

PROBLEMATIC OF INTERNATIONAL ARBITRATION IN LATIN AMERICA

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I. INTRODUCTION

The development of the practice of arbitration in the world, and especially in Latin America, during the last decade has been substantial. Latin America is no longer considered a hostile subcontinent when it comes to arbitration. Instead, it has become an increasingly more attractive place for its practice. Nevertheless, this Article identifies that there are still problems to be solved in this area, since, although 14 countries have modernized their arbitration legislations, only four of them (Chile, Guatemala Mexico and Peru) possess the proper regulation for the development of international arbitration procedures within their boundaries. This Article ends with an interesting study on private arbitration within the process of Latin American integration.

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Since the last decade, the world has seen how arbitration¹ has stopped being a private matter practiced in a very few nations, since many countries, including those that have been traditionally considered hostile towards arbitration, are now adopting modern legislations and are abiding by important treaties on the matter.

Carbonneau² reckons that part of the reason why arbitration has developed so impressively is due to the Model Law of the U.N. Commission on International Trade Law (UNCITRAL) on international commercial arbitration,³ which has been adopted, wholly or partially, by many countries in the world, including several Latin American countries as well as Germany, Russia and different Asian jurisdictions.⁴

1. In this Article, we will not analyze arbitration between states or arbitration between states and investors, which, as we know, is also becoming increasingly important, thanks to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) and to the Bilateral Investment Treaties for the Reciprocal Promotion and Protection of Investments (BITs). See generally Fernando Cantuarias Salaverry, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)*, 56 REVISTA PERUANA DE DERECHO DE LA EMPRESA [Magazine Peruvian Law on Enterprise] (Lima) 199, 199-226 (2003); Fernando Cantuarias Salaverry, *Conditions to Have Access to the ICSID, With Regards to the Luchetti Case*, 1 REVISTA DE ECONOMÍA Y DERECHO [JOURNAL OF ECONOMICS & LAW] (Lima) 29, 29-50 (2004); Fernando Cantuarias Salaverry, *Bilateral Treaties for the Reciprocal Promotion and Protection of Investments and the Access to Arbitration*, 1 J. ECON. & L. (Lima) 29, 29-50 (2004); Fernando Cantuarias Salaverry, *The Use of Arbitration in Dispute Settlement Between the Peruvian State and Investors*, 48 THEMIS (Lima) 167, 167-86 (2004).

2. Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 779 (2002) ("During the 1990s, there was an eruption of Uncitral-inspired arbitration laws throughout the globe—from Latin American countries to Germany to former Soviet bloc states and Asian jurisdictions.").

3. The Model Law of UNCITRAL is not a treaty, but simply a model, which can be implemented by the legislation of each country with the purpose of modernizing and standardizing the treatment of international arbitration. See generally Gerold Hermann, *UNCITRAL's Work Towards a Model Law on International Commercial Arbitration*, 4 PACE L. REV. 537 (1984); Gerold Hermann, *The UNCITRAL Model Law—Its Background, Salient Features and Purposes*, 1 INT'L ARB. 13 (1985); W. Lawrence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1 (1995); ALAN REDFORD ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 525 (2d ed. 1991); Kenneth T. Ungar, *The Enforcement of Arbitral Awards Under UNCITRAL's Model Law on International Commercial Arbitration*, 25 COLUM. J. TRANSNAT'L L. 717, 727-41 (1987).

4. Laws have been enacted based on the Model Law of UNCITRAL on international commercial arbitration in Germany, Australia, Azerbaijan, Bahrain, Bielorussia, Bermuda, Bulgaria, Canada, Chile, Cyprus, Croatia, Egypt, inside the United Kingdom and Northern Ireland: Scotland, Spain, the Russian Federation, Greece, Guatemala, Hong Kong (special administrative region of China), Hungary, India, Iran (Islamic Republic), Ireland, Japan, Jordan, Kenya, Lithuania, Macau (special administrative region of China), Madagascar, Malta, Mexico, Nigeria, New Zealand, Oman, Paraguay, Peru, the Republic of Korea, Singapore, Sri Lanka, Tunisia, Ukrainian,

Undoubtedly, another reason lies on the Agreement on the Recognition and Enforcement of Foreign Arbitration Awards (known as the Convention of New York of 1958),⁵ of which 134 nations take part in since July 2004.⁶

In addition, the success of arbitration is owing to arbitration itself as it has proven to be a very valuable tool for the resolution of disputes, especially those arising out of international commercial trade.

Indeed, although within the scope of domestic disputes arbitration has become very important as compared to the Judiciary,⁷ it is in the resolution

inside the United States of America: California, Connecticut, Illinois, Oregon, and Texas; Zambia Zimbabwe. See generally Bette E. Shifman, *Developments in Adoption of the 1985 UNCITRAL Model Law on International Commercial Arbitration*, 1 AM. REV. INT'L ARB. 281 (1990); Frank Griffiths Dawson, *The Role of the Judiciary in the Arbitration Procedure, Assistance or Intervention?*, 15 J. LAW (Lima) 200 (1997); Gerold Hermann, *Power of Arbitrators to Determine Procedures under the UNCITRAL Model Law*, in ICCA XII INTERNATIONAL ARBITRATION CONGRESS, VIENNA 21 (1994); ICC Commission on International Arbitration, *Final Report on Intellectual Property Disputes and Arbitration*, 9 ICC INT'L CT. ARB. BULL. 47 (1998).

5. Richard J. Graving, *How Non-Contracting States to the "Universal" New York Arbitration Convention enjoy Third-Party Benefits but not Third-Party Rights*, 14 J. INT'L ARB. 167 (1997) ("The New York Arbitration Convention of 1958 is mercifully short and, for the international commercial community, successfully sweet." Without evident hyperbole Lord Mustill has called it "perhaps the most effective instance of international legislation in the entire history of commercial law." Or as President Stephen Schwebel of the International Court of Justice has put it with greater economy but no less accuracy, "it works." Yet another authority, Professor Thomas Carbonneau, has described it as the "universal charter" of international commercial arbitration."). See generally Albert Jan van den Berg, *Non-domestic Arbitral Awards Under the 1958 New York Convention*, 2 INT'L ARB. 198 (1986). See also Albert Jan van den Berg, *New York Convention of 1958: Consolidated Commentary, Cases reported in Volumes XIII(1988)-XIV(1989)*, 14 Y.B.COM. ARB., 528, 534-55 (1989); Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1059-60 (1961).

6. The updated list of member countries available at: U.N. Commission on International Trade Law, UNCITRAL Texts & Status, International Commercial Arbitration & Conciliation, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

7. Because of the increasing number of actions filed at the judiciary, arbitration offers parties a more expeditious alternative, which is less formalist and that more easily adapts to the parties' needs and expectations. In addition, arbitration allows that experts in the subject matter perform as arbitrators unlike the judicial process in which a judge is many times forced to be a "generalist." This way, arbitration offers an excellent opportunity for the dispute to be resolved by one or more specialized persons in the subject matter. Also, the fact that arbitration offers the chance to choose the people who will resolve the dispute makes it especially attractive. In addition to these advantages, we should also add the ones of privacy and a less confrontational setting than those that parties have to face in a judicial process. LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 3 (1st ed. 1987); see also Gilberto Peña Castrillon & Nestor Martinez Neira, *Arbitration Pact and Conscious Arbitration*, 6 THEMIS S.A. (Bogota) 6 (1986); Nils Mangard, *Arbitration and the Judicial System*, in ESTUDIOS SOBRE ARBITRAJE COMERCIAL INTERNACIONAL [STUDIES ON INTERNATIONAL COMMERCIAL ARBITRATION] 95 (2d ed. 1983); Hans

of international commercial disputes where arbitration really stands out because of the following additional reasons:

a) The parties to an international commercial transaction normally appreciate neutrality, which is normally hard to achieve if controversies were to be settled before the Judiciary. This is because a judicial procedure would probably be held in another language, under unfamiliar regulations, with the need of advice from local attorneys and, last but not least, there would always be the risk that judges make a discriminatory decision in favor of their nationals.⁸

Smit, *The Future of International Commercial Arbitration: A single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 15 (1986); Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 277 (1982).

8. Roque J. Caivano, *Arbitration and the Integration Processes (Their Future in the Mercosur)*, 1996 JURISPRUDENCIA ARGENTINA MAG. (Buenos Aires) 791, 791 (1996).

If only when it comes to domestic issues arbitration has become one of the most satisfactory formulas, its advantages increase when the dispute includes parties who reside in different places of the world. The dilemma of resorting to a certain judicial jurisdiction with the subsequent suspicion and partiality that the other party might perceive is only resolved through the remedy of a neutral and specialized arbitration procedure, in which the parties can agree not only on the election of the proper person for the case, but also on the forum where the arbitration will be held, as well as the language, the procedures that arbitrators should follow, and even the applicable core law.

Id.; Gary B. Born, *Forum selection versus Arbitration*, 39 INT'L COM. LITIG. 29, 30 (1999) ("national courts inevitably apply local procedural rules to international disputes, which may be ill-suited for parties from different legal traditions and regions of the globe."). Juan A. Cremades Sanz-Pastor, *Neutrality in Arbitration: Language, Forum and the Applicable Law to Arbitration*, in STUDIES ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 7, at 46.

