

2023
Volume 5, Issue 2



Institute for Transnational Arbitration
ITA IN REVIEW

ITA IN REVIEW

The Journal of the Institute for Transnational Arbitration





ITA IN REVIEW

VOL. 5

2023

No. 2

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BOOK REVIEW:

GUÍA DE ARBITRAJE DE INVERSIÓN

CO-EDITED BY Yael Ribco Borman and Sandro Espinoza Quiñones

Reviewed by Pilar Álvarez

I. INTRODUCTION

As is widely known, cases against states from Latin America, Central America and the Caribbean make up a significant portion of the total international investment arbitration caseload. However, despite this sustained trend, high-quality and updated specialized literature in Spanish is scarce. The *Guía de Arbitraje de Inversión* (the “Guide”), co-edited by Yael Ribco and Sandro Espinoza, seeks to reduce this gap by providing Latin American and Spanish-speaking practitioners with high-quality material on investment arbitration.¹ With the collaboration of top experts in the field, and addressing a wide array of topics, the Guide amply accomplishes its goal.

As illustrated by the brief overview of the Guide’s content provided in the next Section, the Guide offers an overview of the crucial aspects of the theory and practice of investment arbitration, making it a valuable resource for students and young practitioners alike.

II. THE STRUCTURE AND CONTENT OF THE GUIDE

The Guide begins with a general overview of the origin and evolution of investment arbitration, following which it analyses concepts relevant to the different stages of an arbitration proceeding, in their natural order: the initiation of the proceedings with the notice of arbitration; issues of applicable law which determine the legal framework of the dispute; matters pertaining to jurisdiction and admissibility; the substantive legal obligations analyzed in the merits stage and the determination of liability; the concept and quantification of damages; and, finally,

¹ The Guide, published in 2023, comes as a new initiative by the Arbanza Escuela de Arbitraje in its commitment towards generating and spreading knowledge among the Spanish-speaking arbitration community. Founded in 2021 as the first Latin American School of Arbitration, Arbanza periodically provides online courses on a variety of topics, which are taught by an impressive team of world-renowned experts in the field, many of whom have contributed to the Guide.



practical insight into the preparation of hearings and the conduct of cross-examinations.

Chapter One of the Guide, jointly written by Colombian attorneys *Juan Felipe Merizalde Urdaneta* and *María José Monroy Valencia*, sets the stage for the Guide by explaining the origin and evolution of investment arbitration. The authors provide a thorough historical chronicle of the evolution of investment arbitration, including references to developments pertinent to Latin America, such as the Calvo Doctrine, regional integration efforts, and the increase in cases against states from Latin America and other developing regions following the cases relating to the Argentinean economic crisis of 2001. Mr. Merizalde and Ms. Monroy then analyze some of the arguments wielded against investor-state arbitration during the last two decades, including its alleged lack of adequacy to address environmental issues or issues affecting local communities, as well as the challenges posed by double hatting and the increase in third-party funding. The authors ably describe different mechanisms to respond to each of these common concerns, including recent arbitral case law as well as institutional efforts such as those carried out by Working Group III of the UN Commission on International Trade Law (“UNCITRAL”) and the leading arbitral institutions (ICSID, ICC, LCIA, ICDR). As Merizalde and Monroy conclude, the field of investment arbitration, which is still developing, has shown its willingness and ability to adapt and improve itself.

Chapter Two, written by London-based Colombian attorney *Ximena Herrera-Bernal*, with the collaboration of *Juan Pablo Pontón Serra*, provides practical insight on the relevance and content of the *Notice of Intent* and *Request for Arbitration*. Ms. Herrera-Bernal first focuses on the *Notice of Intent*, analyzing its impact on the dispute, as well as its potential impact on the admissibility of the claimant’s claims and/or the jurisdiction of the arbitral tribunal, while identifying elements for strategic decision-making. Ms. Herrera-Bernal then analyses the *Request for Arbitration*, particularly regarding the timing of its submission (mainly with regards to *cooling-off* periods) and practical requirements under various investment treaties. Throughout the Chapter, the authors often refer to both case law and multilateral



and bilateral investment treaties to illustrate each of the points made, resulting in a thought-provoking read on a subject that is not frequently explored.

In Chapter Three, Washington, DC-based *Francisco X. Jijón* addresses fundamental aspects of the jurisdiction of international investment tribunals, with a particular focus on Latin American cases. Mr. Jijón begins by analyzing the evolution of the relationship between state sovereignty and investor-state dispute settlement, providing a brief overview of the changing paradigms that led Latin American states first to reject the ICSID Convention,² then to its signature and, in the case of some states, to its denunciation in more recent times. The author then addresses the need for *consent* in international arbitration, as a natural consequence of state sovereignty. Further, Mr. Jijón explains each of the dimensions of a tribunal's jurisdiction: jurisdiction *ratione voluntatis*, *ratione materiae*, *ratione personae* and *ratione temporis*. In this Chapter, Mr. Jijón identifies several relevant cases against Latin and Central American states in which jurisdictional issues have been discussed, providing a region-specific overview of the matter which, as the author himself expresses, has richly evolved, and will continue to evolve in the coming years.

