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Regional Law on International Commercial and Investment Arbitration in Latin America and Its Impact on Economic Integration of the Region**

The article examines the role of major Latin American regional organizations in promotion of commercial and investment arbitration (through regional international law) as a method of dispute resolution in the region. It also analyses whether there is a relationship between the development of regional law in the field in question and better integration of Latin American economies. Before moving on to the main analysis, the author discusses the phenomenon of regional economic integration in Latin America and considers the role that arbitration plays (or is believed to play) in the processes of liberalization of international trade and investment. The author concludes that it is rather unclear whether the regional initiatives on international arbitration in Latin America have a positive impact on economic integration and development of Latin American countries. Having found that the positive role of the discussed regional initiatives is somewhat ambiguous, the author submits that they neither hamper the economic integration processes in the region nor jeopardize the harmonization efforts in the area of international arbitration undertaken at the global level.

I. INTRODUCTORY REMARKS

The aim of this article is twofold. Firstly, it attempts to examine the role of major Latin American regional organizations in promoting commercial and investment arbitration as a method of dispute resolution in the region (section V). Hence, it reviews their *aquis* – i.e. international regional law – in the relevant area. Secondly, after describing the most important regional instruments on the matter, it attempts to analyse the relationship between the development of regional international law on commercial and investment arbitration and the economic integration of Latin

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American states within the relevant organizations (section VI). In order to achieve this aim, the article will first look, somewhat more broadly, at the phenomenon of regional economic integration in Latin America, more exactly mainly in South America, and it will try to identify the regional organizations which have for decades been the most ambitious in bridging the gap between their member states (section). Before moving on to the main analysis, it is also important to consider the role that arbitration is believed to play in the processes of liberalization of international trade and investment (section III), and to briefly explain the historical distrust of many Latin American states toward it (section IV). Only afterwards, once the aforesaid issues have been adequately considered, is it possible to tackle the question of the relationship between the legal output of Latin American regional integration organizations in the area of commercial and investment arbitration, on the one hand, and the pace of progress in economic integration of the analysed region, on the other.

In other words, the article tries to answer the question: To what extent, if any, have Latin American regional organizations contributed to the integration and economic development of their member states by promoting out-of-court settlement of business disputes? While the article will primarily focus on organizations geographically rooted in South America, often considered to be a sub-region within Latin America and the Caribbean (LAC), including first and foremost the Common Market of the Southern Cone (MERCOSUR) and the Andean Community – and hence it does not pretend to discuss all Latin American regional economic integration organizations – the role of the earliest regional organization, i.e. the Latin American Free Trade Association (LAFTA/LAIA), and the latest integration scheme, i.e. the Pacific Alliance, in integration of their members will be also addressed. The Pacific Alliance is definitely the most progressive in offering investor-state dispute resolution mechanism (ISDS) to individuals. In a similar vein, departing from the focus on South America, the author illustrates the role of the Organization of American States (OAS) in the historical promotion of commercial arbitration in Latin America, even though the OAS clearly lacks the objective of economic integration and reaches outside the relevant region; the author also briefly touches upon integration efforts of the Caribbean Community and Common Market (CARICOM) in the relevant field (though keeping in mind that it was established by the English-speaking countries of the region). The emergence of post-neoliberal organizations which shift away from the classic emphasis on the role of trade and investment for growth (the Union of South American Nations, UNASUR; and the Bolivarian Alliance of the Peoples of Our America, ALBA) is also considered. UNASUR, politically led by Brazil, will be addressed due to its initiative to create a regional arbitration centre within UNASUR (the UNASUR Arbitration Centre), the idea of which has resulted from opposition of some states to the International Centre for Settlement of Investment Disputes (Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID Convention and/or ICSID)[1]. The activity of ALBA will be shortly mentioned as some of its prominent member states decided to withdraw from ICSID (Bolivia, Venezuela, Ecuador). This proves

[1] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS, p. 159 (entered into force 14 October 1966).

that the promotion of out-of-state procedures for dispute resolution at the lower sub-regional level of integration in South America – if one decides to consider it being a separate region – and especially the promotion of investment arbitration as the primary ISDS method, together with the underlying idea of liberalizing the flow of investment, did not fall on fertile ground everywhere.

As the question formulated in this article is based on the inevitable assumption that the multifaceted promotion of commercial and investment arbitration – undertaken by various public decision-makers, including state and non-state players – invariably fosters economic development, on the way to answering the said question, the article will critically address this assumption. It will suggest that more economic studies are needed in this field. Far from offering any definite answers, or anticipating final conclusions at this stage, the author would like to submit that the improvement of out-of-state procedures for doing business justice within certain geographical boundaries and the faster economic development of that area, which is the ultimate goal of economic integration, are not inextricably linked. Much may depend on the indicators of economic integration that one decides to apply when answering the question formulated in this article, i.e. should it be measured by the level of legal or institutional convergence or perhaps rather by the ratio of international trade or foreign direct investment (FDI) to gross domestic product (GDP)? On top of this, the current wave of skepticism against the Washington Consensus, which inspired the phenomenon of regional economic integration in the 1990s and early 2000s, resulting, for example, in creation of organizations like UNASUR, shows that the relationship between the development of regional *acquis* on commercial and investment arbitration, on the one hand, and economic integration and growth, on the other hand, remains unclear. It is yet to be seen whether (if at all) the UNASUR Arbitration Centre will push UNASUR member states toward placing more emphasis on the economic dimension of integration. Finally, it can also possible be submitted that most of recent arbitration law reforms in Latin America were not regionally driven, but rather resulted from uncoordinated efforts of individual countries, which attempted to modernize their legislation and policies in line with well-regarded legal instruments of the United Nations Commission on International Trade Law (UNCITRAL). If proven to be true, this additionally undermines the practical meaning of certain regional provisions on international commercial and investment arbitration that were adopted by regional organizations in Latin America (and therefore points to much higher relevance of the work of UNCITRAL).

II. DEVELOPMENT OF MAJOR REGIONAL INTEGRATION ORGANIZATIONS IN LATIN AMERICA

While the objective of integration (and not only economic integration) in Latin America has a long history, dating back to the first half of the 19th century, there have always been a number of internal and external obstacles to its progress[2].

[2] See C. Mik, *Fenomenologia regionalnej integracji państw. Studium prawa międzynarodowego [Phenomenology of Regional Integration of States. An International Law Study]*, Warszawa 2019, pp. 208–209. See also E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions to Regional Integration Processes: The Case of ECLAC*, UNU-CRIS Working Papers W-2010/8, http://cris.unu.edu/sites/cris.unu.edu/files/W-2010-8.pdf,

These were political instability, military revolts, regional conflicts, and different interventions of external powers such us the United States (US), to name but a few[3]. Also, perhaps quite surprisingly, the colonial past of the region did not assist in integration efforts[4]. Political ideologies of individual states, for example anti-market sentiments, or current interests, many times outweighed long-term economic concerns. Many authors point to the positive role of the OAS (1948), which indirectly facilitated the dialogue processes in Latin America, and/or the direct role of the regional UN Economic Commission (ECLAC) in overcoming the aforementioned challenges[5]. Having explained that overall background, following Jiménez's study (2010), we can indicate three waves of Latin American regionalism.

The first wave of Latin American regionalism, which started concurrently with the European integration process, resulted, among others, in the creation of LAFTA (1960, in 1980 transformed into the Latin American Integration Association, LAIA) and CARICOM (1973, in 2001 transformed by the Revised Treaty of Chaguaramas Establishing the CARICOM Single Market and Economy)[6]. It also led to the signing of the Cartagena Agreement (1969), establishing the Andean Group, transformed three decades later into the Andean Community (1997)[7]. As put by Jiménez, '[t]his first generation of integrationist schemes in the region … had a common denominator: the liberalization of trade', which suggests, in his opinion, that – unlike in post-war Europe – the integration in Latin America was initially driven more by economic than political reasons[8]. Of course, one may question whether the European integration was driven mainly by political reasons as the economic cooperation of Germany and France in 1950s and the strive for peace in Europe were interrelated. Paradoxically, it was the threat of limited access

p. 3, accessed on: 20 January 2020; G. Mace, *Regional Integration in Latin America: A Long and Winding Road*, International Law Journal (Toronto, Ont.) 1988, Vol. XLIII (Summer 1988), pp. 404–407; V. Tafur-Dominguez, *International Environmental Harmonization – Emergence and Development of the Andean Community*, Pace International Law Review (1)2000, Vol. 12, pp. 284–285.

[3] C. Mik, *Fenomenologia* …, p. 208–209.

[4] G. Mace, *Regional Integration*…, p. 406.

[5] See e.g. C. Mik, *Fenomenologia* …, pp. 209, where the author discusses the role of OAS, and 207–208, where he discusses the role of ECLAC. See also G. Mace, *Regional Integration*…, pp. 408–409; E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*…, pp. 5–8.

[6] See *Treaty establishing a free-trade zone and instituting the Latin-American Free Trade Association (Montevideo Treaty)*, 18 February 1960, 1484 UNTS, p. 223 (entered into force 1 June 1961); and *Treaty establishing the Caribbean Community*, 4 July 1973, 946–947 UNTS, p. 17 (entered into force on 1 August 1973).

[7] See *Tratados y Protocolos*, online *La Comunidad Andina*: http://www.comunidadandina.org/Normativa.aspx?link=TP, accessed on: 20 January 2020. See also E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*…, p. 5 et seq. For a different perspective, see G. Mace, *Regional Integration*…, p. 414 et seq.

[8] E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*…, p. 414. See also G. Mace, *Regional Integration*…, p. 407. For more historical information on the early activity of these organizations, see a series of annual/quarterly reports published in the 1960s, 1970s and 1980s in Lawyer of the Americas by e.g. F.V. Garcia Amador, F. Orrego-Vicuna, A. Tolosa, L.A. Fernandez, or S.F. Rose, including, among others, F.V. Garcia Amador , *Latin American Economic Integration*, Lawyer of the Americas (1)1969, Vol. 1, p. 73 et seq.; F.V. Garcia Amador, *Latin American Economic Integration*, Lawyer of the Americas (1)1970, Vol. 1, p. 74 et seq.; F.V. Garcia Amador, *Latin American Economic Integration*, Lawyer of the Americas (3)1971, Vol. 3, p. 581 et seq.; F. Orrego-Vicuna, A. Tolosa, *Latin American Economic Integration*, Lawyer of the Americas (3)1972/3, Vol. 4, p. 529 et seq.; F. Orrego-Vicuna, A. Tolosa, *Latin American Economic Integration*, Lawyer of the Americas (3)1973, Vol. 5, p. 578 et seq.; F. Orrego-Vicuna, *Latin American Economic Integration*, Lawyer of the Americas (3)1974/3, p. 802 et seq.; L.A. Fernandez, *Latin American Economic Integration*, Lawyer of the Americas (1)1979, Vol. 11, p. 151 et seq.; S.F. Rose, *Latin American Economic Integration*, Lawyer of the Americas (2/3)1979, Vol. 11, p. 521 et seq.; A. Semel, *Latin American Economic Integration*, Lawyer of the Americas (3)1978, Vol. 12, p. 730 et seq.

to European markets, caused by their integration within the European Communities, that accelerated economic integration efforts in Latin America[9]. The first integration organization – namely LAFTA, quite interestingly endorsed by the US, which had rather a reserved attitude toward the first wave of regionalism in Latin America – attempted to create a free trade area in the region[10]. This, however, turned out to be far too ambitious a goal in late 1960s, i.e. the economic interests of the member states from the north and south of the continent were still too divergent in the 1960s[11]. Nevertheless, it is worthy of note that '[t]he intraregional trade share (measured by exports) in LAFTA member states went from 6.7 per cent in 1961 to 14.0 per cent in 1980'[12]. Regarding both CARICOM and the Andean Group, their long term goal was the establishment of a common market, which was meant to be achieved through the earlier creation of customs unions[13]. The latter was an initiative complementary to LAFTA, aimed, among other objectives, at creating a common regime for FDI. Even though the Andean Group had a more developed institutional structure than LAFTA, including even an investment bank, and performed quite well in its early years, some of its major objectives were largely unrealistic and feared by foreign investors (e.g. joint industrialization of the member states, coordination of the choices of industrial sectors in which member countries should specialize, attempts to control foreign capital)[14]. The Andean Group was largely dependent on 'the climate of economic nationalism that swept through the region from 1968 to 1974'[15]. The initiative stopped developing, one of the reasons being the fact that Chile's military government decided to adopt a liberal economic programme, inspired by Milton Friedman, which sought relaxation of regional regulations[16]. Disturbances in the global economy in the 1970s and 1980s, mainly oil and fiscal crises, which led to shift to a much more liberal era in the global economy, eventually undercut the first wave of regional integration in Latin America. In general, the inherent features of this wave of integration schemes included strong focus on the import substitution strategies, aimed at expanding protected markets, and focus on industrial goods and tariffs, i.e. merely superficial economic integration was planned[17]. These were combined with an attitude of distrust toward foreign, and especially US, capital (and *vice versa*: neither the US nor the World Bank supported integration schemes from the 1960s).