[I]n most of the cases, the parties . . . file for international commercial arbitration . . . so as to obtain neutrality. This neutrality doesn't mean that the decision-maker is impartial since impartiality is also found before a national jurisdiction. Then neutrality should be understood as equality for the parties before the decision-maker. Indeed, one of the parties is always favored before a national judge, even if he is an impartial one. As a matter of fact, to be successful in an action, it is necessary to demonstrate that one is right, and during that demonstration, communication has a very important role. One of the parties could perform this communication much better before a national judge than before a foreign judge. There is a wide range of reasoning styles, empathetic points of view, and similarity in the legal reasoning that can make a party fit in much better with a national judge than with foreign judge.

Conversely, arbitration offers a neutral instance for the resolution of disputes arising out of international commercial transactions.⁹

b) Even if a dispute is agreed to be submitted before a certain Judiciary entity, there will always be a risk that other jurisdictions do not acknowledge such agreement and decide to resolve the dispute themselves.¹⁰

In other words, there is a permanent risk of multiple judicial litigations, which include the usual subsequent costs and uncertainty.¹¹

Furthermore, as Caivano¹² explains, it may be that "even if (the parties) could agree . . . and convene to submit their matters to a specific public jurisdiction . . . there is a possibility that the chosen State's legislation rejects it because it considers it out of its jurisdiction."¹³

Id.

9. William W. Park, *Finality and Fairness in Tax Arbitration*, 11 J. INT'L ARB. 19, 20 (1994) ("[T]he principal *raison d'être* of international commercial arbitration has long been the enhancement of political and procedural neutrality . . . When a company in Boston concludes a joint venture with an Algerian State agency, neither party wants to end up litigating in the other side's court.").

10. Garrigues & Andersen, Attorney at Law and Tax Consultants, *Arbitration as an Alternative Dispute Settlement Formula; When and How to Resort to Arbitration?*, 1999 PROCEDURAL & ARB. INFORMATIONAL BULL. (Madrid) 5.

When an international component is added to a commercial relationship, due to the presence of a foreign or business partner on the export and import of goods and services, the scenarios of potential litigation increase in a direct proportion to the number of state jurisdictions involved in the contractual relationship.

Id.

11. Roque J. Caivano, *Arbitration: its Efficacy as an Alternative Dispute Settlement System*, 1993 AD-HOC SRL (Buenos Aires) 86, 86 ("It could be that . . . the provisions of the country of who has submitted his affairs to the jurisdiction of another do not allow such jurisdiction extension and might actually claim it in his favor.").

12. *Id.* at 86.

13. Peter D. Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL'Y INT'L BUS. 1191, 1192 (1977).

Even if the contract contains both choice of law and choice of forum clauses, the judicial road to resolution of disputes remains full of obstacles. The selected forum may decline jurisdiction over the dispute if adjudication at that location would cause undue hardship to one of the parties, or if there is an insufficient relationship between the forum nation's law and the transaction out of which the dispute arose. Even if the selected court were willing to decide the dispute, that nation's law on conflict of laws might direct the parties to another body of law and forum

In addition to all this, we must mention that up until now there is no acceptable solution within the scope of international law that can reduce the uncertainty generated by the possibility that judiciary entities may refuse to respect the submission agreement convened by the parties.¹⁴

These and many other problems¹⁵ are dramatically reduced when it is agreed to submit disputes to arbitration,¹⁶ since most of the times it is possible to apply the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (Convention of New York of 1958).¹⁷

altogether. Also, where the forum selected by or for the parties is foreign to one or both, the procedures and substantive law may be unfamiliar.

Id.

14. GARY B. BORN, *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: PLANNING, DRAFTING AND ENFORCING* 89-90 (1999).

Many developed countries, including the United States, are not party to any international treaty or other agreement relating to the enforcement of forum selection clauses. There are some bilateral or regional treaties governing international forum agreements, such as the Brussels and Lugano Conventions, but most international forum selection clauses are governed in most national courts by domestic law.

Id.

15. As in the case of "exorbitant jurisdiction" or "the long arm of jurisdiction," in which some states outrageously expand the jurisdiction of their national courts to see to a certain dispute. See Joseph Halpern, "Exorbitant Jurisdiction" and the Brussels Convention: *Toward a Theory of Restraint*, 9 *YALE J. WORLD PUB. ORDER* 369 (1982); see also Beverly M. Carl, *Competence in International Private law in the United States*, 40 *DERECHO [LAW]* (Lima) 75 (1986); ALAN C. SWAN & JOHN F. MURPHY, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS* 866 (2d ed. 1999).

16. BORN, *supra* note 14, at 13 ("Similarly, 'public policy' or 'mandatory law' limitations are usually less significant in arbitral than in judicial proceedings. For these reasons, it is often easier to obtain effective enforcement of an international arbitration agreement than of a forum selection clause.").

17. Article II (3) of the Convention of New York:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 2(3), June 7, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3. See Berg, *supra* note 5, at 557-65. See also TOM CARBONNEAU, *CASES AND MATERIALS ON COMMERCIAL ARBITRATION* 423 (1997); GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* 285-359 (1994); Alejandro

c) Finally, it is important to mention that there is no worldwide treaty yet which allows for the recognition and quick, secure and cost effective enforcement of judicial decisions. In the face of this situation, many times we will have to abide by the provisions of the legislation of each of those States, in which a judicial decision is to be enforced, with the risks that usually come along with it.¹⁸

Conversely, and as already mentioned, within the scope of arbitration the Convention of New York of 1958¹⁹ allows for the recognition and enforcement of arbitration awards in practically all the world.²⁰

M. Garro, *Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America*, 1 J. INT'L ARB. 293, 319 (1984); Albert Jan van den Berg, *Non-domestic Arbitral Awards under the 1958 New York Convention*, 2 ARB. INT'L 51, 51-52 (1986).

18. BORN, *supra* note 14, at 106-07.

[A] substantial number of countries will generally not enforce foreign court judgments. Many states apply rules which deny recognition to any foreign judgment absent a treaty relationship with the rendering state (or "state of origin") providing for mutual recognition and enforcement of judgments . . . Other countries simply refuse to recognize any foreign judgments, or admit foreign judgments solely as evidence in support of a party's substantive claims, which must be re-litigated. Even in countries where it is theoretically possible, the recognition and enforcement of foreign judgments is infrequently sought and even more rarely obtained. This is particularly true with respect to judgments against local nationals—against whom enforcement is typically most important. The enforcement of foreign judgments can be subject to procedural delays and other shortcomings, especially in states where courts lack experience with such efforts. The absence of a treaty commitment means that there are few external checks on parochial obstacles to enforcement against local nationals.

Id.; see generally José Daniel Amado, *Recognition and Enforcement of Foreign Judgments in Latin American Countries: An Overview and Update*, 31 VA. J. INT'L L. 99 (1990).

19. Article I (1) of this treaty provides the following: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are requested, and which arise out of differences between persons, either individuals or corporations." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 17, art. 1(1).

20. William Laurence Craig, *Uses and Abuses of Appeal from Awards*, 4 ARB. INT'L 174, 174 (1988).

International Arbitration has become the ordinary way of resolving international commercial disputes. One of the reasons for this success has been the relative ease with which awards rendered in a foreign jurisdiction can be enforced at the debtor's domicile or in any jurisdiction where the debtor has assets. That ease has been due, in large part, to the New York Convention of 1958.

As a result, the way to dramatically reduce the possibility that disputes arising out of international transactions be subject to conflicts of competence, or get caught up in the red tape of the courts, or even that, ultimately enforcement problems arise, is to agree on the submission to arbitration of future or present disputes.

Therefore, if we would like to promote the mass development of trade among our boundaries in Latin America, we definitely have to guarantee that traders and entrepreneurs have the chance to submit their disputes to arbitration in any of our countries. Is that currently possible?

II. ARBITRATION IN LATIN AMERICA

“Traditionally Latin America has been considered a hostile subcontinent towards arbitration.”²¹

This statement is easy to prove by simply analyzing the very poor arbitration legislation bodies that have ruled our countries in the past few years²² and the almost nonexistent acceptance of universal arbitration treaties like the Convention of New York and the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).²³

Id.

21. Ana. I. Piaggi, *Recent Developments in International Commercial Arbitration in Latin America*, 2000 LAW REV. MERCOSUR, 148, 148 (“Our countries are known as the traditionally difficult area for arbitration, even hostile, and we are probably the region of the world which has most slowly accepted this system as a method to resolve disputes.”); see also Frank E. Nattier, *International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements and Awards*, 21 TEX. INT’L L.J. 397, 399 (1986).

22. See generally Alejandro M. Garro, *Arbitration in the Model Law Proposed by the Commission of the United Nations for International Trade Law and in the New Spanish Private Arbitration Legislation: A Model for the Reform of Commercial Arbitration in Central America*, in *ARBITRAJE COMERCIAL Y LABORAL EN AMÉRICA CENTRAL [COMMERCIAL AND LABOR ARBITRATION IN CENTRAL AMERICA]* (Alejandro M. Garro ed., 1990); Alejandro M. Garro, *The UNCITRAL Model Law and the 1988 Spanish Arbitration Act: Models for Reform in Central America*, 1 AM. REV. INT’L ARB. 201 (1990); Garro, *supra* note 17; Horacio Grigera Naón, *Arbitration in Latin America: Overcoming Traditional Hostility*, 5 ARB. INT’L 137 (1989).

