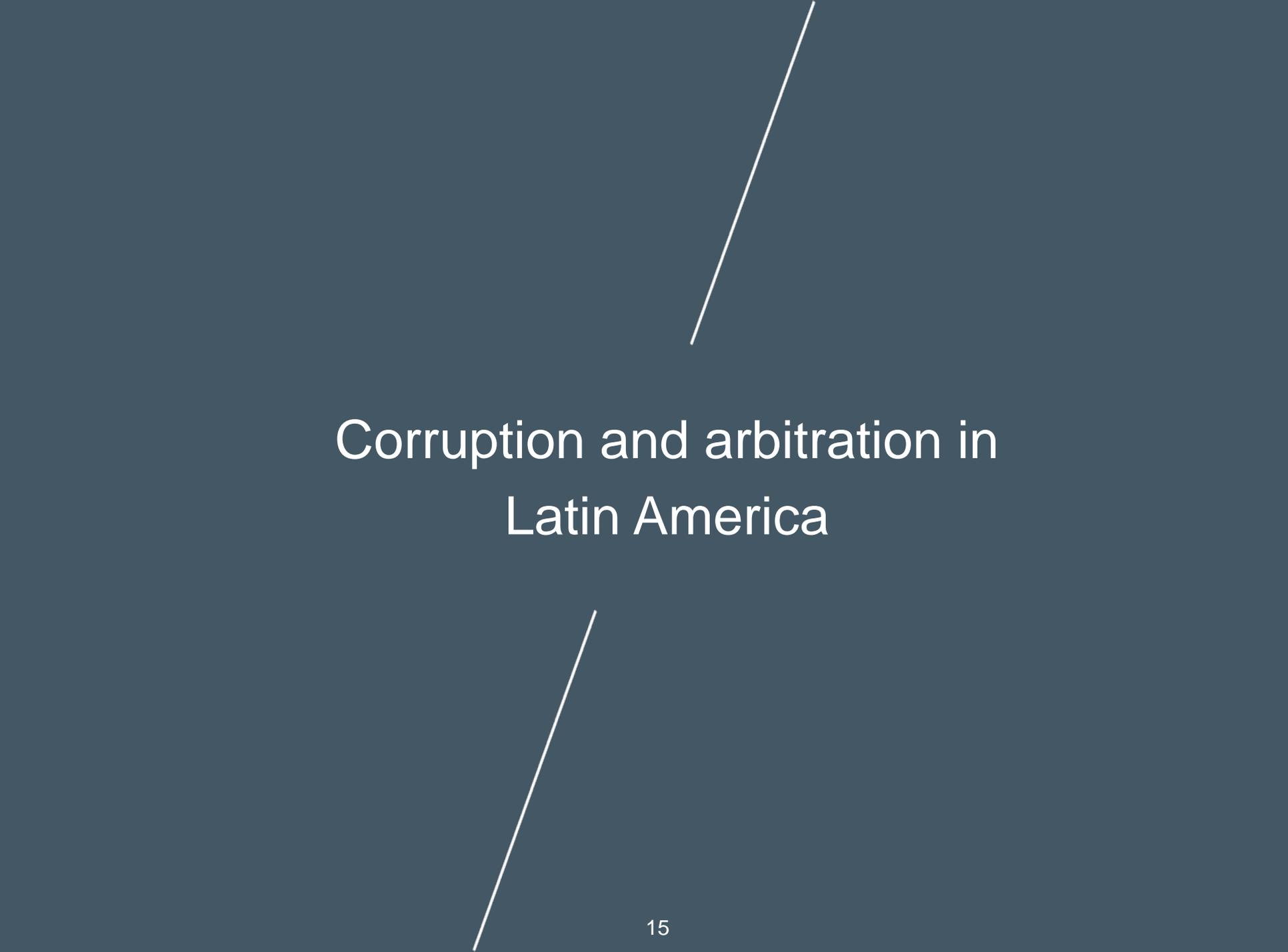


Challenges to the representation of Venezuela

- » In January, Juan Guaidó (opposition leader and president of the National Assembly) declared himself the country's interim president.
- » He is recognized by more than 50 countries (including the U.S.) as Venezuela's leader.
- » A special attorney appointed by Juan Guaidó has challenged the representation of the State by the lawyers instructed by the government of Nicolás Maduro in all ICSID cases to which Venezuela is a party. Also, attorneys appointed by Juan Guaidó have intervened in pending arbitrations and court proceedings.

Challenges to the representation of Venezuela

- » In the *Favianca* case, the ICSID *ad hoc* Committee has rejected the challenge. *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/21)
- » An ICC tribunal has stayed the proceedings brought by a PDVSA subsidiary (the stay was requested by the Paraguayan state-entity Petropar and supported by the Guaidó government).
- » The US District Court in NY has upheld a request by Guaidó for a stay of a US\$182 million lawsuit against PDVSA brought over PDVSA's default on loan agreements.
- » The U.S. Court of Appeals for the Third Circuit allowed Guaidó's representatives to request a stay in the dispute with Crystallex, attempting to collect from Citgo on an arbitration award against Venezuela. (March 2019)
- » US Court of Appeals for the DC Circuit refused a request by Maduro's lawyers to bar Guaidó representatives from appearing on behalf of Venezuela in an appeal against the enforcement of a US\$1.4 billion investment treaty award in favor of Canadian mining company Rusoro.
- » The US District Court for the District of Columbia confirmed an ICSID award in favor of OI European Group (OIEG) finding it was bound to recognize lawyers acting for Juan Guaidó. (May 2019)



Corruption and arbitration in Latin America

Corruption and Arbitration in Latin America

- » Paraguayan Court of Appeal recognized that issues of illegality and corruption are arbitrable in deciding an annulment application (June 2018) .
- » US District Court for the Southern District of Texas rejected a motion by Petrobras subsidiaries to vacate a US\$728 million award in favor of Vantage Drilling and granted a petition by Vantage to confirm the award, rejecting the arguments by Petrobras that the tribunal had overlooked evidence of bribery. (May 2019)
- » Peru: there is a new proposal to amend the arbitration law to include an additional ground for annulment on the basis of corruption or fraud, and provide an extended term to file under this ground.
 - Corruption can already be the basis for annulment of awards under the current law.
 - Under Peruvian law there is a special proceeding against fraudulent judicial decisions, which is applicable to arbitration awards.



Challenges and opportunities

Challenges and opportunities

- » Potential actions against arbitral decisions for the protection of fundamental rights in certain jurisdictions.
- » Increase in the use of international arbitration soft law instruments.
- » An opportunity for increased mediation.
- » An opportunity for third party funding.



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Thank you