Unlike the first wave of regionalism, according to Jiménez, the second wave of regionalism can be characterized by support from the US, tendency to insert Latin American economies in the global economy, and generally much more in-depth

[9] E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*..., p. 5.
[10] See e.g. C. Mik, *Fenomenologia*..., p. 212; G. Mace, *Regional Integration*..., p. 410.
[11] See C. Mik, *Fenomenologia*... For a discussion of reasons of LAFTA's failure, see G. Mace, *Regional Integration*..., pp. 412–413; E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*..., pp. 10–11.
[12] E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*..., p. 12.
[13] See C. Mik, *Fenomenologia*..., p. 275, 240; E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*..., p. 5.
[14] See in general G. Mace, *Regional Integration*..., pp. 416–418. See also E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*..., p. 12. For a criticism in arbitration literature, see B.G. Rinker, *The Future of Arbitration in Latin America: A Study of Its Regional Development*, Case Western Reserve Journal of International Law (2)1976, Vol. 8, pp. 482, 488.
[15] G. Mace, *Regional Integration*..., p. 417.
[16] G. Mace, *Regional Integration*..., pp. 419–420.
[17] E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*..., p. 17.

approach to integration, i.e. covering not only industrial goods, but also services, investment, and competition[18]. As the second wave of regionalism was built on the premise of greater opening up of Latin American markets to international trade and foreign investments (and also US and European capital), this wave of regionalism can be referred to as 'open regionalism'[19]. The second wave of regionalism originated from the economic transformations of the 1980s, when the world economy was entering the early phase of globalization, to which Latin American countries had to adjust, especially as between 1980 and 1990 their economies contracted by 0.1 per cent of *per capita* GDP, while developed economies experienced approx. 2.0 per cent growth *per capita* in the same period[20]. Latin American economies were trying to enhance their competitiveness, and accordingly 'deregulation' and 'privatization' were among the most commonly used terms throughout the 1990s[21]. While the transformation of LAFTA into LAIA in 1980 can be seen as the herald of change, the true second wave of Latin American regionalism started in 1991 with the creation of MERCOSUR, and its further stages included the transformation of the Andean Group into the Andean Community (1997), and the 2001 revision of the Treaty of Chaguaramas, which is the current legal basis for CARICOM (CSME)[22]. Among these regional organizations, MERCOSUR appears to be the most recognizable and important organization, focusing mostly on economic integration, as it has adopted a significant number of legal instruments regarding a range of areas of business life (but being criticized for its recent turn to protectionism)[23]. In comparison with MERCOSUR, the Andean Community has a broader scope of interests, including not only economic integration, but also, for example, environment protection, which appears to stand high on its agenda[24]. Its ultimate aim is the formation of a common market[25]. The case of CARICOM, at least looking from the historical point of view, is somewhat different as the organization was launched largely by English-speaking countries of the Caribbean. As all of its members are

[18] E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*…, p. 15 et seq.

[19] See E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*…, p. 19. See also J.A.E. Vervaele, *Mercosur and Regional Integration in South America*, International & Comparative Law Quarterly 2005, Vol. 54, p. 387.

[20] E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*…, pp. 12, 15.

[21] J.E. Curutchet, *MERCOSUR: The South American Common Market*, Currents: International & Trade Law Journal (3)1994, pp. 24–25.

[22] See *Treaty of Montevideo*, 12 August 1980, 1329 UNTS, 225 (entered into force 18 March 1981); *Treaty for the establishment of a Common Market (Asuncion Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (with annexes)*, 26 March 1991, 2140 UNTS, p. 257 (entered into force 21 November 1991); *Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy*, 5 July 2001, 2259 UNTS, p. 293 (entered into force 4 February 2002). For a reference to the Cartagena Agreement /*Protocolo de Trujillo*/*Protocolo de Sucre*, see *supra* note 7. See also E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*…, p. 16.

[23] See Ch. Leathley, *International Dispute Resolution In Latin America: An Institutional Overview*, Alphen aan den Rijn 2007, pp. 151–152; S.A. Arieti, *The Role of MERCOSUR as a Vehicle for Latin American Integration*, Chicago Journal of International Law (2)2006, Vol. 6, p. 761 et seq.; C. Mik, *Fenomenologia*…, pp. 249, 262–264. See, however, also J.A.E. Vervaele, *Mercosur and Regional Integration*…, p. 405 et seq., 408, where the author explains that the MEROCSUR *acquis* in different areas (e.g. judicial cooperation, environmental law) is 'developing rapidly'. For criticism, see Ch. Daniels, *The Pacific Alliance and Its Effect on Latin America: Must a Continental Divide Be the Cost of a Pacific Alliance Success*, Loyola of Los Angeles International and Comparative Law Review (2)2015, Vol. 37, p. 157.

[24] See C. Mik, *Fenomenologia*…, pp. 247–248. See also V. Tafur-Dominguez, *International Environmental Harmonization*…, p. 307 et seq.

[25] Ch. Leathley, *International Dispute Resolution*…, p. 115.

relatively small and have been historically 'highly trade-dependent' countries, the revised integration scheme (CSME) is meant to overcome 'the disadvantages of small scale …, whether seeking scale economies from an enlarged domestic market, greater intraregional trade, shared costs in the provision of public sector goods, or integration of policy responses to negotiate from a stronger unified position in the international arena'[26]. The common features of all of these three initiatives have been, in particular, the trend of FDI liberalization, sometimes referred to as the 'lifeblood of globalization', and the pursuit of development of the private sector, both of which are traditionally believed to require non-public mechanisms of doing business justice[27]. For this reason, the legal output of the regional organizations from the second wave of Latin American regionalism in the area of commercial and investment arbitration is much broader than the scarce output of regional organizations from the first wave. It will be discussed at length in section V of the article.

The third wave of regionalism in Latin America brought the creation of UNASUR (previously the South American Community of Nations (2004), in 2008 transformed into the current formula) and ALBA (2004)[28]. Both of these organizations stem from 'the poor results yielded by the neo-liberal reforms' and somewhat skeptical approach toward the role of trade and FDI in development[29]. Of course, UNASUR and ALBA do not share identical approaches to integration, with the first suggesting cooperation (quite pragmatically) in political, social, environmental, and security areas, whereas the latter being based on ideologically-driven cooperation of socialist regimes (though officially appearing to have a similar agenda to UNASUR)[30]. ALBA is inspired by Heinz Dieterich's idea of 'Twenty-first Century Socialism'[31]. UNASUR and ALBA promote the 'return of the state' policy and are sometimes criticized for their failure to present a coherent (alternative) integration model[32]. Indeed, both appear to put much more emphasis on the political and socio-cultural dimensions of regional integration, rather than the economic one.

Last but not least, it is important to mention the launch of the Pacific Alliance in 2011[33]. The association is considered to be the first 'strictly apolitical' regional integration scheme in Latin America[34]. The Pacific Alliance aims to promote the economic development of its members through economic integration, yet it envisages neither a typical customs union, nor a common market between its members (Chile, Colombia, Mexico, and Peru)[35]. Instead, it is meant to become a 'platform

[26] J.F. Hornbeck, *CARICOM: Challenges and Opportunities for Caribbean Economic Integration*, CRS Report for Congress 2008, http://www.sice.oas.org/TPD/CAR_EU/Studies/CRSCARICOM_Challenges_e.pdf, pp. 1, 5, accessed on: 20 January 2020. See also Ch. Leathley, *International Dispute Resolution*…, pp. 134–135; C. Mik, *Fenomenologia*…, p. 273 et pass.

[27] B.M. Cremades, D.J.A. Cairns, *The Brave New World of Global Arbitration*, Journal of World Investment & Trade (2)2002, Vol. 3, p. 174.

[28] See *Constitutive Documents of UNASUR*, UNASUR https://www.unasursg.org/en/regulary-documents-of-unasur, accessed on: 20 January 2020; *ALBA Documentos*, ALBA: http://www.portalalba.org/index.php/alba/documentos, accessed on: 20 January 2020.

[29] E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*…, p. 24.

[30] E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*…, p. 24. See also C. Mik, *Fenomenologia*…, pp. 301, 303.

[31] Ch. Daniels, *The Pacific Alliance*…, p. 157.

[32] E.M. Jiménez, *The Contribution of the Regional UN Economic Commissions*…, pp. 25–26.

[33] See *Framework Agreement on the Pacific Alliance*, Pacific Alliance https://alianzapacifico.net/en/documents-and-studies/, accessed on: 20 January 2020.

[34] Ch. Daniels, *The Pacific Alliance*…, p. 153.

[35] Ch. Daniels, *The Pacific Alliance*…, pp. 159–160.

of cooperation', which supports, among other goals, building 'in a participatory and consensual way an area of deep integration to move progressively toward the free mobility of goods, services, resources and people'[36]. Hence, member states of the Pacific Alliance aim to enjoy benefits of a common market within a loose structure.

III. THE ROLE OF ARBITRATION IN IMPROVING INTERNATIONAL TRADE AND INVESTMENT

As accurately observed by McConnaughay, '[a] dilemma that is common to all emerging economies … is how to provide the legal institutions upon which economic development depends, without the developed economy upon which effective legal institutions depend'[37]. The bedrock assumption of this opinion is that economic development depend to some (or maybe even large) extent upon the quality of judicial mechanisms for solving business disputes (with both private and public parties). While this assumption is true, and the paradox identified by McConnaughay undeniably exists, it is interesting to see that most authors suggest solving the dilemma rather through the promotion of out-of-court dispute resolution, especially through international arbitration as a way of opting out of underdeveloped judiciaries, than through lengthy judicial reforms (resolving business disputes through arbitration can be seen as somewhat uncommon and perhaps culturally alien to a number of developing countries, yet reform of a judiciary can be harder to accomplish in many developing countries due to their political instability, difficulties with reaching a compromise on the most effective model of judiciary, etc.). Major obstacles to the promotion of non-public, or semi-public, as in case of investment arbitration, mechanisms of dispute resolution in developing countries will be discussed in section of the article, which attempts to explain some historical distrust of many Latin American countries toward arbitration. It should be enough to note at this place that most literature on the topic of the role of arbitration in modern business life suggests the existence of a relationship between safeguarding arbitration as a means of dispute resolution and economic development. Put differently, arbitration is generally believed to play a vital role in the processes of liberalization of trade and investment (the ultimate goal of which is to boost economies of developing countries).

McConnaughay makes an interesting analogy between contemporary developing countries and developed countries in their post-World War II period of history. He argues that developing countries have to create 'legal institutions that do not require a significant public financial investment but that, nonetheless, are somehow capable of immediately providing certain important regulatory and adjudicatory functions that otherwise would require years to develop' and that 'like the nations that were members of the international trading community during the post-World War II period, developing countries need to achieve all of this without unduly sacrificing their sovereign powers, interests, and responsibilities'[38]. In the

[36] See *What is the Pacific Alliance?*, Pacific Alliance, https://alianzapacifico.net/en/what-is-the-pacific-alliance/, accessed on: 20 January 2020.
[37] P.J. McConnaughay, *The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles*, PKU Transnational Law Review (1)2013, Vol. 1, p. 10.
[38] P.J. McConnaughay, *The Role of Arbitration*…, p. 11.

post-war decades, the international community struggled to arrange transnational mechanisms of solving business disputes (and commercial arbitration assumed a leading role in this regard thanks to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention)[39]. McConnaughay is aware that his analogy is imperfect[40]. In any event, he sees the broad promotion of arbitration as the most natural (and the easiest) solution for the identified dilemma and 'essential to economic development and prosperity'[41]. Due to its flexibility, stemming from the principle of party autonomy, arbitration can mitigate cultural differences, mentioned at the beginning of this section as a potential obstacle to its promotion in developing countries, and hence it should neither be seen as a 'Westernized' nor 'Americanized' procedure of dispute resolution[42]. Following the perspective proposed by McConnaughay, expanding his line of thinking, one may try to identify region-specific differences in the conduct of commercial arbitrations[43]. Their existence would confirm that arbitration, if necessary, can adapt to regional particularities. On the other hand, the practice of investment arbitration, especial under the aegis of ICSID in the 1990s and 2000s, became somewhat dominated by US attorneys and elite arbitrators representing mostly the western countries[44]. As will be discussed in more detail in section of the article, this elitism of international arbitration can be a subsidiary source of bias against it in some developing countries, especially those which share anti-American or anti-Western sentiments.

In any case, an economic study by Berkowitz, Moenius and Pisto (2004) finds a positive impact of accession to the New York Convention on a country's trading patterns, i.e. parties to the New York Convention 'export more complex goods even in the absence of high marks on domestic institutional quality'[45]. Thus, the ratification of the New York Convention by a given country influences trading behavior of foreign entrepreneurs[46]. As argued by Fry (2011), '[o]ther conventions promoting international arbitration also have impact on improvement of business and investment climate'[47]. He lists the Inter-American Convention on International Commercial Arbitration (Panama, 1975, known as the Panama Convention), prepared under the auspices of the OAS, among those instruments which regionally improve business climate (which is unsurprising as the New York

[39] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS, 3 (entered into force 7 June 1959).
[40] P.J. McConnaughay, *The Role of Arbitration*..., p. 11.
[41] P.J. McConnaughay, *The Role of Arbitration*..., pp. 15, 16, where he argues that:
> '[a]s I suggested in my comparison of developing countries to the post-World War II international community of nations, there can be no question about international arbitration's extraordinary contribution to the promotion and growth of international commerce during the past 50 years'.