23. Let us remember the position adopted by Latin American countries in 1965, against the execution of the ICSID, whose joint decision is known as the “No of Tokyo.” See Michael M. Moore, *International Arbitration between States and Foreign Investors—The World Bank Convention*, 18 STAN. L. REV. 1359, 1376 (1966); see also Paul C. Szasz, *The Investment Disputes*

However, since the last decade, things have started to change for the better.²⁴ In fact, currently Antigua, Barbuda, Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Chile, Dominica, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, and Venezuela are part of the Convention of New York of 1958.²⁵

Also the Convention of the ICSID, applicable to the resolution of disputes between investors and investment-recipient states, has, as many of its members, a very important number of Latin American nations.²⁶

Furthermore, as Craig, Park & Paulsson²⁷ indicate, there is an

Convention and Latin America, 11 VA. J. INT'L L. 256, 256-65 (1971); Alden F. Abbott, *Latin American and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L.J. 131 (1976).

24. Fernando Mantilla Serrano, *Major Trends in International Commercial Arbitration in Latin America*, 17 J. INT'L ARB. 139, 139 (2000) ("Latin America can no longer be said to suffer from hostility towards international arbitration").

25. Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela have ratified the Inter-American Agreement on international commercial arbitration (known as the Convention of Panama of 1975). This agreement, however, is less important and of a lower hierarchy than the Convention of New York. See generally Albert Jan Van Den Berg, *The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?*, 5 ARB. INT'L, (1989) (on file with author); Robert B. von Mehren, *The Enforcement of Arbitral Awards under Conventions and United States Law*, 9 YALE J. WORLD PUB. ORDER 343, 346 (1982); BORN, *supra* note 14, at 99; Horacio Grigera Naón, *Latin American Countries as a Forum of International Commercial Arbitration*, INT'L CT. ARB. BULL. 49 Special Supp. (1995) (on file with author).

26. As of November 3, 2003, 140 states make part of the treaty, among which there are quite a few Latin American countries: Argentina (1994), Bahamas (1995), Barbados (1983), Bolivia (1995), Colombia (1997), Costa Rica (1993), Chile (1991), Ecuador (1986), El Salvador (1984), Grenada (1991), Guatemala (2003), Guyana (1969), Honduras (1989), Jamaica (1966), Nicaragua (1995), Panama (1996), Paraguay (1983), Peru (1993), Saint Vincent and the Grenadines (2003), Trinidad and Tobago (1967), Uruguay (2000) and Venezuela (1995), available at <http://icsid.worldbank.org/icsid/index.jsp>. Ibrahim F.I. Shihata & Antonio R. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID REV.—FOREIGN INVESTMENT L.J. 299, 316 (1999) ("Particularly impressive has been the increase in the number of ICSID members in Latin America, from two at the beginning of the period to thirteen today."). Fernando Mantilla Serrano, *supra* note 24, at 139 ("Concerning political risks and protection of foreign investment, the ratification of the 1965 World Bank Convention on the Settlement of Investment Disputes has contributed to reassure potential investors in the region.").

27. W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 5 (3d ed. 2000) (Latin American countries seem to be overcoming much of their traditional resistance to international arbitration. Parties from Latin America, who constituted only 3.8% of the ICC users in 1987, represented 9.8% in 1999. Latin America is now the fourth most frequently represented region in ICC arbitration after Western Europe, North America and the Far East. This included twelve countries with more than five nationals represented in ICC arbitral proceedings.). The authors in chart 5, in their colossal work, identified that, between 1989 and 1999, 245 Latin

increasing number of parties coming from Latin America who take part in arbitration procedures before the International Chamber of Commerce (ICC), the main commercial arbitration center of the world.

However, where we can see the most relevant change is in the important number of recent arbitration legislation bodies,²⁸ of countries such as Bolivia (1997), Brazil (1996), Colombia (1998), Costa Rica (1997), Chile (2004), Ecuador (1997), El Salvador (2002), Guatemala (1995), Honduras (2000), Mexico (1993), Panama (1999), Paraguay (2000), Peru (1996), and Venezuela (1998).²⁹

American companies or persons participated as claimants and 306 as defendants in arbitration procedures before the ICC, being parties from Mexico, Panama, Argentina, Brazil, and Venezuela (in that order) the most relevant due to their number. *Id.* at 732-33.

28. Horacio A. Grigera Naón, *Recent Trends Regarding Commercial Arbitration in Latin America*, in ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA: PAPERS PRESENTED AT THE 1988 VANCOUVER IBA CONFERENCE 95-96 (Bernardo María Cremades ed. 1999).

There is no doubt, it has by now become almost truism, that Latin America has become a more fertile ground than before for the development of commercial arbitration . . . one of the dominant characteristics of the evolution of commercial arbitration in Latin America during the last ten years has been the proliferation of new legislation regarding commercial arbitration in this part of the world.

Id.; see also Carbonneau, *supra* note 2, at 783-85.

29. Up until the moment that this Article was written, the arbitration legislation bodies of Antigua and Barbuda, Argentina, Barbados, Belize, Dominica, Grenade, Guyana, Haiti, Nicaragua, Dominican Republic, Trinidad and Tobago, and Uruguay still possess old-fashioned arbitration provisions aloof to arbitration. The case of Chile is outstanding since it has just enacted the Law of International Commercial Arbitration, Law 19971, published on September 30, 2004, which is almost 100% UNCITRAL. However, the prior legislation is still in force for local arbitration, which establishes a dual system: modern international arbitration and inefficient and old-fashioned domestic or national arbitration. On the Chilean arbitration legislation before the reform, see Carlos Urenda Z., *Recent Developments in National and International Arbitration in Chile*, presented at the First Annual Miami International Arbitration Conference, ICDR International Centre for Dispute Resolution and Stell Hector Davis International, Miami, 2003, at 3 (stating that "the application of internal law is obviously inefficient to make it attractive to submit international arbitration to Chilean arbitrators or local inappropriate procedures and to promote confidence in companies from all over the world which execute all types of contracts whenever they decide to do business in Chile"); see also Hernán G. Somerville, *Arbitration in Chile*, ICC INT'L CT. ARB. BULL. 15-20 Special supp. (1997) (on file with author). Concerning the Argentinean arbitration legislation, see Horacio A. Grigera Naón, *supra* note 28, at 100 (stating that: "[L]egal reform has not reached out yet to all Latin American national jurisdictions. Argentina is an example in spite of several past or presently ongoing attempts to introduce or pass legislation to overcome the present unsatisfactory situation."). In 2001, the Ministry of Justice presented before the Federal Congress a Federal Arbitration Bill developed over the basis of the Model Law of UNCITRAL.

Nevertheless, beyond their number and how recent many of these arbitration legislation bodies are, we believe that these provisions could be grouped in the following way:

a) Legislation bodies that do not distinguish between domestic and international arbitration procedures, and that, in addition, their provisions are so particularistic and foreign to international standards that they become aloof for the practice of international commercial arbitration within their boundaries.

Within this group is Brazil, which despite having a recent arbitration legislation body, still maintains not very modern provisions.³⁰ It is also the case of Costa Rica³¹ and Venezuela³², whose arbitration laws do not aim at attracting international disputes since they are crowded with particularistic provisions which are very distant from international standards.

b) Legislation bodies that, even though they do distinguish between domestic and international arbitration procedures, apply a large

30. Arbitration Law No. 9307 does not distinguish between national and international arbitration, which, in our opinion, makes Brazil a not very attractive international arbitration forum. Moreover, although this law was enacted a few years ago, it possesses serious mistakes, such as the one that keeps, at least in part, the classic distinction between the promissory clause and the arbitration commitment. Horacio A. Grigera Naón, *supra* note 28, at 101 (“[T]he new Brazilian Act maintains the ‘compromiso’ (apparently . . . on the basis of an interpretation of Article 5 of this statute a ‘compromiso’ is not required when the parties have agreed on institutional arbitration or on the application of a ad-hoc arbitration rules excluding the ‘compromiso’).”). Carlos Nehring Netto, *The New Brazilian Arbitration Law*, ICC INT’L CT. ARB. BULL. 11-14 Special supp. (1997) (on file with author).

31. Law on Alternative Dispute Settlement and the Promotion of Social Peace, Law No. 7727 (1997). Although this provision is a substantial improvement in the rules for arbitration compared to the previous framework, it does not possess special regulations on international arbitration, making it necessary to resort to arbitration under not very friendly domestic provisions. *Id.*

32. Commercial Arbitration Law, Law No. 36430 (1998). This law “does not distinguish between international and domestic arbitration,” which, in our opinion, makes it not very friendly to the practice of international arbitration. Ninfa Urdaneta & John H. Rooney Jr., *The Law and Practice of International Commercial Arbitration in Venezuela*, 11 WORLD ARB. & MEDIATION REP. No. 10, at 20 (200). In addition, “the Arbitration Law contains several loopholes that may result in the intervention of the judiciary during the course of an arbitral procedure. Hence, this shall be carefully reviewed before including any contractual provision submitting to any agreement to arbitrate under the rules of the Arbitration Law.” Bernardo Welninger, *Validity of Arbitral Agreements and the Enforcement of Arbitral Awards in Venezuela* at 5, presented at the First Annual International Arbitration Conference in Miami (2003).

number of particularistic provisions to international arbitration which end up converting these forums in very unapproachable places for the practice of international commercial arbitration.