[42] P.J. McConnaughay, *The Role of Arbitration*..., pp. 28–29.
[43] See K. Czech, *The Distinctive Characteristics of Commercial and Investment Arbitration Proceedings: Lex multiplex, universa curiositas, ius unum?*, Polish Yearbook of International Law 2015, Vol. XXXV, p. 317 et pass. See also G.M. Wilner, *Acceptance of Arbitration by Developing Countries*, [in:] T.E. Carbonneau (ed.), *Resolving Transnational Disputes through International Arbitration*, Charlottesville 1984, p. 286.
[44] K. Czech, *The Distinctive Characteristics*..., p. 320. See also UNCTAD, *Investor-State Dispute Settlement: Review of Developments in 2017*, Geneva 2016, p. 6 (Figure 6).
[45] D. Berkowitz, J. Moeniu, K. Pistor, *Legal Institutions and International Trade Flows*, Michigan Journal of International Law (1)2004, Vol. 26, pp. 167–177 et pass. See also J. Fry, *Arbitration and Promotion of Economic Growth and Investment*, European Journal of Law Reform 2011, Vol. 13, p. 391.
[46] D. Berkowitz, J. Moeniu, K. Pistor, *Legal Institutions*..., p. 177.
[47] J. Fry, *Arbitration and Promotion*..., p. 392.

Convention and the Panama Convention are similar)[48]. Fry refers *in extenso* to the economic study by Berkowitz, Moenius and Pisto from the mid-2000s. The pool of other useful studies is small, and reported studies rather generally measure the influence of the quality of a country's institutions on its growth than the impact of arbitration on improving economic development[49]. Except for one study from Colombia, by Cayón, Correa and Espriella (2018), which deals with the impact of international arbitration on economic growth in Latin America, more up to date studies, with a focus particularly on determining the economic value of offering arbitration as an alternative to litigation, or an additional mode of settling business disputes with foreign entities, have not appeared[50]. Hence, while the studies by Berkowitz, Moenius and Pisto (2004), and Cayón, Correa and Espriella (2018) are conclusive, and can be cited as evidence of the positive impact of availability of international arbitration on economy, one would expect more support for the assumption in point.

Having accepted the common assumption that arbitration generally fosters business life, the question arises as to the role of investment arbitration: Does it have equally positive influence on the improvement of the flow of investment as commercial arbitration on the improvement of trade? To reiterate, what do empirical studies say about the impact of ISDS on the growth of investment in capital-importing countries?

The answer to the above-posed question is not simple. Some definitely affirmative answers to the posed question can be found in literature[51]. Some other voices coming from the international arbitration milieu claim more carefully that the so-called 'offer to arbitrate' addressed to investors can be helpful in encouraging investment (but it is not decisive in making business choices)[52]. Different opinions on the matter are perhaps best summarized by Franck (2007) in her powerful article on the proliferation of international investment agreements (IIAs – most of IIAs include ISDS which provide for investment arbitration)[53]. Franck distinguishes between 'market protagonists', who believe that other factors than IIAs relating to the targeted market are much more likely to influence business decisions, and 'treaty protagonists', who find that IIAs increase FDI, and thus suggests that the views of various authors are strongly polarized[54]. Economic studies examined by Franck use different methodologies, which makes their outcomes difficult to compare[55]. Importantly, however, the group of 'market protagonists' includes analysts from

[48] J. Fry, *Arbitration and Promotion*…, p. 392. See *Inter-American Convention on International Commercial Arbitration*, 30 January 1975, 1438 UNTS, p. 245 (entered into force 16 June 1976). See also A. Braghetta, *Polygamy of Treaties in Arbitration – A Latin American and MERCOSUL Perspective*, [in:] M.A. Fernandez-Ballester, D. Arias (eds.), *Liber Amicorum Bernardo Cremades*, Madrid 2010, pp. 266–267.

[49] D. Berkowitz, J. Moeniu, K. Pistor, *Legal Institutions*…, p. 166.

[50] E. Cayón, J. Santiago Correa, L. de la Espriella, *Does international arbitration affect economic growth in Latin America?*, WSEAS Transactions on Business and Economics, http://www.wseas.org/multimedia/journals/economics/2018/a985107-657.pdf, accessed on: 20 January 2020, p. 505.

[51] J.W. Salacuse, N.P Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, Harvard International Law Journal (1)2005, Vol. 46, pp. 109, 111.

[52] J. Fry, *Arbitration and Promotion*…, p. 392.

[53] S.D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law*, Pacific McGeorge Global Business & Development Law Journal (2)2007, Vol. 19, p. 345 et seq.

[54] S.D. Franck, *Foreign Direct Investment*…, pp. 349–353.

[55] S.D. Franck, *Foreign Direct Investment*…, p. 352.

the United Nations Commission on Trade and Development (UNCTAD)[56]. Yet, the opinion of UNCTAD is rather balanced and less straightforward than expected[57]. Franck's work and UNCTAD's studies are also cited by Newcombe and Paradell (2009) in their treatise on IIAs[58]. In the end, both Franck, and Newcombe and Paradell conclude that empirical literature is inconclusive[59]. A 2016 empirical study from South Africa, however, firmly finds that 'the net benefit accruing to countries with BITs [bilateral investment treaties – *my explanation*] is substantially lower than for countries without BITs'[60]. Overall, having examined the literature, it is difficult to make any definite observations.

In addition to this, Brazil and Ireland are well-known examples of countries successful in liberalizing their economies in the 1990s/2000s and attracting FDI almost without IIAs[61]. The phenomenon of Brazil's economic accomplishments is often discussed in arbitration literature as 'it remained at the edges of … new international legal order' [international commercial and investment arbitration regime – *my explanation*] due to its hesitance in ratifying the New York Convention (which it eventually ratified in 2002) and in joining the ICSID system (it is still neither a signatory nor a contracting state of the ICSID Convention)[62]. While in mid-1990s Brazil signed a number of BITs with capital-exporting countries, including agreements with the United Kingdom, France, Germany, Switzerland, and the Netherlands, the Brazilian Government decided to withdraw ratification proposals due to, among other reasons, its skepticism toward agreements providing for arbitration[63]. Of course, the growth of Brazilian investments in other Latin American countries and Africa, taken together with first difficulties with the protection of Brazilian investments in Ecuador and Bolivia, led to some revision of its initial position on IIAs[64]. Since 2015 Brazil has signed IIAs with Angola, Chile, Colombia, Ethiopia, Guyana, Malawi, Mexico, Mozambique, and Suriname (hence

[56] S.D. Franck, *Foreign Direct Investment*…, p. 349. See also UNCTAD, *World Investment Report 2003*, Geneva 2003, pp. 89–91, where the report finds that:

> 'An aggregate statistical analysis does not reveal a significant independent impact of BITs in determining FDI flows (UNCTAD 1998a). At best, BITs play a minor role in influencing global FDI flows and explaining differences in their size among countries. Aggregate results do not mean, however, that BITs cannot play a role in specific circumstances and for specific countries. For example, they could signal that a host country's attitude towards FDI has changed and its investment climate is improving—and to obtain access to investment insurance schemes. Indeed, investors appear to regard BITs as part of a good investment framework.'.

[57] See also UNCTAD, *World Investment Report 2003*…

[58] A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties*, Alphen aan den Rijn 2009, pp. 62–63.

[59] See S.D. Franck, *Foreign Direct Investment*…, p. 348, 353; A. Newcombe, L. Paradell, *Law and Practice*…, p. 62.

[60] U. Kollamparambil, *Bilateral Investment Treaties and Investor State Disputes*, Economic Research Southern Africa (ERSA), ERSA working paper 589, https://econrsa.org/system/files/publications/working_papers/working_paper_589.pdf, p. 13, accessed on: 20 January 2020.

[61] See S.D. Franck, *Foreign Direct Investment*…, pp. 348, 361; A. Newcombe, L. Paradell, *Law and Practice*…, p. 63. See also N.D. Rubins, *Investment Arbitration in Brazil*, Journal of World Investment 2003, Vol. 4, p. 1072.

[62] N.D. Rubins, *Investment*…

[63] A. Wald, *A New Approach to International Investment Agreements (IIAs) in Brazil*, [in:] M.A. Fernandez-Ballester, D. Arias (eds.), *Liber Amicorum*..., p. 1188.

[64] A. Wald, *A New Approach*…, pp. 1189–1190. See, however, also E. Lindsay, G. Angles, *International Investment Arbitration in Latin America: Year in Review 2016*, Bryan Cave, https://www.bclplaw.com/images/content/9/3/v2/93581/International-Investment-Arbitration-YiR-Latin-America-2016.pdf, p. 6, accessed on: 20 January 2020.

it negotiates IIAs mostly with capital-importing economies)[65]. The first of these agreements (Angola-Brazil BIT from 2015) went into force on 28 July 2017[66]. Even though Brazil has recently started changing its policy toward IIAs, its earlier success in attracting FDI, and the fact that until now it has concluded new IIAs only with less developed countries (e.g. Angola) or other emerging economies (e.g. Chile, Colombia), undermines to some degree the role of IIAs/ISDS in liberalization economies. Most importantly, however, Brazil is still reluctant to include in its IIAs provisions on investor-state arbitration, which are typical for most ISDS clauses, i.e. the parties to the recent generation of Brazilian IIAs may resort only to arbitration mechanisms between states.

Notwithstanding the above observations, it is also necessary to underscore that the relationship between the expansion of international commercial and investment arbitration, on one side, and the development of international trade and investment, on the other, is a two-way street. On the one hand, as already discussed, it is possible to argue that the promotion of arbitration as a method of dispute resolution fosters business life (yet a greater number of economic studies is needed in this regard, especially examining the weight of the 'offer to arbitrate' addressed to investors in their investment decisions). On the other hand, it is equally true that globalization, defined as a process of growing economic liberty and integration of the markets, boosts arbitration[67]. The quick development of arbitration in its various forms is strictly linked to the indicated process[68]. In other words, it is the global nature of nowadays trade and frequent export of capital that create the space for the worldwide expansion of arbitration. Getting back to the McConnaughay's dilemma, whether we like it or not, the era of globalization proved that, despite its flaws, and recent criticism of investment arbitration, so far only arbitration has met the need for effective protection of international trade and investment. This conclusion can be also backed by Brazil's turn to IIAs in order to safeguard its exported capital.

IV. HISTORICAL DISTRUST OF LATIN AMERICAN STATES TOWARD ARBITRATION

Arbitration, and, in particular, international arbitration – whether commercial or investment, and whether contract-based or treaty-based – has never been much favoured by developing nations, including a number of Latin American countries.

Sperry aptly observes that arbitration, at least in its modern form, has for many decades been considered to be an intellectual product of the 'grand old men' who served as academics and practitioners across the major US and Western European international hubs and hence dominated the international arbitration milieu by 'interchangeably' constituting arbitral tribunals and representing clients[69]. This origin

[65] See 'Brazil' at *Investment Policy Hub UNCTAD*, https://investmentpolicyhub.unctad.org/IIA/CountryBits/27, accessed on: 15 December 2018.
[66] See 'Brazil' at *Investment Policy*…
[67] B.M. Cremades, D.J.A. Cairns, *The Brave New World*…, pp. 173, 175.
[68] D. Sperry, *The Impact of International Commercial Arbitration on Developing Nations: Has the Emergence of the International Private Justice Market Narrowed the Gap between Developed and Developing Parties*, Hong Kong Law Journal (2)2010, Vol. 40, No. (Part) 2, p. 362.
[69] D. Sperry, *The Impact of International*…, p. 367.

of the international arbitration regime gave rise to the perception that developing countries were underrepresented in the international arbitration milieu, as well as frequently 'confronted by a foreign system run by elite foreigners' who were (allegedly) biased[70]. Still this allegation resulted largely from the fact that in the past many developing countries were not attentive in nominating arbitrators, often designating public officials to ICSID, as Shihata, the Vice President and General Counsel of the World Bank and Secretary-General of ICSID, went on to explain in 1986[71]. Hence, ICSID was aware of the need to seek 'increasingly diversified representation of nationalities' on ICSID panels, and to promote better understanding of international arbitration, long before the advent of the current treaty-based arbitration era[72]. As arbitration was generally 'little practiced' in Latin America until the 1980s, it was difficult to found statistical information and legal commentaries, not to mention arbitral decisions, on international treaties on the law of arbitration at that time[73]. How much has changed since then? It is needless to say that access to intelligence on arbitrators, literature and data bases on international arbitration, or arbitration in general, is much easier nowadays. The international arbitration milieu is today definitely more diversified, including well-known first-class arbitrators from Latin America like Prof. F. Orrego Vicuña, Prof. G.S. Tawil, Dr. H.A. Grigera Naón, or Dr. C. von Wobeser. Also, the overall number of Latin American arbitrators in cases proceeded under the aegis of the ICC International Court of Arbitration substantially increased between mid-1990s and 2005[74]. Naturally, the elitism of international arbitration has not completely vanished and investment arbitration still attracts criticism in this respect[75]. Anyway, the lack of diversity has been just one of the reasons for distrust of international arbitration in Latin America.

Another reason was the general perception that the entire normative architecture of international arbitration, including not only its procedural and institutional aspects, but also, for example, the 'doctrinal configuration' of international law, favoured interests of developed nations (e.g. the preference for the Hull formula in investment arbitration as its cornerstone)[76]. This largely stereotypical perception was perhaps best phrased by President Morales who expressed the view that '[g]overnments in Latin America, and I think all over the world never win the cases. The transnationals always win.'[77]. The regime of international arbitration

[70] D. Sperry, *The Impact of International*..., p. 368. See also G.M. Wilner, *Acceptance of Arbitration*..., p. 286.
[71] I.F.I. Shihata, *Obstacles Facing International Arbitration*, International Tax & Business Lawyer (2)1986, Vol. 4, p. 210.
[72] I.F.I. Shihata, *Obstacles Facing*..., p. 210.
[73] A.M. Garro, *Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America*, Journal of International Arbitration (4)1984, Vol. 1, pp. 293–294.
[74] J.M. Alcala, J. Briones, *Arbitration in Latin America: A First Look at the Impact of Legislative Reforms*, Law and Business Review of the Americas (4)2007, Vol. 13, p. 999. See also M.B. Burghetto, *Notes on Arbitration in Argentina*, Law and Business Review of the Americas (3)2003, Vol. 9, p. 491.
[75] See *Investor-State Dispute Settlement* at note 46, p. 6 (Figure 6), where UNCTAD concludes that '[a] small number of people have been appointed to more than 30 cases each (figure 6), with three having received the most appointments. All but one are citizens of European or North American countries.'
[76] D. Sperry, *The Impact of International*..., pp. 366–367.
[77] D. Sperry, *The Impact of International*..., p. 367. See also B.G. Rinker, *The Future of Arbitration*..., p. 483, who correctly observed (as early as in 1976) that:

> 'The Latin American nations' experience with arbitration has generally been negative. Although these countries have participated in a little over 200 arbitration decisions in the past 150 years, most decisions rendered rarely favored the Latin American states involved in the disputes.'.

was viewed for a long time as a 'modern alternative to the gunboat diplomacy used by colonial powers in times past'[78]. As explained already in 1984 by Wilner, it was so (and it was so for long decades not only in Latin American, but also in African and Asian countries) as:

> 'In many developing countries, the national legal system has been infused with elements that are inspired by the principles of the New International Economic Order or that at least are consonant with them. These rules which affect transnational trade, commerce, investment, and other components of national economic life have important and often essential public policy purposes; they are rules to be respected and enforced (…) Foreign courts and arbitration tribunals are part of the Western consensus and certainly cannot be trusted to serve the basic national interests of the particular developing country developing country itself might be involved in such relationships.'[79].

Likewise, colonialism, foreign military interventions, and the large scale exploitation of Latin American natural resources by foreign-owned corporations resulted in the Calvo Doctrine, according to which foreigners should not be entitled to any extra rights and privileges that are not held by a country's own nationals, which Latin American countries turned into a constitutional principle[80]. It was an ideological basis for rejecting contract- and treaty-based arbitration with multinationals by most Latin American countries until late 1970s[81]. The so-called 'Calvo Clause' used to be inserted into state contracts in Latin America, providing that disputes arising out of them had to be settled in local courts[82]. In consequence of the general distrust toward arbitration, local arbitration laws provided for a number of limitations requiring, for instance, that arbitrators have to be nationals or alumni of local law schools, that appointment of arbitrators must be approved by courts, or restrictions to the arbitration tribunal's power to order interim measures[83]. Also, the ratification of the New York Convention and the ICSID Convention was

[78] D. Sperry, *The Impact of International*…, p. 367. See also G. van Harten, *Policy Impacts of Investment Agreements for Andean Community States*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461097, p. 34, accessed on: 20 January 2020, where he concludes his analysis by stating:

> 'Given the apparent bias – arising from the financial interest of the arbitration industry – in favour of investors and against respondents, present arrangements for investment treaty arbitration are understandably regarded to be unfair to developing, capital-importing states. It is of course true that investors have been unsuccessful in many cases under investment treaties, but they have also won many claims and received substantial damages following expansively pro-investor interpretations of the treaties by tribunals.'.

[79] G.M. Wilner, *Acceptance of Arbitration*…, p. 288. See also B.G. Rinker, *The Future of Arbitration*…, p. 483.

[80] See J.M. Alcala, J. Briones, *Arbitration in Latin America*…, p. 997. See also M.B. Olmos Giupponi, *Trade Agreements, Investment Protection and Dispute Settlement in Latin America*, Alphen aan den Rijn 2018, pp. 79–80; J.G.P. Munoz, *The Rise of Common Principles for Investment in Latin America: Proposing a Methodological Shift for Investor-State Dispute Settlement*, Journal of World Investment & Trade (4)2016, Vol. 17, pp. 616–619.

[81] See e.g. J.M. Alcala, J. Briones, *Arbitration in Latin America*…, p. 997. See also J.C. Hamilton, *Three Decades of Latin American Commercial Arbitration*, University of Pennsylvania's Journal of International Law (4)2009, Vol. 30, p. 1100.

[82] C. Titi, *Investment Arbitration in Latin America. The Uncertain Veracity of Preconceived Ideas*, Arbitration International (2)2014, Vol. 30, p. 360.

[83] C. Titi, *Investment Arbitration*…, p. 360.

delayed in Latin America[84]. That used to fit in with a protectionist approach of domestic courts to foreign arbitral awards.

While almost all, if not all, of these side-effects of the Calvo Doctrine have gone with the wind over time, investment arbitration statistics indicate that the top five nationalities of investors in ICSID cases filed against Latin American countries are the US, Spain, Netherlands, France, and Canada[85]. These are either former colonial powers or North American states. Intra-Latin American disputes have been definitely less frequent so far[86]. Moreover, in 2014 it was reported that only 3 of 172 investment disputes involving Latin American parties were initiated by investors from the said region against states from outside the region (and Spain faced an investment claim from a Latin American investor only in 3 of 45 disputes initiated against it)[87]. What stems from the cases against Latin American countries is that foreign investment protection is still characterized (up to a point) by the tension between the western economies of North America and Europe, and developing or emerging economies[88]. Put another way, unlike in Central and Eastern Europe where the majority of cases against, for example, Poland (20 of 29 cases), the Czech Republic (34 of 38 cases), or Hungary (15 of 16 cases) are launched by European investors, intraregional cases do not prevail in Latin America over cases initiated by multinationals from other regions[89]. According to UNCTAD, Argentina (with 60 cases), Venezuela (42 cases), Mexico (25 cases), and Ecuador (23 cases) were among most frequent respondent states worldwide (from 1987 to 2017)[90]. Overall, approx. 28.6% of reported investment cases were brought against Latin American countries[91]. This makes Latin America the region most affected by investment arbitration[92]. A recent empirical study of Kollamparambil (2016) goes even further and lists Argentina, Venezuela, Ecuador, and Mexico, at the list of 'Top 20 Losers' in terms of net benefits of IIAs[93]. All of this probably partially explains, bearing in mind the colonial past of Latin America, why Latin American countries have been for a long time reluctant to provide for arbitration with foreign corporations and shows that, even nowadays, they have a reason for criticism of ICSID and to seek alternatives to it. As of today, the above-cited

[84] See M.B. Olmos Giupponi, *Trade Agreements*..., p. 83. See also A.M. Garro, *Enforcement of Arbitration*…, pp. 300–301; B.G. Rinker, *The Future of Arbitration*…, pp. 481–482.
[85] E. Lindsay, G. Angles, *Year in Review 2016*…, p. 3.
[86] E. Lindsay, G. Angles, *Year in Review 2016*…, p. 3.
[87] E. Lindsay, G. Angles, International *Investment Arbitration in Latin America: Year in Review 2014*, Bryan Cave, https://www.bclplaw.com/images/content/7/0/v2/70896/Arbitration-LatinAmerica-YIR-FINAL.pdf, p. 2, accessed on: 20 January 2020. See also 'Spain – as respondent state' at *Investment Policy Hub UNCTAD*, https://investmentpolicyhub.unctad.org/ISDS/CountryCases/197?partyRole=2, accessed on: 15 February 2019.
[88] M.B. Olmos Giupponi, *Trade Agreements*..., p. 82.
[89] See 'Poland – as respondent state' at *Investment Policy Hub UNCTAD*, https://investmentpolicyhub.unctad.org/ISDS/CountryCases/168?partyRole=2, accessed on 15 February 2019; 'Czech Republic – as respondent state' at *Investment Policy Hub UNCTAD* , https://investmentpolicyhub.unctad.org/ISDS/CountryCases/55?partyRole=2, accessed on: 15 February 2019; 'Hungary – as respondent state' at *Investment Policy Hub UNCTAD*, https://investmentpolicyhub.unctad.org/ISDS/CountryCases/94?partyRole=2, accessed on: 15 February 2019.
[90] UNCTAD, *Special Update on Investor-State Dispute Settlement: Facts and Figures*, Geneva 2017, p. 3 (Figure 2).
[91] C. Olivet, B. Müller, L. Ghiotto, *ISDS in numbers: Impacts of investment arbitration against Latin America and the Caribbean*, Transnational Institute, https://www.tni.org/en/publication/isds-in-numbers, p. 2, accessed on: 20 January 2020.
[92] C. Olivet, B. Müller, L. Ghiotto, *ISDS in numbers*…
[93] U. Kollamparambil, *Bilateral Investment Treaties*…, p. 20 (Table 9).

opinion of Wilner appears to be still true mainly as far as some of ALBA countries are concerned (i.e. the hotly debated cases of withdrawal from ICSID, provisions of Ecuador's 2008 constitution that forbid Ecuador from subjecting itself to international arbitration, or Venezuela's policy to avoid arbitration in joint-venture agreements in the oil and gas industry)[94]. Also, on 22 April 2013, several Latin American countries, including Bolivia, Ecuador, or Venezuela, adopted a declaration on 'Latin American States affected by transnational interests'[95]. Indeed, the fear that some developing countries can get together to create obstacles to further development of international arbitration is noticeable in literature[96]. The tendency to shift away from ICSID, and also to readopt in general less friendly approaches to arbitration, will be further discussed in section V of the article.

But it is undeniable that attitudes of most Latin American countries toward international arbitration have been positively changing over the years. A lot has changed in Latin America, especially with the rise of globalization in the 1990s and the interrelated second wave of regionalism in LAC, which – as suggested by Alcala & Briones – pushed many countries from this region toward improving their policies with respect to arbitration[97]. There has been a great advance in promoting international arbitration in Latin American countries[98]. The changes had two dimensions[99]. First, legislative reforms of arbitration laws, making them more arbitration-friendly, were undertaken in the 1990s and 2000s in a number of Latin American countries, including Argentina, Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Nicaragua, Paraguay, Peru, or Venezuela[100]. Secondly, a much more sympathetic approach to investor-state arbitration, and more generally to IIAs, has been adopted in the past two decades by many countries of the region.

As this short article is not a suitable place for a thorough discussion of the process of arbitration law reforms in Latin America, it will be probably best to sum it up by quoting Hamilton, known for his specialization in the region, who explains that:

> 'Principally in the 1990s, many Latin American countries overhauled their domestic arbitration laws to provide for the type of commercial arbitration contemplated in the Panama and New York Conventions [without intrusive court intervention in the process of arbitration – *my explanation*]. The changes in Latin American arbitration laws occurred as

[94] J. Briones, A. Tagvoryan, *Is International Arbitration in Latin America in Danger?*, Law & Business Review of the Americas (1)2010, Vol. 16, p. 132.
[95] UNCTAD, *World Investment Report 2013. Recent Policy Developments,* Geneva 2013, p. 114 (Box III.7).
[96] W.O. Durosaro, *The Role of Arbitration in International Commercial Disputes*, International Journal of Humanities, Social Sciences and Education (3)2014, Vol. 1, p. 7.
[97] J.M. Alcala, J. Briones, *Arbitration in Latin America*…, pp. 995–996.
[98] P.L. Cibie, *Enforcement of Arbitration Awards in Latin America: The Current Progress and Setbacks*, Law & Business Review of the Americas (2)2016, Vol. 22, p. 93. See also A. Jana L., *International Commercial Arbitration in Latin America: Myths and Realities*, Journal of International Arbitration (4)2015, Vol. 32, p. 421 et pass.
[99] For a similar distinction, see F. Mantilla-Serrano, *Major Trends in International Commercial Arbitration in Latin America*, Journal of International Arbitration (1)2000, Vol. 17, pp. 139–140.
[100] See, however, P.E. Mason, M.G. Ferreira Dos Santos, *New Keys to Arbitration in Latin-America*, Journal of International Arbitration (1)2008, Vol. 25, p. 32. See also 'Nueva Ley de Arbitraje Comercial Internacional en la Argentina', https://www.marval.com/publicacion/nueva-ley-de-arbitraje-comercial-internacional-en-la-argentina-13212, accessed on: 20 January 2020.