The most clear example of this group is Colombia.³³ Although it does distinguish between domestic and international arbitration procedures, in our opinion Colombia is a very unattractive place for the practice of international arbitration due to the lack of clear regulations for its development and due to the fact that the applicable provisions on domestic or national arbitration are extremely particularistic, and diverge

33. Colombia possesses the Statute of Alternative Mechanisms for Dispute Settlement, which provides that:

arbitration shall be international when the parties agree as such, providing that also the following cases are complied with:

That the parties, at the time of executing the arbitration agreement, are domiciled in different States.

That the place of compliance of such substantial part of obligations directly related to the litigation aim is located out of the State in which the parties have their principal domicile.

When the place of the arbitration is located out of the State in which the parties are domiciled, provided that such condition was agreed on in the arbitration agreement.

When the dispute submitted to arbitration directly and unquestionably affects the interests of international trade . . .

Statute of Alternative Mechanisms for Dispute Resolution, Decree No. 1818, art. 196 (1998). The article on international arbitration issues comes down to the provisions of section 197:

International arbitration shall be wholly ruled pursuant to the provisions of the law hereby, especially by the provisions of the treaties, agreements, protocols and other acts of international law executed and ratified by Colombia, which prevail over the regulations established in the Civil Procedural Code. In any case, the parties are free to determine the applicable substantial provision by which the arbitrators shall resolve the dispute. They will also be able to directly, or by referring to certain arbitration regulation, determine everything related to the arbitration procedure, including the summoning, the incorporation, the paperwork, the language, the designation and nationality of the arbitrators, as well as the forum of the court, which could be in Colombia or in a foreign country

Id. art. 197. See also Marco Gerardo Monroy Cabra, *International Arbitration in Colombia*, *Ibero-American Arb. Rev.*, available at www.servilex.com.pe/arbitraje/congresopanama/b-07.php; Fernando Mantilla Serrano, *Colombian Arbitration Legislation*, in *THE ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN—INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA, SPECIAL SUPPLEMENT* at 21-31 (1997).

considerably from international standards. Ecuador is in a similar situation.³⁴

This group also contains the arbitration legislation bodies of Bolivia,³⁵

34. Article 41 of the Arbitration and Mediation Law of Ecuador, provides the following:

regardless of the provisions of international treaties, and arbitration procedure shall be considered international when the parties have so agreed, providing that the following requirements are complied with: a) That the parties, at the time of executing the arbitration agreement, are domiciled in different States or, b) When the place of compliance of a substantial part of the obligations or the place with which the litigation aim has a closer relationship is located out of the State in which, at least one of the parties, is domiciled or, c) When the litigation aim is referred to an international trade operation.

Arbitration and Mediation Law of Ecuador, Law No. 145/97, art. 41. In addition, article 42 provides that:

international arbitration shall be ruled by the treaties, conventions, protocols and all other acts of international law executed and ratified by Ecuador. Every individual or corporation, public or private, with no restriction whatsoever is free to stipulate, either directly or by referring to an arbitration regulation, everything that has to do with the arbitration procedure, including its incorporation, paperwork, language, applicable law, jurisdiction and the forum of the court, which could be situated in Ecuador or in a foreign country.

Id. art. 42; see also Alfredo Larrea-Falcony, *Arbitration in Ecuador*, in THE ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN - INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA, SPECIAL SUPPLEMENT at 41- 48 (1997); Xavier Andrade Cadena, *Advantages of International Arbitration: Ecuadorian Perspective*, IBERO-AMERICAN ARB. REV. at 5-14, available at www.servilex.com.pe/arbitraje/colaboraciones/ventajas_internacional.html.

35. The Law of Arbitration and Settlement, Law No. 1770, possesses a special heading on international arbitration matters. This law considers an arbitration procedure carried out within the Bolivian territory to be international when:

I. For the purposes of this law, arbitration shall be considered international in the following cases: When at the time of executing the arbitration agreement, the parties have establishments in different States.

When the place of compliance of a substantial part of the obligations or the place with which the aim of the controversy has a closer relationship is located out of the state in which the parties have their establishments. When the parties expressly agree that the arbitration matter is related to more than one State.

II. For the purposes of determining the international nature of arbitration, when one of the parties has more than one establishment for the exercise of his or her main activities, the one that has a relationship to the arbitration agreement shall

El Salvador,³⁶ Honduras³⁷ and Panama,³⁸ which all have the same

be considered. If one of the parties has no establishment, his usual residence shall be the one to be considered."

Law of Arbitration and Settlement, Law No. 1770, art. 71 (1997).

36. Article 3(h) of the Mediation, Settlement and Arbitration law, Decree No. 914, provides the following:

International Arbitration: Whenever one of following cases occur:

When the parties to an arbitration agreement have, at the moment of executing such agreement, their domiciles in different States.

If one of the following places is located out of the State in which the parties have their domiciles:

The place of arbitration, if such place has been determined in the Arbitration Agreement, or so convened according to such agreement.

The place of compliance of a substantial part of the obligations of the legal relationship or the place with which the aim of the litigation has a closer relationship.

Mediation, Settlement, and Arbitration Law, Decree No. 914, art. 3(h) (2002).

37. Article 86 of the Settlement and Arbitration Law, Decree No. 161, provides the following:

Arbitration shall be international in the following cases:

When the parties to an arbitration agreement have, at the moment of executing such agreement, their domiciles in different States.

If one of the following places is located out of the State in which the parties have their domiciles:

The place of arbitration, if such place has been determined in the Arbitration Agreement, or so convened according to such agreement.

The place of compliance of a substantial part of the obligations of the legal relationship or the place with which the aim of the litigation has a closer relationship.

Arbitration Law, Decree No. 161, art. 86 (2000).

38. Article 5 of the Arbitration and Mediation Law, Law Decree No. 5 of 1999, provides the following:

International commercial arbitration is, pursuant to the law decree hereby, international when the aim or legal business contains foreign or connection elements of enough significant importance to make it as such, or when the dispute rules of the forum make it international.

Also arbitration shall be considered commercial international when one of the following events concurs:

If the parties to an arbitration agreement have, at the time of executing such agreement, their establishments or offices in different States.

problem, although their local provisions diverge less from international standards. However, just the fact that these local provisions do exist makes the practice of international arbitration less attractive within their boundaries.

c) Legislation bodies that do not distinguish between domestic and international arbitration procedures, but that have set up adequate standards for the practice of international arbitration within their boundaries since they have almost entirely adopted the Model Law of UNCITRAL.

Mexico belongs in this group³⁹ and, to a lesser extent, Guatemala does

If the place of arbitration that has been determined in the arbitration agreement or according to it, is located out of the country in which the parties have their establishments.

If the place of compliance of the obligations derived from the legal relationship which binds the parties is located out of the country in which the parties have their establishments.

If the place with which the dispute has a closer relationship is located out of a country in which the parties have their establishments.

If the arbitration matter is of international civil or trade nature and/or is related to more than one State and/or process is in the rendering of services, conveyance or disposal of goods or capital transfer which produce transborder or extra territorial effects.

Arbitration and Mediation Law, Decree No. 5, art. 5 (1999). Even though this law has adopted almost entirely the Model Law of UNCITRAL, several local provisions are applied which significantly hinder the practice of international arbitration. See Gilberto Boutin, *The Notion of International Commercial Arbitration*, IBERO-AMERICAN ARB. REV., available at www.servilex.com.pe/arbitraje/congresopanama/a-03.php.

39. Article 1415 of the Reformed Commerce Code of Mexico of 1993 provides the following: "The provisions of the law hereby shall apply to national commercial arbitration, and to international arbitration when the place of such arbitration is located within the national territory . . ." Reformed Commerce Code of Mexico, art. 1415 (1993). On the other hand, Article 1416 (III) states the following:

Arbitration shall be considered international when:

The parties, at the moment of executing the arbitration agreement, have their establishments in different countries, or

The place of the arbitration, determined in the arbitration agreement or according to it, the place of compliance of a substantial part of the obligations of a commercial relationship or the place with which the aim of the litigation has a closer relationship, is located out of the country in which the parties have their establishments.

also.⁴⁰ Paraguay can be included in this group as well since it possesses a very interesting set of regulations, mainly based on the Model Law of UNCITRAL.⁴¹ However, we must draw our attention to the fact that, in many cases, this law allows for the intervention of the judiciary. For this reason we will have to pay close attention to the reaction of judicial courts so as to confirm or eliminate Paraguay as a potential center for international arbitration.

Id. art. 1416(III); see also Julio C. Treviño, *International Commercial Arbitration in Mexico*, in THE ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN-INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA, SPECIAL SUPPLEMENT at 54-60 (1997).

40. Article 1 of Arbitration Law No. 67-95 provides the following: "This Law shall apply to national and international arbitration, when the place of arbitration is located within the national territory . . ." Guatemalan Arbitration Law, No. 67-95, art. 1.

Article 2 provides:

Arbitration is international when:

The parties to an arbitration agreement, at the moment of executing such agreement, have their domiciles in different States, or

One of the following places is located out of the State in which the parties have their domiciles:

The place of arbitration, if it has been determined in the arbitration agreement or according to it.

The place of compliance of a substantial part of the obligations of the commercial relationship or the place with which the aim of litigation has a closer relationship, or

The parties have expressly convened that the arbitration matter is related to more than one State.

Id. art. 2(1). Guatemala, unlike Mexico, has a few local provisions, which in some cases cannot be very friendly to the practice of international arbitration. See Marcos Ibarguen S., *Arbitration in Guatemala*, in THE ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN-INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA, SPECIAL SUPPLEMENT at 45-49 (1997).

41. Article 3(c) of the Arbitration and Mediation Law considers arbitration to be international when:

The parties to an arbitration agreement have, at the moment of executing such agreement, their establishments in different states, or

The place of compliance of a substantial part of the obligations of a commercial relationship or the place with which the litigation aim has a closer relationship, is located out of the state in which the parties have their establishments.

Arbitration and Mediation Law, No. 1872/02, art. 3(c).

d) Legislation bodies that distinguish between domestic and international arbitration procedures and that have established the adequate standards for the practice of international arbitration within their boundaries since they have adopted the Model Law of UNCITRAL.

This group includes the Peruvian General Arbitration Act (LGA),⁴² which has practically incorporated the Model Law of UNCITRAL⁴³ in its

42. Article 91 of the Peruvian General Arbitration Act states that:

Arbitration is international if:

The parties to an arbitration agreement, at the moment of executing such agreement, have their domiciles in different States, or

One of the following places is located out of the state in which the parties have their domiciles:

The place of arbitration, if determined in the arbitration agreement or according to it.

The place of compliance of a substantial part of the obligations of the legal relationship or the place with which the litigation aim has a closer relationship. For the effects of this article, if one of the parties has more than one domicile, the domicile shall be the one that keeps a closer relationship with the arbitration agreement; if one of parties has no domicile, his usual residence shall be considered.

In accordance with this framework, any arbitration will be necessarily international if it is performed between persons or corporations domiciled abroad or when, at least, one of the parties is not domiciled in Peru.

Peruvian General Arbitration Act, No. 26572, art. 91 (1996).

43. For a general description of the rules on international arbitration contained in the Peruvian General Arbitration Act, we recommend reading: Fernando Cantuarias Salaverry, *The New General Arbitration Act*, GACETA JURÍDICA T. 25 (1996); Fernando Cantuarias Salaverry, *New Peruvian General Arbitration Act*, JURISPRUDENCIA ARGENTINA No. 5998 (1996); Fernando Cantuarias Salaverry, *New Regulatory Framework Applicable to Arbitration in our Country*, SCRIBAS No. 2 (1996); Fernando Cantuarias Salaverry, *Arbitration, in INVESTING IN PERÚ - LEGAL BUSINESS GUIDE 783-96* (Beatriz Boza ed., 1998); Reynaldo Pastor Bebin, *The Legislative Framework for Arbitration in Peru*, 14 ICSID REV. - FOREIGN INVESTMENT L.J. 381-89 (1999); Fernando Cantuarias Salaverry, *General Arbitration Act of Peru*, REVISTA JURÍDICA DEL PERÚ No. 18 (2001); Fernando Cantuarias Salaverry, *National, International and Foreign Arbitration in the General Arbitration Act*, GACETA JURÍDICA - ACTUALIDAD JURÍDICA T. 117 (2003); Fernando Cantuarias Salaverry, *Peru: a convenient forum in South America for the development of International Arbitration*, in AMCHAM ARBITRATION CENTER REVIEW PERÚ, LAUDO, No. 1, (2003); Fernando Cantuarias Salaverry, *Is the regulation of National and International Arbitration necessary in the General Arbitration Act?*, 1 REVISTA DE ECONOMÍA Y DERECHO No. 4 (2004).

entirety, making the practice of international arbitration possible within its boundaries.⁴⁴ Similarly, the recent Law of International Commercial Arbitration 19971 of Chile allows for a proper international arbitration

44. Aside from the advantage that arbitration implies in Peru with UNCITRAL's provisions, the General Arbitration Act establishes some special provisions that divert from such Model Law, but that make it even more attractive:

A) It provides more security for arbitration agreements by establishing that its validity is subject to the law agreed upon by the parties or otherwise to the law of the place where the agreement is executed, but, if the formalities of Peruvian Law are complied with, its validity could not be challenged. Peruvian General Arbitration Act, No. 26572, art. 99 (1996)

B) In case the arbitration is not institutional, and the parties, or either the arbitrators or the entity in charge of appointing the arbitrators designated by the parties, cannot set up the arbitration tribunal, it will not be necessary to resort to the Judiciary, since Article 102 provides that the entity in charge of residually appointing arbitrators shall be any of the arbitration entities that operate in the place of the arbitration or in Lima, at the interested party's choice. *Id.* art. 102.

C) Unless otherwise agreed by the parties, the arbitration institution (in case it is an institutional arbitration) or the arbitration tribunal itself (ad-hoc arbitration) shall be able to rule on the challenge of the arbitrators, unless it is a one-person ad-hoc arbitration procedure, the only possible case in which the Judiciary can intervene. *Id.* art. 105.

D) parties could be advised by a domestic or foreign attorney. *Id.* art. 108.

E) If there is no agreement between the parties on the law provision applicable to the subject matter of the dispute, Article 117 provides that the arbitrators shall directly determine the applicable law (the general arbitration act has eliminated the remedy of provisions of conflict of laws). *Id.* art. 117.

F) Unless convened otherwise by the parties, the president of the arbitration tribunal has a decisive vote for the adoption of decisions, including the arbitration award. *Id.* art. 119.

G) Unless one of the parties is Peruvian, or has his usual domicile or residence in Peru, the parties could agree, in the arbitration agreement or in a subsequent written document, to waive their right to resort to the Peruvian Judiciary and file a remedy of annulment, or to limit such remedy to one or more of the restrictive causes provided by the General Arbitration Act. *Id.* art. 126. "Peru is well-positioned if we see its legislation compared to others in Latin America. The Peruvian arbitration law is very good and Peru has ratified the Convention of New York on arbitration awards and the Inter-American Convention of Panama, which facilitates international recognition of awards issued in Peru." *Interview with Horacio Grigera Naon, ex-Secretary General of the Arbitration Court of the ICC*, EXPRESO, Nov. 18, 2000, at 8.

legislation body,⁴⁵ regardless of any inefficient or old-fashioned national or domestic set of regulations.⁴⁶

III. PROBLEMS WITH PRIVATE ARBITRATION IN LATIN AMERICAN INTEGRATION PROCESSES

The issues of the regional and extra regional integration are an essential part of the Latin American agenda.⁴⁷ In this Article, we will not analyze

45. Article 1 of the law published on September 30, 2004 provides the following:

Article 1.—Application scope.

1) This law shall apply to international commercial arbitration regardless of any multilateral or bilateral treaty in force in Chile.

The provisions of this law, except articles 8, 9, 35 and 36, shall only apply if the place of arbitration is located within the national territory.

Arbitration is international if:

The parties to an arbitration agreement have, at the time of executing such agreement, their establishments in different states, or

One of the following places is located out of the State in which the parties have their establishments:

The place of arbitration, if determined in the arbitration agreement or according to it.

The place of compliance of a substantial part of the obligations of the commercial relationship or the place with which the litigation aim has a closer relationship, or
The parties have expressly agreed that the subject matter of the arbitration agreement is related to more than one State.

For the purposes of number 3) of this article:

If one of the parties has more than one establishment, the establishment shall be the one that has a closer relationship with the arbitration agreement.

If one of the parties has no establishment, his usual residence shall be considered.

This law shall not affect any other law by which certain disputes are not subject to arbitration or could be submitted to arbitration only pursuant to provisions that are not those of the law hereby.

Law of International Commercial Arbitration, No. 19971, art. 1 (2004).

46. See *supra* text accompanying note 29.

47. Alan Fairlie Reinoso, *The Andean Community and the Hemispheric Integration*, 42 THEMIS at 67-79 (2001) (describing the current situation of the negotiations among the members

these integration processes since they go beyond the scope of the limited content referred to arbitration exclusively.⁴⁸ Instead, we will reduce our analysis to the utilization of arbitration within the integration processes, particularly on matters related to the settlement of private commercial disputes, because it is in that instance that we believe there are bigger problems as well as much inattention.

As a matter of fact, German Jaramillo,⁴⁹ when analyzing arbitration in the integration processes, states that arbitration is very useful as part of the mechanisms for dispute settlement between Member States. This is why it is an issue that

has a very special importance in all the scopes of contemporary international law. The general characteristic is the creation of a system or special forum which possesses competence to solve these issues. The decisions issued by this forum must be binding on the Member States. These systems avoid confrontation and the use of retaliation measures between Member States. This level of dispute is included in most Integration Treaties. Currently, the most practiced model is the Dispute Settlement System of the World Trade Organization (WTO).⁵⁰

Jaramillo also understands that arbitration is useful in the settlement of disputes between individuals and integration systems, consisting in "the set of claims of individuals against decisions adopted by integration mechanisms or against decisions adopted by the States themselves... (in which) the need to use impartial and neutral systems which can settle differences arises."⁵¹ When Jaramillo analyzes the issue of the settlement

of the Andean Community in detail and of the Mercosur and how much the talks for the establishment of the Free Trade Area of the Americas (FTAA) has advanced).