> part of sweeping legal reforms and economic liberalization. Many Latin American states based their domestic arbitration laws in whole or in part on the Model Law on Commercial Arbitration formulated by the United Nations Commission on International Trade Law ("UNCITRAL Model Law")."[101].

Surely, the picture of the region is more nuanced than this quote conveys. It is important to distinguish between, for example, Brazil, which followed a monistic approach, yet its unique arbitration law draws from the UNICTRAL Model Law along with drawing from the Spanish Arbitration Act of 1988 and the Panama Convention, and Chile, which followed a dualistic approach and hence almost fully adopted the UNCITRAL Model Law, or Peru, which decided to revise its arbitration law twice in order to adjust it not only to the 1985 UNCITRAL Model Law, but also to the 2006 amendments to the UNCITRAL Model Law[102]. Therefore, Latin American countries followed different paths of reform. Regrettably, despite the extensive legal reforms, some post-arbitration awards from Latin America on contracts involving state-owned entities, particularly ones issued in the last decade, demonstrate the continuing protectionism of domestic courts towards local economic interests (e.g. a broad public policy exception in some Argentinean cases)[103]. It remains to be seen how domestic courts react to the new pro-arbitration policies of Latin American governments in the long run[104]. Even if court interference in arbitration proceedings still has to be minimized in some Latin American jurisdictions, a lot has been done in the region to promote commercial arbitration anyway: the arbitration laws in Latin America have gone a long way toward modernization since the 1980s.

In addition to discussing the modernization of arbitration laws in Latin America, it is relevant to note that the region has become in the 1990s and 2000s covered by an impressive array of different IIAs, including not only regional or inter-regional agreements and/or free trade agreements with investment provisions (FTAs or TIPs), but also bilateral agreements, many of which overlap (e.g. according to UNCTAD, the Additional Protocol to the Framework Agreement of the Pacific Alliance, signed in 2014, hereinafter the Pacific Alliance Additional Protocol, concerning investments co-exists with Chile-Colombia BIT, Chile-Peru BIT, Trans-Pacific Partnership, all of which include ISDS, and with a number of FTAs with investment provisions)[105]. As discussed on the example of Brazil, the approach of Latin American countries to IIAs has recently become less tentative, which change is reflected in statistical

[101] J.C. Hamilton, *Three Decades*..., pp. 1102–1103.

[102] J.C. Hamilton, *Three Decades*..., pp. 1102–1103. See also A. Jana L., *International Commercial Arbitration*..., pp. 423–424; P.E. Mason, M.G. Ferreira Dos Santos, *New Keys*..., p. 45; J. Briones, A. Tagvoryan, *Is International Arbitration*..., p. 135.

[103] See P.E. Mason, M.G. Ferreira Dos Santos, *New Keys*..., p. 34 et seq. See also P.L. Cibie, *Enforcement of Arbitration Awards*..., pp. 93–94, yet P.L. Cibie optimistically concludes that: '[c]ase law suggests, however, that the trend among Latin American courts is to restrict the application of the public policy exception'. For a more positive assessment, see M.B. Burghetto, *Notes*..., p. 493.

[104] A. Jana L., *International Commercial Arbitration*..., p. 425.

[105] For an overview of Latin American IIAs and FTAs, see Ch. Leathley, *International Dispute Resolution*..., p. 13 et seq. See also 'Additional Protocol to the Framework Agreement of the Pacific Alliance' *Investment Policy Hub UNCTAD*, https://investmentpolicyhub.unctad.org/IIA/country/165/treaty/3409, accessed on: 18 January 2019.

data. A 2016 review of international investment arbitration in Latin America reports that:

> 'Reflecting trade and investment patterns, countries in the region have concluded at least 663 investment treaties (including bilateral investment treaties, free trade agreements and other treaties containing investment-related provisions). Notably, over 22% of the region's investment treaties are intraregional (i.e. concluded between only Latin American countries).'[106].

Among Latin American countries, Argentina (61 BITs and 18 TIPs), Chile (55 BITs and 32 TIPs), and Peru (33 BITs and 30 TIPs) have signed the greatest number of IIAs[107]. While not all of these IIAs are currently in force, and not all them provide for investment arbitration, the growth in the number of IIAs in Latin America throughout the 1990s and 2000s was impressive. Many Latin American countries have started being capital-exporting countries at that time[108]. Much of the historical distrust toward being sued by foreign corporations has therefore gone (although, as suggested by the statistics on investment disputes, this is a much more multidimensional and complex relationship – the discussed IIAs gave birth to a wave of cases against Latin American countries and hence also contribute to the rebirth of some distrust of arbitration).

Whatever the case may be, does all this mean that it was solely (or mainly) regional international law on international commercial and investment arbitration that influenced the discussed policy changes in Latin American countries? Arguably, even if closely related to globalization, or indirectly caused by it, the policy changes in Latin American countries do not really result from the regional integration processes, but rather from a series of individual efforts of different Latin American countries to adjust to expectations of their trading and/or business partners, or to overcome the economic challenges affecting Latin America (e.g. demand for FDI to handle the international financial crisis of 2008). The latter proposition appears particularly true with regards to Brazil[109]. Also, as shown by the example of Brazil, its policy change in relation to IIAs does not mean providing for investment arbitration. It can be validly argued that the investment protection legal framework in Latin America has broadened in an uncoordinated manner in response to new trends in global investment flows in the 1990s and 2000s[110]. If so, the relevant changes were rather market-driven than planned at the regional level. Finally, perhaps the historic changes in Latin America, especially as far as reforms of arbitration laws are concerned, were inspired rather by UNCITRAL than by the regional organizations from the second wave of regionalism (and were

[106] E. Lindsay, G. Angles, *Year in Review 2016*…, p. 1.
[107] See 'Argentina' at *Investment Policy Hub UNCTAD*, https://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/8#iiaInnerMenu, accessed on 19 February 2019; 'Chile' at *Investment Policy Hub UNCTAD*, https://investmentpolicyhub.unctad.org/IIA/CountryBits/41#iiaInnerMenu, accessed on 19 February 2019; 'Peru' at *Investment Policy Hub UNCTAD*, https://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu, accessed on: 19 February 2019.
[108] M.B. Olmos Giupponi, *Trade Agreements*..., p. 82.
[109] A. Wald, *A New Approach*…, p. 1192 et pass.
[110] M.B. Olmos Giupponi, *Trade Agreements*..., pp. 44–45.

conceptually supported by the consolidated international arbitration community, not by analysts and jurists from the regional integration organizations)?

As matter of fact, the modern transnational regime of international commercial and investment arbitration was historically sponsored largely by UNCITRAL, UNCTAD, and the World Bank, and more recently by global arbitral institutions or private institutes, which in the last twenty years took the lead in developing various substantive and procedural international arbitration soft law instruments[111]. It was the 1990's increase in the ratification of the New York Convention and the broad ratification of the ICSID Convention, together with the widespread adoption of UNCITRAL Model Law in Latin America, that have changed the landscape for different types of international arbitration in the LAC region to the greatest extent. This probably undermines the importance of initiatives taken by the regional integration organizations to promote arbitration in Latin America that are discussed in the next section (e.g. works of the Inter-American Commercial Arbitration Commission under the auspices of the OAS).

V. LEGAL OUTPUT OF MAJOR LATIN AMERICAN REGIONAL ORGANIZATIONS IN THE AREA OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION

In light of the above observations, it is now necessary to review *aquis* of Latin American regional organizations in the area of arbitration, i.e. to examine both the extensiveness and intensiveness of regional regulations on international commercial and investment arbitration. The review will be carried out on an organization-by--organization basis, starting from the OAS, or actually from the Inter-American Commercial Arbitration Commission (IACAC), and ending with the Pacific Alliance. A summary of findings is offered in section VI.

A. OAS/IACAC

The IACAC was established in 1934, yet its works 'were subsumed' later within the OAS system that was established in 1948 (but, unlike the main OAS headquarters located in Washington, D.C., IACAC is based in Bogota, Colombia)[112]. Latin American chambers of commerce – and the American Arbitration Association, which gives IACAC an Inter-American character, and administers arbitration cases conducted under it auspices – currently constitute national sections of IACAC[113]. Its early initiatives to regionally harmonize regulation of international commercial arbitration were largely unsuccessful. IACAC harmonization initiatives in the 1950s and 1960s are best summarized by Garro:

> 'Regional arbitration agreements sponsored by the Inter-American Commercial Arbitration Commission have fared no better [than major

[111] See D. Arias, *Soft Law Rules in International Arbitration: Positive Effects and Legitimation of the IBA as a Rule-Maker*, Indian Journal of Arbitration Law (2)2018, Vol. 6, pp. 29–30, where D. Arias explains, for example, the role of INCOTERMS (ICC), or instruments drafted by the International Bar Association.
[112] Ch. Leathley, *International Dispute Resolution*..., pp. 79, 81.
[113] Ch. Leathley, *International Dispute Resolution*..., pp. 83–84.

> international conventions on commercial arbitration, which were not popular in Latin America – *my explanation*]. At their meeting in Mexico City in 1956, the Inter-American Council of Jurists adopted and recommended a model law on arbitration. However, no Latin American country adopted this 1956 Draft Uniform Law on Inter-American Commercial Arbitration. In 1967, the Inter-American Juridical Committee proposed a draft convention on international commercial arbitration, which recognized compulsory arbitration clauses and required that contracting states enforce foreign arbitral awards as though they were final judgments unless a party to the arbitration agreement could demonstrate that the award had been invalidly rendered or did not truly resolve the dispute at issue. No Latin American country indicated it supported the 1967 Draft Inter-American Convention on International Commercial Arbitration.'[114].

Hence, it is probably the successful promotion and support of the Panama Convention in the Western hemisphere that is the greatest achievement of IACAC[115]. The Panama Convention, which was concluded under the aegis of the OAS, assisted in dismantling the Calvo Doctrine in the region[116]. Its conclusion is considered to be a turning point in the history of arbitration in Latin America[117]. Just as in case of other regional instruments, the Panama Convention has its global equivalent in the New York Convention (and the Panama Convention probably accelerated the New York Convention ratification process in Latin America)[118]. It is even suggested that the Panama Convention is a 'hybrid offspring' of the 1967 Draft Inter-American Convention on International Commercial Arbitration (IACAC) and the New York Convention (UNCITRAL)[119]. The Panama Convention and the New York Convention overlap to a large degree as both of them deal with basic international requirements of arbitration clauses and proceedings, as well as stipulate the conditions for the enforcement of foreign arbitral awards[120]. There are, of course, also notable differences between these instruments[121]. The possibility of conflicts between the New York Convention and the Panama Convention, and their concurrent applicability, is a subject of debate among scholars[122]. The most interesting feature of the Panama Convention is likely its unique stipulation that, unless the parties agree otherwise, arbitration proceedings shall be conducted under the arbitration rules of IACAC (Article 3). Though the latter are closely modelled on the UNCITRAL Arbitration Rules, the stipulation has tended to 'regionalize' arbitration proceedings too far.

Other important regional law instruments agreed within the OAS system, include, *inter alia*, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (agreed in 1979, the 'Montevideo

[114] A.M. Garro, *Enforcement of Arbitration*..., p. 301.
[115] Ch. Leathley, *International Dispute Resolution*..., pp. 81–82.
[116] J.C. Hamilton, *Three Decades*..., pp. 1100–1101.
[117] J.C. Hamilton, *Three Decades*..., pp. 1100–1101.
[118] Ch. Leathley, *International Dispute Resolution*..., p. 82.
[119] A.M. Garro, *Enforcement of Arbitration*..., p. 303. See also J.C. Hamilton, *Three Decades*..., p. 1101.
[120] For an overview of the Panama Convention, see *The Inter-American Convention on International Commercial Arbitration*, Lawyer of the Americas (1)1977, Vol. 9, p. 44 et pass (authorship not provided).
[121] A.M. Garro, *Enforcement of Arbitration*..., pp. 303–304, 318–320.
[122] J.C. Hamilton, *Three Decades*..., p. 1106.

Convention')[123]. Article 1 of the Montevideo Convention provides that it shall apply to matters not covered by the Panama Convention. A useful comparison of the Panama Convention, the Montevideo Convention, and the New York Convention was published by the OAS[124]. The comparison does not fully explain the interplay of these instruments within all Latin American jurisdictions, though.

B. Andean Community

The emergence of the so-called 'Andean Community Law', which is directly (horizontally and vertically) applicable in the Andean Community member states, is a distinctive feature of this supranational organization[125]. There is number of community decisions either directly or indirectly relevant to investment protection, including Decision 291 of 21 March 1991 (Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties), which is probably known best outside Latin America. Decision 291 provides in Article 10 that in settling disagreements or disputes arising from FDI the Andean Community member states shall follow provisions of their domestic regulations[126]. By providing so, Decision 291 can be read as a step away from the Calvo Doctrine, which was traditionally applied in the earlier Andean Community Law decisions[127]. As Article 10 leaves the settlement of investment disputes to individual states' policies, much depends on the host member state's policy toward investor-state arbitration (e.g. Peru with its liberal policy toward ISDS vs. Bolivia's hostility to investment arbitration).