48. See Abdias Teofilo Sotomayor Vertiz, *Antidumping and Antitrust provisions in the Integration Processes: The Can, Nafta, Mercosur, G-3, Alca and other Processes. Analysis and Proposal* (2000)(unpublished Master's dissertation, Pontificia Universidad Católica del Perú)(on file with Pontificia Universidad Católica del Perú).

49. German Jaramillo Rojas, lecture given at the XXIV Inter American Conference on Commercial Arbitration: International Arbitration and the Integration Processes at 3 (May 2002) [hereinafter Jaramillo Rojas].

50. Jorge Witker V., *Alternative Mechanisms on commercial dispute settlement in OMC, TLCAN-ALCA*, in UNIVERSIDAD FEDERAL DE SANTA CATALINA AND THE SECRETARY-GENERAL OF THE ORGANIZATION OF AMERICAN STATES, INTERNATIONAL LAW LECTURES at 248-52 (2003) (analyzing the disputes or commercial differences and the diverse ways to resolve them within the World Trade Organization (WTO)).

51. Jaramillo Rojas, *supra* note 49, at 4. Here we can also find the arbitration mechanisms used in the dispute settlement between investors and investment-receiving States. With respect to

of international disputes between individuals, he considers that "according to the principle of parties' free will, they can agree on the submission of their differences to International Arbitration Courts in contrast with the solution by national jurisdictions of any of the parties."⁵² This opinion, which is shared by many specialists, presumes that in integration processes it is only necessary to develop or promote arbitration mechanisms in the first two levels identified by the aforementioned author, since the last level (the strictly private one) is exclusively ruled by "free will."⁵³

For this reason, if we analyze the issue of dispute settlements within the initial integration setting of the Mercosur, for example, we will see that the main concern were the settlement of disputes between States⁵⁴ and between States and individuals,⁵⁵ rather than dispute settlements between individuals.⁵⁶ We will find the same situation in the original regulation plan of the Andean Sub Regional Integration Agreement (known today as

Mercosur, see Grigera Naón, *supra* note 28, at 99. With respect to NAFTA, see Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A practical guide to terms, arbitration clauses, and the enforcement of judgments and arbitral awards*, 24 SYRACUSE J. INT'L L. & COM. 12 (1997); and, Daniel Q. Posin, *Cases brought under the NAFTA Investment Arbitration Rules*, 13 WORLD ARB. & MEDIATION REP No. 2, at 67 (2002).

52. Jaramillo Rojas, *supra* note 49, at 5.

53. Also, Jorge Witker V., when analyzing the alternative mechanisms for dispute resolution, explains that "disputes between private agents, are the subject matter inherent to international commercial arbitration". Witker, *supra* note 50, at 247.

54. The Treaty of Asunción (1991), which gave rise to the Mercosur, established a temporary system for the resolution of disputes that was later on substituted by the Protocol of Brasilia (1991), which at the same time was complemented by the Protocol of Ouro Preto (1994). See Jorge Hernán Gil Echeverry, *Arbitration in States' Relations*, IBERO-AMERICAN ARBITRATION REVIEW at 8, available at www.servilex.com.pe/arbitraje/congresopanama/b-01.php; Didier Operti Badan, *Dispute Settlement System in the MERCOSUR*, in ADVANCES IN INTERNATIONAL PRIVATE LAW IN LATIN AMERICA, LIBER AMICORUM 457-68 (Jurgen Samtleben, Jan Kleinheisterkamp & Gonzalo A. Lorenzo eds., 2002). This initial framework has been amended by the Olivos Protocol. See Adriana Breyzin de Klor, *MERCOSUR's arbitration awards: a prospective vision*, in Universidad Federal de Santa Catalina and the Secretary-General of the Organization of American States, *International Law Lectures 2002*, Washington D.C., 2003, at 19-39; Robert Puchero Ripio, *New advances in the MERCOSUR's dispute resolution: The "Olivos Protocol" for dispute resolution*, in Universidad Federal de Santa Catalina and the Secretary-General of the Organization of American States, *International Law Lectures 2002*, Washington D.C., 2003, at 121-31.

55. The Protocols of Cologne and Buenos Aires on the promotion and protection of investments in the Mercosur, and between the Mercosur and its partners (this is Chile and Bolivia), respectively, established the possibility to resort to arbitration. See Horacio A. Grigera Naón, *supra* note 28, at 99.

56. Caivano, *supra* note 8, at 787. "In the Mercosur's organic system . . . there is no provision whatsoever with respect to disputes between individuals." *Id.*

the Andean Community of Nations or CAN).⁵⁷ Was it reasonable at the time that these integration economic plans were implemented to leave the issue of arbitration between individuals exclusively within the field of "free will"?

When the Andean Community of Nations was created at the end of the 1960s, the arbitration legislation bodies of Bolivia, Colombia, Chile, Ecuador, Peru and Venezuela were obsolete. We can say the same thing about the arbitration laws of Argentina, Brazil, Paraguay and Uruguay when the Mercosur was conformed. So, how can we talk about free will if arbitration was, in terms of regulation and legal recognition, a useless institution?

This situation has supposedly changed over the past few years because, as we have seen before, Bolivia, Brazil, Colombia, Chile, Ecuador, Paraguay, Peru, and Venezuela have modernized their arbitration legislation bodies along with Costa Rica, El Salvador, Guatemala, Honduras, and Mexico. However, Antigua and Barbuda, Argentina, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Nicaragua, Dominican Republic, Trinidad and Tobago, and Uruguay still maintain old-fashioned arbitration provisions. As we have seen, there are actually few arbitration legislation bodies that could be regarded as modern and friendly to the practice of international arbitration.⁵⁸

57. Article 40 of the Cartagena Agreement provides that it is the Court of Justice which is the jurisdictional organ of the Andean community. Moreover, Article 47 of such Agreement states that the settlement of disputes which arise due to the application of the Andean legal framework shall be subject to the provisions of the treaty that the Court of Justice creates. Likewise, Article 33 of the Court of Justice's Treaty states that the member countries shall not submit any dispute to any arbitration system or procedure other than the ones contained in the Treaty itself. Mónica Rosell, *Arbitration and dispute resolution in the Andean Community*, IBERO-AMERICAN ARB. REV. at 3, available at www.servilex.com.pe/arbitraje/bolivia/artmrbo.php.

58.

The latest book on international arbitration in Latin America by the authors Nigel Blackaby and others, published on 2002 by Kluwer Law International (*International Arbitration in Latin America*). . . identifies that in the case of international commercial arbitration procedures which have Latin American counterparts, it is usual to select New York, Paris and Miami as forums. Madrid is not selected as a forum, although it should be due to language reasons. This is because there is a lack of an adequate legislation body (however, Spain has just passed an excellent Arbitration Law). In the case of parties who speak Portuguese, as in the case of Brazil, it would be normal to choose Lisbon as a forum. This does not occur either for the same reasons as Madrid and because the convention of New York has just recently been executed. If the one of the parties insists on designating a country in the region as a forum, the favored choice is Mexico. Other possible choices, although posing some difficulties due to political

Under these circumstances, it is very difficult to promote private commercial trade between our boundaries, since the parties are not able, or are seriously limited, to agree on arbitration, simply because the majority of our countries are not ready to adopt international commercial arbitration. Nowadays, for example, it is very difficult for a Peruvian company and another Colombian one to agree on arbitration (except if they wish and are able to carry it out in Mexico, the United States or Europe) in any of the States that comprise the Andean Community of Nations, simply because Bolivia, Colombia, Ecuador and Venezuela possess inadequate arbitration legislation bodies. In addition, within this scenario, Peru is not always an alternative due to neutrality issues.

Even if we could state that the majority of Latin American states had adequate legislation bodies for the practice of international commercial arbitration (which is not the case), we would still have to face a significant additional problem:

The existence of several internal legal systems, with various requirements for the validity and efficacy of arbitration, creates inconveniences of such magnitude that they can give rise to the non-functionality of international arbitration. It is undeniable that nations legislate with the purpose of regulating their own internal reality, and international arbitration exceeds that scope by far.⁵⁹

In other words, even if most of the Latin American countries were ready to hold international commercial arbitration within their boundaries, many of them possess so many local or particular provisions that it is almost impossible to foresee them agreeing on arbitration.

For this reason, the observations made by Zapiola some years ago are not surprising:

Currently the Mercosur faces a structural crisis, which proves some of the system's constitutive drawbacks. This provides us with some kind of alert so as for us to pay close attention to it. Those who try

and economical instability, are Peru and Colombia. Chile and Argentina are not selected at all since they do not possess an international arbitration law.

ARBITRATION AND MEDIATION CENTER OF THE CHAMBER OF COMMERCE OF SANTIAGO, INTERNATIONAL COMMERCIAL ARBITRATION LAW FOR CHILE 3 (2002).

59. Felipe Osterling Parodi, *The Need to Standardize Provisions on Arbitration in Latin America as a Consequence of Globalization*, IBERO-AMERICAN ARB. REV. at 2, available at www.servilex.com.pe/arbitraje/peru/artfope.php.

to explain the reasons for this crisis agree on the fact, which we would like to emphasize at this point, that there is insufficient or scarce consideration given to the rights of individuals within the institutional structure of the Mercosur. The most important demonstration of this lack of interest for individuals' rights is the inexistence of a fast and reliable dispute settlement system so as to resolve disputes between individuals.⁶⁰

As we will see below, these observations are currently fully applicable to the Andean Community of Nations. How can we tackle this serious problem?

IV. SOLUTION ALTERNATIVES AND EXISTING ANSWERS

The first alternative would be for all the countries in the region unify their arbitration legislation bodies. Although experts as important as Caivano consider this possibility feasible,⁶¹ we do not believe that it would work out that well. The reason is very simple. Nobody can deny that in a little less than ten years Latin America has shown clear advances towards arbitration⁶² and that, as Griguera explains, the new arbitration legislation

60. Horacio Zapiola, *Arbitration in the Mercosur*, IBERO-AMERICAN ARB. REV., at 2, available at www.servilex.com.pe/arbitraje/congresopanama/b-08.php.

61. Caivano, *supra* note 8, at 783.

The standard ratification of conventions on the recognition and enforcement of foreign arbitration awards (New York 1958 and Panama in 1975) and the unification processes of internal legislations on arbitration have overcome the hardships which previously made international arbitration awards a not very effective tool in the presence of the reluctance of national judges to enforce them.

Id. Ulises Pitti G., *Arbitration Regulation, Conciliation and Mediation in the Legislation of Panama*, IBERO-AMERICAN ARB. REV., at 2, available at www.servilex.com.pe/arbitraje/colaboraciones/reconoclaudos.php.

Countries should carry out reforms towards economic and jurisdictional modernization before entering into integration areas. This is extremely necessary to create and develop new laws for the expeditious settlement of disputes, and to ratify and perform the conventions of Panama of 1975 and New York of 1958, within the application scope of the integration Treaties.

Id.

62. Ruben Santos Belandro, *A New Attitude of Latin American States towards Arbitration*, IBERO-AMERICAN ARB. REV. at 6, available at www.servilex.com.pe/arbitraje/colaboraciones/

bodies are aimed at the adoption of principles and rules on commercial arbitration which prevail in the world and which enjoy a very broad consensus.⁶³ Nevertheless, problems arise because of small ("big") differences. That is, the presence of particularistic "exceptions" hinder a clear harmonization, and, in many cases, the cause important gaps to exist.

We believe, therefore, that what we need is the adoption of international agreements that enable the correction of this current situation. This is the direction that recently has been adopted by the Andean Community of Nations and the Mercosur, although, as we will see below, the former by proposing an absurd and an acceptable solution and, the latter, by establishing an interesting framework that requires urgent corrections.

In the case of the Andean Community of Nations, Rosell explains that:

arbitration has become absolutely necessary for international transactions since it would be very difficult to conceive a dynamic trade without this alternative formula for dispute settlement . . . its importance increases when it is necessary to settle disputes between entrepreneurs from different countries, which are ruled by different laws and different procedural legal systems, which make the litigant have a natural concern when he or she has to submit to foreign or strange courts.⁶⁴

The Andean Community of Nations has "resolved" the lack of standardized rules concerning international commercial arbitration within the countries that compose it by issuing the Protocol of Cochabamba of May 26, 1996. Through this Protocol,

congreso_internacional_rsb.php. "The consequence of this big codifying effort is that nowadays every national legislation body of the continent, to different extents, supports and encourages arbitration." *Id.*

63. Horacio A. Grigera Naón, *supra* note 28, at 96.

The new texts do not denote the creation of a 'regional' arbitration culture that would differ from general trends fashioning the development of commercial arbitration in the world. On the contrary, the new legislative trends in Latin America are oriented towards the adoption of the general principles and rules concerning commercial arbitration prevailingly accepted or enjoying general consensus in the milieu of arbitral experts and practitioners, primarily as enshrined in the Model Law.

Id.

64. Rosell, *supra* note 58, at 1.

the Court of Justice is empowered, in some cases, with arbitration functions in disputes such as: (i) Disputes that are generated due to the application or interpretation of contracts, agreements or covenants, executed between entities and institutions of the Andean Integration System and between these and third parties, when the parties agree to do so, and (ii) disputes that are generated due to the application or interpretation of issues contained in private contracts and ruled by the Andean Community's legal system. Through the same Protocol, the Secretary-General is entitled to decide, through "managed arbitration", disputes that individuals submit with respect to the application or interpretation of issues contained in private contracts and ruled by the Andean Community's legal system.⁶⁵

This great "solution" for the Andean Community of Nations converted the naturally private institution of international commercial arbitration into a semi-public one, since arbitrators will not be private agents, but rather international officers appointed directly by the Member States.⁶⁶ This is an

65. Ulises Montoya Alberti, *History of Arbitration*, 56 REVISTA PERUANA DE DERECHO DE LA EMPRESA at 30-31 (2003); Rosell, *supra* note 58, at 4.

According to the party's choice, the court shall issue its award, either by law or by equity, and it shall be mandatory, unappealable and it shall constitute enough legal entitlement to request its enforcement pursuant to the internal provisions of each member nation. Article 38 of the Protocol of Cochabamba.

The Secretary-General will issue its award according to equity and technical-based criteria, pursuant to the Andean Community's legal framework. Its award is mandatory and unappealable, except if the parties agree otherwise, and it shall become enough legal entitlement to request its enforcement, in accordance with each country's internal provisions. Article 39 of the Cochabamba Protocol.

For the Court of Justice or the Secretary-General to intervene, it is enough that the interested parties have agreed to resort to the community organs to resolve any disputes that may arise between them in their agreements in which it is applicable or necessary to interpret provisions of the Andean legal framework.

Ulises Montoya Alberti, *supra*, at 30-31.

66. Mónica Rosell, *Arbitration and Disput Resolution in the Andean Community*, IBERO-AMERICAN ARB. REV. at 4, available at www.servilex.com.pe/arbitraje/arbitraje/bolivia/artmrbo.php.

Finally, we should point out that the establishment of private arbitration with the Protocol of Cochabamba is aimed at providing an alternative means of dispute resolution between individuals, when in their commercial transactions, there are provisions that make part of the Andean legal framework. The arbitration alternative established in this provision is an option that individuals will be able

unacceptable decision, which violates every principle that inspires international commercial arbitration. It does not tackle the lack of standardization in the arbitration legislation of the countries that make part of this community at all. Ultimately, it will be rejected by the economic agents that, understandably, will refuse to submit their disputes to people whom they cannot elect and who in the end depend on the States that make part of this integration system.

The Mercosur, in contrast, is decisively in favor of establishing a supranational framework which can promote the practice of international commercial arbitration within its Member States.⁶⁷ Its first step was to adopt the protocol of Buenos Aires on international jurisdiction concerning contractual issues (December 1994),⁶⁸ which, among other things, authorized the access to arbitration as an alternative to the judiciary for private dispute settlement.⁶⁹

to count on with a prior agreement between them so as to get a satisfactory solution to their problems, and supposedly with all the advantages that this mechanism implies.

Id. We obviously disagree with Rosell's opinion since we believe this system is not a private one at all and it is not an option either, because it will definitely not help to encourage international commercial arbitration within the borders of the Andean Community of Nations.

67. Caivano, *supra* note 8, at 792. "The Mercosur has the advantage of promoting a new legal and economic space for international trade, and any dispute that may arise between individuals due to the economic exchange which is stimulated by a common market, shall be resolved in a private fashion." *Id.*

68. In fact, in June 1992, the Protocol of Jurisdictional Cooperation and Assistance on civil, commercial, labor and administrative matters (Protocol of Las Leñas) was executed, which refers to arbitration in a chapter dedicated to the recognition and enforcement of legal judgments and arbitration awards. However, as we will see later on (see note 76), this regulation unfortunately it is still not up to par.

69. Horacio A. Grigera Naón, *supra* note 28, at 99.

Other Mercosur international legal texts concern international commercial arbitration from the perspective of this sub region. Mention should be made in such context of the 1994 Buenos Aires Protocol on international jurisdiction, authorizing to resort to arbitration as an alternative to the jurisdiction of national courts for the resolution of contractual disputes (Art. 4(2)).

Id.

With respect to arbitration specifically, the Protocol of Buenos Aires establishes that it is possible to extend the corresponding legal jurisdiction to arbitration tribunals by convening such extension in writing when executing the agreement, while it is in force or when the dispute arises. The validity of the agreement of the forum's election shall be ruled by the law of the participating States which would

However, as Cattaneo⁷⁰ explains, years later and due to the

growth of commercial and financial transactions between the Mercosur countries and its partners, Chile and Bolivia, it undoubtedly was necessary for the member countries to have a specific set of regulations for private international commercial arbitration. This way, Protocols No. 3/98 and 4/98 were executed on June 23, 1998. The former contains provisions applicable to the four signing countries of the Treaty of Asuncion: Argentina, Brazil, Paraguay and Uruguay. The latter, Protocol No. 4/98, also established the same regime for the aforementioned four countries but extending its scope over the two partners of the Mercosur: Bolivia and Chile, which as we know, are not full members of the Mercosur.⁷¹

These are two international instruments (although substantially similar) of the utmost importance for the preservation of international commercial arbitration in Latin America since, as Fraser explains,⁷² they not only

have jurisdiction pursuant to such Protocol. In case of any doubt, the most favorable law to the validity of the agreement shall be applied.