At the same time, the Protocol of Cochabamba Amending the Treaty Creating the Court of Justice (1996), in Article 38 allows individuals to submit disputes arising out of contracts governed by the Andean Community law to the Andean Court of Justice's arbitration[128]. The arbitral awards of the Andean Court of Justice do not require *exequatur*, i.e. they are directly applicable in the Andean Community[129]. Thus, this *sui generis* arbitration system bears features that make it different from private commercial arbitration.

C. MERCOSUR

As regards MERCOSUR, Blackaby and Noury divide the arbitration-related initiatives of MERCOSUR into two types: (1) those aimed at the regional harmonization

[123] See *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*, http://www.oas.org/juridico/english/treaties/b-41.html, accessed on: 20 January 2020.
[124] See *Comparison of Inter-American Arbitration Treaties & The New York Convention*, http://www.oas.org/en/sla/dil/docs/Comparison%20of%20Inter-American%20Arbitration%20Treaties%20and%20the%20New%20York%20Convention.pdf, accessed on: 20 January 2020.
[125] Ch. Leathley, *International Dispute Resolution*…, pp. 116, 125.
[126] Ch. Leathley, *International Dispute Resolution*…, pp. 116–118. See also *Decision 291: Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties*, http://www.sice.oas.org/trade/junac/decisiones/dec291e.asp, accessed on: 20 January 2020.
[127] E.A. Wiesner, *ANCOM: A New Attitude Toward Foreign Investment?*, University of Miami Inter-American Law Review 1993, Vol. 24, pp. 442 et pass, 448.
[128] See *Protocol of Cochabamba Amending the Treaty Creating the Court of Justice*, http://www.sice.oas.org/Trade/Junac/Tribunal/TratModi.asp, accessed on: 20 January 2020. See also Ch. Leathley, *International Dispute Resolution*…, p. 126.
[129] Ch. Leathley, *International Dispute Resolution*…, p. 126.

of commercial arbitration instruments; and (2) those aimed the establishment of regional mechanisms of investment protection[130]. The brief discussion of arbitration-related initiatives of MERCOSUR will mirror these two categories of initiatives.

The MERCOSUR International Commercial Arbitration Agreement (MICAA or MAA) and the Agreement on International Commercial Arbitration between MERCOSUR, Bolivia, and Chile fall into the first category (both agreed on 23 July 1998)[131]. The agreement between MERCOSUR, Bolivia and Chile (associate members in 1998) parallels the agreement between MERCOSUR full member states (Argentina, Brazil, Uruguay, Paraguay)[132]. Their aim of these agreements was to 'establish uniform arbitration rules and principles for the signatory countries' and hence were quite zealously received by some commentators[133]. But the MICCA's attempt to regulate the entire scope of commercial arbitration procedure, including issues like the applicable law, place of arbitration, language of proceedings, jurisdiction, interim measures, or rules governing the enforcement of arbitral awards, largely duplicates the objectives of the UNCITRAL Model Law[134]. It explicitly refers to the UNCITRAL Model Law, which supplements the MICCA if the latter fails to regulate some issues, as well as refers to other regional international instruments, including the Panama Convention[135]. This makes the entire instrument an interesting amalgam of different international and regional law elements, but also superfluous, i.e. overlapping with more popular regulations[136]. Moreover, some of its provisions, for example, regarding the law applicable to the validity of the arbitration clause, contradict international standards[137]. It is argued that the MICCA 'introduces potential complications given the way it overlaps with other laws and procedural rules'[138]. Hence, it is debatable whether it does more good than harm to the process of building international arbitration.

The Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR (agreed in 1994, known as the 'Protocol of Colonia'), the Protocol on Promotion and Protection of Investments coming from non-members of MERCOSUR (agreed in 1994, known as the 'Protocol of Buenos Aires'), and the Intra-MERCOSUR Investment Facilitation Protocol (agreed in 2017) fall into the second category of initiatives (i.e. investment protection related

[130] N. Blackaby, S. Noury, *International Arbitration in the MERCOSUR – Is Harmonization the Solution*, Law & Business Review of the Americas (3)2003, Vol. 9, p. 446.

[131] See *Acuerdo sobre Arbitraje Comercial Internacional del MERCOSUR*, http://www.mre.gov.py/tratados/public_web/DetallesTratado.aspx?id=YoJECHuyUmFj6flylD4u1A==&em=lc4aLYHVB0dF+kNrtEvsmZ96BovjLlz0mcrZruYPcn8=, accessed on: 20 January 2020; and *Acuerdo sobre Arbitraje Comercial Internacional entre el Mercosur, la República De Bolivia y la República De Chile*, http://www.mre.gov.py/tratados/public_web/DetallesTratado.aspx?id=hI/rGRiWQry2xGV5qmXo6g==&em=lc4aLYHVB0dF+kNrtEvsmZ96BovjLlz0mcrZruYPcn8=, accessed on: 20 January 2020. See also Ch. Leathley, *International Dispute Resolution*…, p. 177.

[132] Ch. Leathley, *International Dispute Resolution*…, p. 177.

[133] L. Da Gama E. Souza, *The UNIDROIT Principles of International Commercial Contracts and their Applicability in the MERCOSUR Countries*, R.J.T. 2002, Vol. 36, p. 397. For a more general overview, see E.A. Quintana Adriano, *Commercial Arbitration: Its Harmonization in International Treaties, Regional Treaties and Internal Law*, Penn State International Law Review (3)2009, Vol. 27, pp. 833–834.

[134] See Ch. Leathley, *International Dispute Resolution*…, pp. 177, 179; N. Blackaby, S. Noury, *International Arbitration*…, p. 447.

[135] N. Blackaby, S. Noury, *International Arbitration*…, pp. 447–449.

[136] N. Blackaby, S. Noury, *International Arbitration*…, pp. 468–469.

[137] Ch. Leathley, *International Dispute Resolution*…, p. 181.

[138] Ch. Leathley, *International Dispute Resolution*…, p. 188.

initiatives of MERCOSUR)[139]. However, none of these three protocols are in force, and only the first two provide for investor-state arbitration[140]. Yet, Blackaby and Noury criticize the Protocol of Colonia as it limits 'recourse to arbitration under the ICSID Convention unless and until Brazil becomes a Contracting State' and advise foreign investors, if possible, to initiate future arbitration cases against MERCOSUR member states under BITs[141]. This shows that MERCOSUR's adherence to the 1990s standards of investment protection is questionable.

D. CARICOM

Article 74.2 of the Revised Treaty of Chaguaramas requires CARICOM countries to harmonize their arbitration laws. Another important provision of the Revised Treaty of Chaguaramas for the promotion of alternative dispute resolution is Article 223. It requires that the CARICOM member states: (1) encourage and facilitate the use of arbitration for the settlement of private commercial disputes among their nationals as well as among their nationals and nationals of third states; and (2) provide appropriate procedures in their legislation to ensure observance of arbitration agreements and for the recognition and enforcement of arbitral awards. According to Article 223.3 of the Revised Treaty of Chaguaramas, a CARICOM country which has implemented the New York Convention shall be deemed to be in compliance with the requirement to provide appropriate procedures in its legislation to ensure observance of arbitration agreements. But the New York Convention has not been ratified by Belize, Grenada, St. Kitts and Nevis, Saint Lucia, and Suriname as of yet[142]. Regarding the UNCITRAL Model Law, it has not been adopted in Belize, Grenada, Guyana, St. Kitts And Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago[143]. In the field of investment protection, the Revised Treaty of Chaguaramas provides for state-to-state dispute resolution mechanisms, which are available to investors only in exceptional circumstances[144]. In his 2007 treatise on international dispute resolution in Latin America, Leathley points to a number of regional agreements entered into by CARICOM

[139] See *Protocolo de Colonia para la Promoción y Protección Recíproca de Inversiones en el MERCOSUR*, http://www.mre.gov.py/tratados/public_web/DetallesTratado.aspx?id=QbqmyvQl7CGPrIugK4Iltg==&em=lc4aLYHVB0dF+kNrtEvsmZ96BovjLlz0mcrZruYPcn8=, accessed on: 20 January 2020; *Protocolo sobre Promoción de Inversiones Provenientes de Estados no Partes del Mercosur*, http://www.mre.gov.py/tratados/public_web/DetallesTratado.aspx?id=MzFrhVNTCm7X+Ji9lTDZ0Q==&em=lc4aLYHVB0dF+kNrtEvsmZ96BovjLlz0mcrZruYPcn8=, accessed on: 20 January 2020; and *Protocolo de Cooperación y Facilitación de Inversiones Intra-Mercosur*, http://www.mre.gov.py/tratados/public_web/DetallesTratado.aspx?id=6E8bE7i/WyKPb1VlfV2uLw==&em=lc4aLYHVB0dF+kNrtEvsmZ96BovjLlz0mcrZruYPcn8=, accessed on: 20 January 2020 See also M. Cornell Dypski, *An Examination of Investor-State Dispute Resolution under the MERCOSUR and NAFTA Regimes*, Law & Business Review of the Americas (1)2002, Vol. 8, p. 226 et pass.

[140] See J.D. Fry, J.I. Stampalija, *Towards an Agreement on Investment in Mercosur: Conflict and Complementarity of International Investment Law and International Trade-in-Services Law*, Journal of World Investment & Trade (4)2012, Vol. 13, p. 581; N. Blackaby, S. Noury, *International Arbitration*…, p. 454, 457; C. Dypski, *supra* note 139, 228–229.

[141] N. Blackaby, S. Noury, *International Arbitration*…, p. 469.

[142] See 'New York Convention' *Status*, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2, accessed on: 20 January 2020.

[143] See 'UNCITRAL Model Law' *Status*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html, accessed on: 25 February 2019.

[144] Ch. Leathley, *International Dispute Resolution*…, pp. 130, 146.

which provide for a legal basis for investor protection though[145]. Among the said regional agreements, however, only the CARICOM-Costa Rica FTA provides for investor-state arbitration (ICSID/UNCITRAL as forums of resolving disputes)[146]. In 2017 and 2018 a draft CARICOM Investment Code was being considered[147]. The Investment Code was expected to be finalized in 2019.

E. ALBA and UNASUR

Latin American countries initially opposed establishing ICSID[148]. After this initial opposition of Latin American governments to ICSID decreased in 1990s (with the exceptions of Brazil and Mexico, yet Mexico became a member state in 2018), a great number of cases initiated against Latin American countries attracted strong regional criticism and resistance to ICSID[149]. Since 2007 an 'ideological component' was included in some of the critiques – Presidents Morales and Chavez jointly announced that the ALBA countries (Bolivia, Venezuela, Cuba and Nicaragua) would withdraw from = ICSID and denounce all of their IIAs[150]. Indeed, ICSID was vigorously criticized for an alleged 'Western bias'[151]. Bolivia and Venezuela took a number of anti-investment arbitration measures end eventually withdrew from ICSID (in 2007 and 2012 respectively)[152]. These countries were joined by Ecuador (a former member state of ALBA between 2006 and 2018) which first decided to exclude its oil and gas sector from ICSID's jurisdiction (2007) and subsequently completely withdrew from ICSID (2009)[153]. Paradoxically, Ecuador was one of the first Latin American countries which joined ICSID[154]. At the 39th Session of the General Assembly of OAS (2009), the frustration with the high number of cases initiated against Latin American countries at ICSID led to a proposal of Ecuador to create, under the aegis of UNASUR, an arbitration centre alternative to ICSID[155]. The proposal submitted by Ecuador included a set of new investment arbitration rules and a code of conduct for UNASUR adjudicators[156]. According to the proposal, with time, the UNASUR

[145] Ch. Leathley, *International Dispute Resolution*…, pp. 134–135.
[146] See 'CARICOM (Caribbean Community)' CARICOM-Costa Rica FTA, Investment Policy Hub https://investmentpolicyhub.unctad.org/Download/TreatyFile/2675/, accessed on: 25 February 2019.
[147] See *Trade and Investment Agreements in CARICOM*, https://www.paho.org/ocpc/index.php?option=com_docman&view=download&alias=115-trade-and-investment-agreements-in-caricom&category_slug=seminar-on-tobacco-trade&Itemid=490, accessed on: 25 February 2019. See also *Successful COFAP and CSME Meetings in Barbados*, https://caricom.org/communications/view/successful-cofap-and-csme-meetings-in-barbados, accessed on: 25 February 2019.
[148] I.A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, Law & Business Review of the Americas (3)2010, Vol. 16, pp. 417–418.
[149] I.A. Vincentelli, *The Uncertain Future*…, p. 421.
[150] I.A. Vincentelli, *The Uncertain Future*…, p. 421.
[151] K. Grant, *The ICSID Under Siege: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration*, Osgoode Legal Studies Research Paper No. 26 (6)2015, Vol. 11, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2626498, p. 5, accessed on: 20 January 2020.
[152] For a close analysis of the anti-arbitration steps, see I.A. Vincentelli, *The Uncertain Future*…, pp. 428, 447–449 respectively. See also J.C. Bernal Rivera, M. Viscarra Azuga, *Life after ICSID: 10th anniversary of Bolivia's withdrawal from ICSID* (12 August 2017), http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivias-withdrawal-icsid/, accessed on: 20 January 2020.
[153] See I.A. Vincentelli, *The Uncertain Future*…, pp. 410, 442. For a detailed discussion of the denunciation of the ICSID by members of ALBA and its consequences, see UNCTAD, *IIA Issues Note: Denunciation of the ICSID convention and BITs*, Geneva 2010.
[154] I.A. Vincentelli, *The Uncertain Future*…, p. 419.
[155] K. Grant, *The ICSID Under Siege*…, p. 25.
[156] K. Grant, *The ICSID Under Siege*…, p. 25.