Caivano, *supra* note 8, at 790.

70. María Rosa Cattaneo, *International commercial arbitration in the Mercosur, Bolivia y Chile. Its recent development and future perspectives*, IBERO-AMERICAN ARB. REV. at 4, available at www.servilex.com.pe/arbitraje/congresopanama/b-10.php.

71. Alicia M. Perugini Zanetti, *International commercial arbitration in the Mercosur*, in AVANCES DEL DERECHO INTERNACIONAL PRIVADO EN AMÉRICA LATINA, LIBER AMICORUM 636-37 (Jurgen Samtleben, Jan Kleinheisterkamp & Gonzalo A. Lorenzo eds., 2002).

Such regulatory circumstances encouraged the Meeting of Ministers of Justice to instruct the Technical Commission to prepare a common text in response to the unresolved problems and that would allow having a standard arbitration system in the Member States of the Mercosur, Bolivia and Chile. A standard solution would make it possible for the participants of an arbitration procedure -the parties, the arbitrators and the judges- to foresee the treatment that this alternative settlement system would receive in its different stages in each of the States. In addition, a common text would also have a residual effect: it itself would contribute to promote arbitration, which is unfortunately not very spread out in the countries of the region.

Id.

72. David Fraser, *Arbitration in Latin America: An Overview*, 5 INT'L ARB. L. REV. 65 (2002).

regulate the recognition and enforcement of foreign arbitration awards, but they also set an entire regulation system of international commercial arbitration within Mercosur and between Mercosur and its partners (Chile and Bolivia).⁷³

In fact, and although we are not trying to analyze the protocols⁷⁴ in depth, we must point out the important effort to try to standardize the treatment of international commercial arbitration procedures, such as: the application scope, the arbitration covenant (called arbitration convention), the arbitration procedure, the arbitration court, the competence of the arbitration tribunal, the arbitration award, the remedies against arbitration awards, and the recognition and enforcement of foreign arbitration awards.⁷⁵

Nevertheless, we would also like to point out some serious mistakes: too much importance is given to the legislation of the forum of the arbitration for the regulation of some sensitive issues; its application scope⁷⁶ is extremely limited; there is an incorrect reference to different treaties from the Convention of New York for the recognition and enforcement of foreign arbitration awards;⁷⁷ and, certain conditions and

This is not a convention dealing only with the recognition and enforcement of arbitration awards in the Mercosur countries; it is a complete code of arbitration law, including enforcement of foreign awards, regulating arbitration of international commercial contracts. It has been described as 'a new regime'. So far it has been ratified only by Argentina.

Id.

73. To date, Peru has only executed with the Mercosur a Partial Agreement on Economic Complementation.

74. The protocols can be found at: www.sice.oas.org/trade/mrcsrs/decisions/dec0398.asp and www.sice.oas.org/trade/mrcsrs/decisions/dec0498.asp.

75. Luis O. Andorno, *The Agreement on International Commercial Arbitration of the Mercosur. Its possible application to participating companies in the multimodal agreement on the transportation of merchandise*, in REVISTA JURÍDICA VIRTUAL DEL PROGRAMA DE INVESTIGACIÓN SOBRE ARMONIZACIÓN DE LAS LEGISLACIONES, available at www.salvador.edu.ar/vrid/di/r_prog_arm_rev01-01-a2.htm; see also Zanetti, *supra* note 72, at 638-66.

76. Cattaneo, *supra* note 71, at 5. "The material application scope is, in my opinion, very small, since it is limited to commercial agreements between private persons, private individuals or corporations . . . excluding other commercial business transactions." *Id.*

77. This serious problem has been present since the time of the Protocol of Las Leñas. Jonathan Van Ee, *MERCOSUR Arbitration: A New Regime*, 4 INT'L ARB. L. REV. 58 (2001).

Article 23 of the Mercosur Agreement provides that enforcement of foreign arbitration awards in Mercosur countries shall be governed by a Mercosur Protocol, the Inter American Convention, and the Montevideo Convention. Notably absent is the New York Convention, which is significant because, as the

requirements are established which are distant from international standards.⁷⁸ However, both protocols are very valuable in the task of consolidating the practice of international commercial arbitration in Latin America. Thus, they should be used as a basis of a general plan that can go beyond the Mercosur.⁷⁹

V. CONCLUSIONS

Currently, several integration processes are being negotiated, including the ones that promote the Mercosur with the Andean Community of Nations and the Free Trade Area of the Americas (FTTA). Although it is true that the NAFTA could be useful as a precedent to regulate the procedures of dispute settlement between Member States and between

most comprehensive arbitration regime, one could expect to find it incorporated in some manner. This absence is the biggest hurdle to incorporating the New York Convention through the Mercosur Agreement.

Id. "One wonders why Mercosur countries did not follow the easier path of just ratifying the Panama or New York Conventions instead of creating and adopting special compacts governing the recognition and enforcement of arbitral awards for the Mercosur region." Horacio A. Grigera Naón, *supra* note 28, at 105.

78. Van Ee, *supra* note 78, at 57.

The Mercosur Agreement uses distinctions the foreign lawyer may not be familiar with such as an arbitration agreement's "formal validity" and "intrinsic validity," which are both different from issues regarding the merits of the dispute. Also, there is the requirement that arbitrators abide by principles of contradictory (*contradictorio*) and free persuasion (*libre convencimiento*). If these distinctions are not respected an award may be set aside.

Id.

79. Horacio A. Grigera Naón understands the same thing when he states that:

These coordinated efforts, when properly undertaken from a common multinational approach, should have the beneficial effect of unifying rules and criteria for dealing with issues regarding arbitration procedures, arbitral clauses and awards in the different Latin American countries and hopefully thus enhance the predictability of the corresponding solutions irrespective of the national jurisdiction called to decide on them.

Horacio A. Grigera Naón, *supra* note 28, at 99.

these and investors,⁸⁰ we should not forget that this treaty does not regulate international commercial arbitration⁸¹ at all, probably because the United

80. David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163, 164 (1997). "NAFTA's ability to settle disputes affectively is one aspect of the Agreement that is particularly crucial to its overall success." *Id.*; Thompson, *supra* note 52, at 22.

NAFTA's approach to dispute resolution is already serving as a model for other international agreements as seen in the "G-3" Agreement, between Colombia, Mexico, and Venezuela where dispute resolution provisions closely mirror those in Article 2022 of the NAFTA. Chapter 11 of the NAFTA also establishes a complex mechanism for private investment disputes between NAFTA signatories for breaches of Chapter 11 obligations which circumvent a formal NAFTA dispute panel in favor of international arbitration. In addition, Chapter 20 lays out the institutional arrangements and dispute settlement procedures for disputes arising under the NAFTA.

Thompson, *supra* note 52, at 22.

81. Lopez, *supra* note 81, at 42.

Importantly, NAFTA does not provide a mechanism for the settlement of disputes exclusively between private parties. With respect to the resolution of international commercial disputes between private parties in the free trade area, NAFTA simply reflects each government's pledge to encourage the use of arbitration and other means of alternative dispute resolution and to comply with certain pre-existing international arbitration accords.

In fact, article 2002 of the NAFTA states the following:

"Alternative Dispute Resolution."

Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.

In this respect, each Party shall provide adequate procedures to ensure the observance of agreements to arbitrate and for the recognition and enforcement of arbitration awards in such disputes.

A Party shall be deemed to be in compliance with paragraph 2 if it is a party to, and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration.

The Commission shall establish a Consulting Committee on Private Commercial Disputes consisting of people with expertise or experience in the resolution of private international commercial disputes. The Committee shall report and make recommendations to the Commission on general issues submitted to it by the Commission concerning the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area.

States, Canada, and Mexico already had modern arbitration legislation bodies at the time they adopted such integration agreement.⁸² Since this is not the status of most of Latin American countries, we believe that this time the new integration agreements must address the regulation of the international commercial arbitration issue, for which the effort carried out by the Mercosur could be considered an important milestone. If we set standard rules that let our traders and entrepreneurs agree on arbitration in any of our countries, thus allowing them to choose the arbitration forum exclusively over the basis of certain criteria like neutrality, costs and services, we will have advanced in the right direction to promote the real growth of trade in our region.⁸³

Id.

82. For this reason, the main effort has been focused on the private sector, which promotes proposals like the Commercial Arbitration and Mediation Center for the Americas (CAMCA), which includes the American Arbitration Association (AAA), the British Columbia Arbitration Center, the National Chamber of Commerce of Mexico City and the National and International Commercial Arbitration Center of Quebec.

83. Jan Kleinheisterkamp, *Conflict of Treaties on International Arbitration in the Southern Hemisphere*, in AVANCES DEL DERECHO INTERNACIONAL PRIVADO EN AMÉRICA LATINA, LIBER AMICORUM 688 (Jurgen Samtleben, Jan Kleinheisterkamp & Gonzalo A. Lorenzo eds., 2002) "Only if business could prosecute its claims beyond the national borders and without the traditional obstacles to recognition and enforcement, the risks of engaging with the interweavement promoted by the politics of integration could become manageable, thus breaking the path to the promised synergetic effects." *Id.*