Arbitration Centre should become open to users from all over the world[157]. While the UNASUR Arbitration Centre and its procedural rules have a number of interesting features – in any case, they address some concerns related to the current ISDS system, including, for instance, absence of an appeal mechanism, or its complexity and high costs[158] – the idea behind this initiative constitutes a regional (and ideological) challenge to the ICSID system (and hence to the World Bank' policies toward foreign investments). The major issue is that the UNASUR Arbitration Centre, which is a unique and untested initiative for the time being, in order to be successful, should gain more credibility and broader regional (or ideally global) acceptance.

F. Pacific Alliance and CACM

The Pacific Alliance stands out from other new integration schemes in Latin America as the Pacific Alliance Additional Protocol includes an ISDS clause providing for investor--state arbitration and forum options, *inter alia*, like ICSID or UNCITRAL. The Pacific Alliance Additional Protocol was signed by all of the Pacific Alliance countries (Chile, Colombia, Mexico and Peru) and entered into force on 1 May 2016[159]. It was enthusiastically received by ECLAC as it 'updates the standards of investment protection and liberalization of trade in services contained in bilateral FTA between PA members'[160]. According to UNCTAD, the Pacific Alliance Additional Protocol is a well-balanced and modern investment agreement which adequately safeguards public interest and promotes responsible business practices[161]. Other pro-ISDS initiatives in Latin America, not discussed yet, are IIAs/FTAs agreed by the Central American Common Market (CACM), including, for example, the Agreement on Investment and Trade in Services between Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua (known as 'CACM Agreement on Investment and Trade Services') and the Free Trade Agreement between Mexico and Central American, both of which provide for investor-state arbitration[162]. So far, there has been one investment dispute reported under an FTA agreed by CACM (based on CACM – Panama FTA)[163]. It will be interesting to see whether this IIA/FTA policymaking of CACM is upheld in its future agreements.

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[157] C. Titi, *Investment Arbitration*…, p. 380.

[158] K. Grant, *The ICSID Under Siege*…, p. 30.

[159] For an overview of the Pacific Alliance Additional Protocol, see R. Polanco Lazo, *Chilean Trade and Investment Agreements with Southern Countries. From Bilateral Treaties to the Pacific Alliance*, SECO /WTI Academic Cooperation Project Working Paper Series 2015/01', https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614356, p. 37, accessed on: 25 Februar 2019.

[160] See J.D. Lima, D. Cracau, *The Pacific Alliance and its economic impact on regional trade and investment. Evaluation and perspectives*, ECLAC, online: https://repositorio.cepal.org/bitstream/handle/11362/40860/1/S1601207_en.pdf, p. 39, accessed on: 20 January 2020.

[161] R. Claros, *Investment Protection and the Safeguard of the Essential Interests of the State: Drawing Lessons from the Pacific Alliance's Investment Treaty Framework*, SECO / WTI Academic Cooperation Project Working Paper Series 2015, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2711662, p. 9, accessed on: 20 January 2020. See also UNCTAD, *IIA Issues Note: Recent Trends in IIAs and ISDS,* Geneva 2015, p. 4.

[162] See 'Free Trade Agreement between Mexico and Central America' at *Investment Policy Hub UNCTAD* (23 February 2019), https://investmentpolicyhub.unctad.org/IIA/country/136/treaty/3291. See also 'Agreement on Investment and Trade in Services between Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua' at *Investment Policy Hub UNCTAD*, https://investmentpolicyhub.unctad.org/IIA/countryGrouping/17/treaty/3203, accessed on: 23 February 2019.

[163] *Álvarez y Marín Corporación S.A., Estudios Tributarios AP S.A., Stichting Administratiekantoor Anbadi, Bartus van Noordenne and Cornelis Willem van Noordenne v. Republic of Panama* (ICSID Case No. ARB/15/14). See also 'Free Trade Agreement between Central America and Panama' at *Investment Policy Hub UNCTAD*, https://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3202, accessed on: 23 February 2019.

VI. ASSESSMENT OF THE RELATIONSHIP BETWEEN THE DEVELOPMENT OF REGIONAL ARBITRATION LAW AND ECONOMIC INTEGRATION

Considering the above, what is the relationship between the development of regional international law on commercial and investment arbitration and economic integration of Latin American states? To rephrase the question: How did the regional lawmaking in this field influence the region's integration? An answer to this question depends on a preliminary issue as to what indicators of economic integration one applies. Basically, there are two approaches used in economic literature to asses economic integration[164]. The first approach assumes that levels of economic integration can be measured by levels of institutional convergence and/or legal harmonization (i.e. a free trade area, common market, customs union, economic and currency union as well as joint legal frameworks within these schemes). It is based on the premise that removing legal obstacles is a *sine qua non* for achieving economic integration. The legal stages-of-integration scale is imperfect, however, as it shows rather 'potential for integration' than the true willingness of different economic actors 'to engage in cross-border economic activity'[165]. The second approach focuses much more on the practical economic outcomes of integration. Thus, it posits examining the ratio of foreign trade to gross domestic product (GDP), or the ratio of FDI inflows to GDP, and sometimes both, as indicators of integration. Again, this proposal is not free of flaws and can be misleading[166]. Leaving aside the question which approach is more accurate, in this section the author would like to offer his views on the issue whether Latin American regional organizations contributed to the integration and economic development of their member states by promoting international commercial and investment arbitration.

Taking the first of the two above-suggested perspectives, the legal output of major Latin American regional organizations in the area of international commercial and investment arbitration, as shown in the previous section, is rather small. Bearing in mind the long history of Latin American regionalism and the acceleration of integration processes in the 1990s (section), in view of the relatively important role that arbitration plays in the processes of liberalization of international trade and investment (section III), one could expect a somewhat more active role of major Latin American regional organizations in its harmonization. This is particularly true as regards commercial arbitration, or, more specifically, with respect to the promotion of arbitration law reforms in the region. Articles 74.2 or 223 of the Revised Treaty of Chaguaramas – which provide for harmonization of arbitration laws within CARICOM and ensuring procedures for the recognition and enforcement of arbitral awards respectively – bear little significance[167]. Likewise,

[164] A. Prakash, J.A. Hart, *Indicators of Economic Integration*, Glob Governance (1)2000, Vol. 6, pp. 95–96. See also C. Mik, *Fenomenologia*…, pp. 106–109.
[165] A. Prakash, J.A. Hart, *Indicators*…, p. 109.
[166] A. Prakash, J.A. Hart, *Indicators*…, p. 110.
[167] See P.E. Mason, M.G. Ferreira Dos Santos, *New Keys*..., p. 32, where the authors find that 'it is worthwhile to note that international commercial arbitration in the Caribbean is not as widely popular as in Latin America for a number of reasons', including the reason that 'most of the Caribbean countries lack standardized arbitration statutes; furthermore, few states in the region have modern statutes'.

the MICAA 'closely tracks the provisions of the UNCITRAL Model Law', and is probably superfluous since major MERCOSUR countries adopted the UNCITRAL Model Law[168]. The same is true with respect to the Panama Convention, which van den Berg found 'redundant'[169]. While it paved the way to the ratification of the New York Conventions and during the 1970s and 1980s constituted a 'bridgehead to international arbitration', it appears to largely copy the work of UNCITRAL[170]. The same objectives could have been achieved through devoting more attention to the stronger regional promotion of the New York Convention and other global instruments. Besides the MICCA and the Panama Convention, the links between regional lawmaking on commercial arbitration and better adaptation of Latin America to global trends in the law of arbitration are weak.

The situation is slightly different as regards treaty-based investment arbitration. Certainly, high hopes are pinned on the Pacific Alliance Additional Protocol. The Additional Protocol demonstrates that regionalism in international investment policymaking (through FTAs) is gaining more importance and that it must not put an end to investment treaty arbitration. However, while '[t]he shift to regionalism can bring about the consolidation and harmonization of investment rules and represent a step towards multilateralism', it does not have to mean further promotion of international arbitration as a way of resolving disputes either[171]. In 2013, in two of its flagship publications UNCTAD proposed promotion of non-binding alternative dispute resolution methods (e.g. an investment ombudsman) and dispute prevention policies[172]. Hence, besides the Pacific Alliance and CACM, any further activity of Latin American regional organizations in the area of investment protection is likely to either limit access to investor-state arbitration in its current shape or promote a range of alternative ISDS methods and forums (e.g. the UNASUR Arbitration Centre as an alternative to the ICSID).

In brief, the overall level of institutional convergence and/or legal harmonization resulting from strictly regional initiatives in the area of international arbitration in Latin America is rather low. Notwithstanding that '[t]he settlement of public and private disputes is a traditional hallmark of regional arrangements', and that many integration schemes from the 1990s did pay attention to alternative dispute resolution, including arbitration, it is difficult to indicate any truly convincing examples of a regional success in its promotion among Latin American countries (i.e. internationally appreciated accomplishments)[173]. All of the Latin American regional initiatives to promote international commercial and investment arbitration have been quite superficial. The Asia Pacific Economic Cooperation (APEC) recommendation to APEC members to ratify the New York Convention and to ratify the ICSID Convention is perhaps the most significant example of regional friendliness

[168] Ch. Leathley, *International Dispute Resolution*..., pp. 177, 179.
[169] A.J. van den Berg, *The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?*, Arbitration International (1)1989, Vol. 5, p. 229.
[170] A.J. van den Berg, *The New York Convention*..., p. 229.
[171] UNCTAD, *IIA Issues Note: Towards a New Generation of International Investment Policies* (Geneva: UNCTAD, 2013) at 5.
[172] UNCTAD, *IIA Issues Note: Towards a New Generation*..., p. 7. See also UNCTAD, *World Investment Report 2013*..., p. 114.
[173] M.A. Echols, *Regional Economic Integration*, International Lawyer (2)1997, Vol. 31, p. 458.

to arbitration (and it fits well into the efforts of UNCITRAL undertaken at the global level)[174]. However, APEC is merely a loose integration scheme, and it encompasses only three Latin American economies (Mexico, Chile, and Peru). Among initiatives which have been not discussed in this article, one could possibly point to the Commercial Arbitration and Mediation Centre for the Americas (CAMCA), which was created in the 1990s – consistently with the broad objectives of the North American Free Trade Agreement (NAFTA) – by the American Arbitration Association, the British Columbia International Commercial Arbitration Centre, the Mexico City National Chamber of Commerce, and the Quebec National and International Commercial Arbitration Centre, and managed to develop its own arbitration rules[175]. Yet this was a private initiative and its practical importance is debatable, since most NAFTA cases are initiated at ICSID (and NAFTA, of course, falls outside the scope of this article).

But perhaps the aforementioned lack of success in the regional promotion of international commercial and investment arbitration is the normal state of affairs when compared to other regions (including Europe). The fact that a lot of harmonization of international arbitration has taken place over the last decades at the global level (UNCITRAL/UNCTAD) undermines the necessity of codifying new arbitration instruments at the regional level, even if one considers building mechanisms for public and private dispute settlement to be an important part of the agenda for economic integration. Considering the works of UNCITRAL and UNCTAD, regional integration organizations should perhaps adopt the *primum non nocere* policy. Looking from this perspective, the recent activism of the European Union, which comes together with UNCTAD and UNCITRAL to jointly rethink the entire ISDS system, is therefore a new phenomenon. Following the proposed line of thinking, the discussed initiatives of Latin American regional organizations to promote international arbitration in the region, and their little success in this area, probably do not deserve a harsh assessment. Some of the initiatives discussed in this article can be viewed as unsuccessful (e.g. the 1956 Draft Uniform Law on Inter-American Commercial Arbitration), and some other as redundant (e.g. the Panama Convention), or taking the idea of regionalism somewhat too far (e.g. the UNASUR Arbitration Centre), but none of them really jeopardized the march of arbitration to the drumbeat of UNCITRAL and transnational actors who standardized its conduct (e.g. ICC, IBA, or Chartered Institute of Arbitrators).

Regarding the second approach, which focuses on the empirical outcomes of regional economic integration – i.e. the growth of a given region – it is difficult to make any definite observations without country-specific or region-specific economic studies. The Colombian study by Cayón, Correa and Espriella (2018), which was referred to in section , finds that international arbitration has a positive effect on economic growth of Latin America[176]. Sadly, this is the only region-specific study known to the author of this article. Though the pool of available general studies on the topic is equally small, most of papers on the role of arbitration in improving business climate

[174] M.A. Echols, *Regional*..., p. 459.
[175] M.A. Echols, *Regional*..., p. 459.
[176] E. Cayón, J. Santiago Correa, L. de la Espriella, *Does international arbitration*..., p. 509.

boldly assume the existence of a relationship between its promotion and economic development. In case of the Pacific Alliance (the Pacific Alliance Additional Protocol) it is probably too early to draw any conclusions as to its general impact on regional trade and investment, but the initial outlook for its economic effects is promising[177]. However, the tremendous growth of Latin American economies in the last two decades, including Chile, Brazil, Columbia, Peru, has probably been only negligibly owed to the continuous promotion of international arbitration in these countries.

In particular, it would be entirely unreasonable to assume that the adoption of the UNCITRAL Model Law was decisive for their growth. Surely its adoption did make it easier for the 'wheels of commerce' to function properly in the aforementioned countries, yet it is very unlikely that it was the leading factor in making them run smoothly. It is also important to stress that the leading members of MERCOSUR (in the context of the emerging Latin American economies, for instance, Brazil) and its associate members (in this context, for example, Chile, Columbia, Peru) undertook their arbitration law reforms – either largely modelled on the UNCITRAL Model Law or drawing from its text – rather in parallel to the MICAA, or even before its signature. Hence, the link between this regional instrument and the process of harmonization of arbitration laws is hardly noticeable[178]. If so, also the link between this regional international law and these countries' economic growth is rather weak.

Another reason why the relationship between the development of some *acquis* on commercial and investment arbitration, on the one hand, and economic integration (with the interrelated economic growth), on the other hand, is unclear, is the birth of regional organizations like UNASUR and ALBA, both of which were built on the fast-growing skepticism against the Washington Consensus. The latter, among its core principles, used to assume trade liberalization, FDI liberalization, and the need for enhancing legal security for property rights. The Washington Consensus definitely inspired regional economic integration in the last two decades, and the worldwide promotion of international commercial and investment arbitration used to fit well into its principles. Nowadays, neither UNASUR nor ALBA puts much emphasis on economic integration, yet both take initiatives aimed at changing paradigms of international arbitration in the 21st century. The latest sign that some ALBA countries are critical about international arbitration was the 2013 declaration on 'Latin American States affected by transnational interests', which was already mentioned in section of the article. Ministers from Bolivia, Cuba, the Dominican Republic, Ecuador, Nicaragua, Saint Vincent and the Grenadines, and Venezuela agreed to create a regional framework responsible for dealing with challenges of transnational corporations' claims (i.e. a regional arbitration centre to locally settle investment disputes and an international observatory for better cooperation of these countries on resolving disputes)[179]. Since 2010, Ecuador has also led the works on the creation of the UNASUR Arbitration Centre[180]. This

[177] J.D. Lima, D. Cracau, *The Pacific Alliance*..., pp. 7, 32, 38.
[178] Ch. Leathley, *International Dispute Resolution*..., pp. 178–179.
[179] UNCTAD, *World Investment Report 2013*..., p. 114 (Box III.7).
[180] D. Páez-Salgado, F. Pérez-Lozada, *New Investment Arbitration Centre in Latin America: UNASUR, A Hybrid Example of Success or Failure?* (27 May 2016), http://arbitrationblog.kluwerarbitration.com/2016/05/27/unasur/, accessed on: 20 January 2020.

proves that arbitration can find its way to the agenda of regional organizations for which economic integration is just a secondary goal and thus undermines the link between regional harmonization of policies and legislation on international arbitration and economic integration.

Although it is impossible to fully examine economic indicators of integration in this article, it is interesting to take a brief look at the World Bank data on the ratio of FDI inflows to GDP for selected Latin American countries. The picture that emerges from the World Bank data is somewhat inconclusive as to the overall importance of economic integration for the region. For example, the ratio trends between 1991 and 2017 for Argentina and Brazil (full members of MERCOSUR, which is probably at the most legally advanced stage of integration in Latin America) and Chile (observer to the Andean Group/Community between 1976 to 2006, its associate member since 2006, and an associate member of MERCOSUR since 1996) are not radically different in the sense that they all show almost common upturns (e.g. in late 1990s or 2004) and downturns (e.g. 2009 or 2013)[181]. Interestingly, Chile is traditionally one of the region's largest target for FDI flows, and foreign investment contributes more significantly to its GDP than in the case of Argentina or Brazil, even though it did not actively participate in the second (1990s) wave of regionalism[182]. This *prima facie* hinders the relevance of the MERCOSUR's legal output, which was presented in section (or even generally its integration efforts). On the other hand, one should keep in mind that the higher ratio of FDI inflows to GDP for Chile can stem from its dedication to IIAs/FTAs (hence liberal economic policies) and from the fact that none of the 1994 MERCOSUR protocols regarding regional and third-country investors came into force[183]. But the discussed ratio for Chile fell down drastically after 2014, despite the fact that it had signed the Pacific Alliance Additional Protocol. Equally interestingly, however, according to UNCTAD, Brazil is among the 'top 5 host economies' for FDI in Latin America (2017) and attracts more than 40 per cent of total FDI flows to the entire region[184]. Its economy is big enough, and most likely strong enough on its own, to distort any analysis of the outcomes of regional integration within MERCOSUR. Yet, again, that fact that Brazil is doing so well in various statistics – in spite of its late accession to the New York Convention, merely partial adoption of the UNICTRAL Model Law, and its membership in regional organizations which were either unsuccessful in pursuing the ambition to harmonize arbitration mechanisms in the region (MERCOSUR), or which turned out to question commonly accepted international arbitration paradigms (UNASUR) – leads to conclusion that the impact of regional law on international commercial and investment arbitration on integration and growth of Latin American economies is rather low.

[181] See 'Foreign direct investment, net inflows (% of GDP)' at *World Bank*, https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?end=2017&locations=AR-BR-CL&start=1991, accessed on: 24 February 2019.

[182] See UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* Geneva 2015, pp. 58, 60.

[183] See R. Polanco Lazo, *Chilean Trade and Investment Agreements…*, p. 30, where the author argues that 'Chilean trade and investment policies have contributed to growth and poverty reduction in the country'.

[184] See UNCTAD, *World Investment Report 2018 – Investment and New Industrial Policies,* Geneva 2018, pp. 50, 52.

VII. CONCLUSIONS

Despite some skepticism among leading practitioners as to the regional initiatives on international arbitration in Latin America, it is possible to argue that the regional law on international commercial and investment arbitration that was developed in Latin America neither jeopardized the harmonization efforts of UNCITRAL at the global level nor hampered the economic integration processes in the region. However, its positive impact on economic integration and development of Latin American countries is less clear. The author is aware of just one empirical study from Colombia aimed at answering the question whether international arbitration really fostered the quick economic development of the region.

The change of paradigms in the Latin American regional integration by UNASUR and ALBA, combined with their thorny attitude toward ICSID, suggests that it is perhaps time for Latin America to abandon its *sui generis* attempts to harmonize international arbitration mechanisms. Such attempts are not necessarily helpful in establishing a modern arbitration infrastructure, and can encourage seeking alternatives to some time-tested international standards[185]. Many of the Latin American initiatives were either too ambitious or too region-specific (e.g. the 1956 Draft Uniform Law on Inter-American Commercial Arbitration, the MICCA, the Buenos Aires Protocol, the Colonia Protocol) and therefore were of little assistance in building international arbitration culture in the region. The said culture could have been built quicker in Latin America by a bold adherence to the major internationally known arbitration instruments (e.g. New York Convention, the UNCITRAL Model Law)[186]. As observed by Grigera Naón in late 1998, the example of economic integration in Europe demonstrates that the New York Convention can fully suffice for the successful expansion of international arbitration[187]. Regional instruments, at least as far as commercial matters are concerned, are not strictly necessary to ensure the protection of cross-border transactions. Accordingly, what Latin America needs after the rise of schemes like UNASUR or ALBA is a clear statement on its unchanged commitment to globally accepted procedural standards developed in the second half of the 20th century at the international level of harmonization[188]. The regional integration organizations which represent the liberal wave of regionalism, and especially MERCOSUR, should therefore focus on promoting (and reforming together with UNCITRAL, UNCTAD, and ICSID) the currently existing and widely-accepted international arbitration instruments. Regardless of what the relationship between the promotion of international arbitration and economic growth is, the history of the Latin American regional attempts to harmonize arbitration prove that, rather than attempting to harmonize arbitration mechanisms by new initiatives, it is advisable to pick and support tried-and-tested international solutions. Only the latter can assist in settling cultural differences and thus their promotion can attract much more positive attention to the region.

[185] See, however, J.G.P. Munoz, *The Rise of Common Principles*..., p. 633.
[186] See N. Blackaby, S. Noury, *International Arbitration*..., p. 469.
[187] N. Blackaby, S. Noury, *International Arbitration*..., p. 469 (note 74, in which Blackaby & Noury *in extenso* cite Dr. Grigera Naón's paper presented at the 1998 Conference of the International Bar Association).
[188] N. Blackaby, S. Noury, *International Arbitration*..., p. 469 (note 74, in which Blackaby & Noury *in extenso* cite Dr. Grigera Naón's paper presented at the 1998 Conference of the International Bar Association).

As a rule, the submitted finding is true for international commercial and investment arbitration in equal measure. In the area of investment treaty arbitration, the above conclusion requires one further comment. UNCTAD (2013) rightly suggested that the '[r]ising regionalism in international investment policymaking presents a rare opportunity to rationalize the regime and create a more coherent, manageable and development-oriented set of investment policies'[189]. This opportunity, however, can be used either to reform the ISDS system in a new generation of regional FTAs, and thus to mitigate fragmentation of international investment law (but without totally rejecting its current shape and by doing so, keeping it acceptable for all global actors), or to seek unique regional arrangements (which are likely to be unacceptable for partners from other regions). The first possibility is currently tested on a large scale by the European Union, which quite actively participates at international forums where rules on international investment protection are discussed, including organizations like UNCITRAL and/or UNCTAD, and tries to develop with its partners a reformed investment dispute settlement approach[190]. The second possibility, assuming the necessity of building some regional infrastructure for resolving investment disputes, is followed by UNASUR. Unfortunately, instead of correcting the currently existing ISDS regime, it can lead to its unwanted fragmentation. If that happens, this would be a negative example of regional integration leading to greater fragmentation of international law.

Abstract

Konrad Czech, *Regional Law on International Commercial and Investment Arbitration in Latin America and Its Impact on Economic Integration of the Region*

The article examines the role of major Latin American regional organizations in promotion of commercial and investment arbitration (through regional international law) as a method of dispute resolution in the region. It also analyses whether there is a relationship between the development of regional law in the field in question and better integration of Latin American economies. Before moving on to the main analysis, the author discusses the phenomenon of regional economic integration in Latin America and considers the role that arbitration plays (or is believed to play) in the processes of liberalization of international trade and investment. The author concludes that it is rather unclear whether the regional initiatives on international arbitration in Latin America have a positive impact on economic integration and development of Latin American countries. Having found that the positive role of the discussed regional initiatives is somewhat ambiguous, the author submits that they neither hamper the economic integration processes in the region nor jeopardize the harmonization efforts in the area of international arbitration undertaken at the global level.

Keywords: *regional law, Latin America, economic integration, international arbitration*

[189] UNCTAD, *IIA Issues Note: The Rise of Regionalism in International Investment Policymaking*, Geneva 2013, p. 4.

[190] See *Dispute settlement*, European Union, http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/#isds, accessed on: 20 January 2020.

Streszczenie

Konrad Czech, *Prawo regionalne regulujące międzynarodowy arbitraż handlowy i inwestycyjny w Ameryce Łacińskiej oraz jego wpływ na integrację gospodarczą regionu*

W artykule zbadano rolę głównych organizacji regionalnych Ameryki Łacińskiej w promocji arbitrażu handlowego i inwestycyjnego (przez regionalne prawo międzynarodowe) jako metody rozwiązywania sporów gospodarczych w państwach regionu. Artykuł analizuje również, czy istnieje związek między rozwojem prawa regionalnego w omawianej dziedzinie a postępami w integracji gospodarczej państw Ameryki Łacińskiej w ramach tamtejszych regionalnych organizacji integracyjnych. Przed przejściem do analizy głównego problemu badawczego, autor omawia zjawisko regionalnej integracji gospodarczej w Ameryce Łacińskiej i rozważa rolę, jaką arbitraż odgrywa (albo rzekomo odgrywa) w procesach liberalizacji międzynarodowego handlu i inwestycji. Autor stwierdza – w świetle badań ekonomicznych – że nie jest jasne, czy inicjatywy regionalne dotyczące arbitrażu międzynarodowego w Ameryce Łacińskiej mają pozytywny wpływ na integrację gospodarczą i rozwój państw Ameryki Łacińskiej. Zarazem, choć pozytywna rola omawianych inicjatyw regionalnych jest niejednoznaczna, nie hamują one procesów integracji gospodarczej w regionie ani nie zagrażają wysiłkom harmonizacyjnym w dziedzinie arbitrażu międzynarodowego podejmowanym na poziomie globalnym.

Słowa kluczowe: *prawo regionalne, Ameryka Łacińska, integracja gospodarcza, arbitraż międzynarodowy*

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