In Chapter Four, New York-based attorneys *Florencia Villaggi* and *Carolina Rocha* analyze issues pertaining to the tribunal's jurisdiction and/or the admissibility of investment claims. The authors first address the scope and purpose of denial of benefits clauses in a variety of bilateral and multilateral investment treaties, as well as their application by investment arbitration tribunals. Mses. Villaggi and Rocha then discuss the phenomenon known as *treaty shopping*, its relationship with the doctrine of abuse of process and its treatment in investment arbitration case law. The authors also address the issue of the potential impact of parallel proceedings on investment claims, through the lenses of fork-in-the-road provisions and the principles of *res judicata* and *lis pendens*. Further, the authors address other procedural requirements, such as cooling-off periods and exhaustion of local remedies clauses. Finally, Mses. Villaggi and Rocha analyze the treatment of states' counterclaims in

² Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Mar. 18, 1965), 575 UNTS 159 (hereinafter the "ICSID Convention").



investment arbitration, providing a comprehensive overview of the relevant case law on the matter.

Chapter Five of the Guide, by Madrid-based attorneys *José Angel Rueda García* and *Lucía Pérez-Manglano Villalonga*, contains valuable practical and strategic insight regarding the initial stages of an investment arbitration, including the appointment of the tribunal and the negotiation of the first procedural order. In addition to analyzing specific proceedings that may apply to both ICSID and non-ICSID arbitrations regarding the constitution of the arbitral tribunal, the authors elaborate on how the use of ballots for the appointment of chairpersons through the *strike and rank* methodology works in practice. Mr. Rueda and Ms. Pérez-Manglano also address each of the procedural items customarily decided in the first procedural order, describing the most widely extended practices in the matter in a clear and concise manner, to the benefit of students and young practitioners alike.

In Chapter Six, Argentine attorney *Ignacio Torterola* analyses the role of investment treaties, domestic law, and general public international law in the determination of the applicable law to investment disputes, contrasting contract and treaty-based arbitrations. The author first addresses Article 42(1) of the ICISD Convention,³ describing how its interpretation by investment tribunals has evolved from the preferential application of domestic law over international law, to the complementary application of both legal systems. The author then proceeds to explain the role of each legal order: first, Mr. Torterola explains the relevance of the investment treaty itself, which he describes as the primary source for the law applicable to a domestic dispute. Further, Mr. Torterola conducts a systematic review of those matters generally understood to be governed by domestic law, including the nationality of an investor, the existence of property rights regarding an investment, issues of attribution and the legality of the investment (where relevant). The author also briefly addresses the impact of the domestic arbitration legislation at the seat of

³ Article 42(1) of the ICSID Convention provides: “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”



the arbitration on the proceedings (in non-ICSID arbitration). In addition, Chapter Six explores the importance of general public international law, particularly in light of the principle of systemic integration. Lastly, the author analyses novel issues pertaining to the law applicable to investment disputes, including regarding its interaction with human rights law and environmental law.

Having addressed a wide array of theoretical and practical topics relating to jurisdiction and admissibility, as well as the initial stages of arbitration proceedings, the Guide continues on to address the substantive aspects of investment arbitration.

In particular, Chapter Seven addresses the standards of protection regarding the prohibition of unlawful expropriation, as well as national treatment and most favoured nation treatment. In this Chapter, Geneva-based attorneys *Luis Miguel Velarde Saffer* and *Isabella Cannatà* conduct a thorough analysis of the evolution of international law and practice regarding each of the standards, as well as their interpretation and application by investment tribunals. The authors adeptly explain the most salient points of debate for each substantive protection.

Chapter Eight of the Guide analyses the substantive standards of protection; of Fair and Equitable Treatment, Full Protection and Security, and the Umbrella Clause. In this Chapter, US-based *Caroline Richard* and *Rosario Galardi* define each of the standards and clearly summarize the profuse case law on each of the specific topics, providing a complete overview of their historical evolution. Particularly, the authors explore the relationship between Fair and Equitable Treatment and the concept of *legitimate expectations*, as well as with the minimum standard of treatment under international law. Regarding Full Protection and Security, Mses. Richard and Galardi explain the different interpretations offered by arbitral tribunals regarding the scope of protection. Finally, as regards the role of the Umbrella Clause, the authors compare the positions held by the tribunals in *SGS v. Paraguay*, *BIVAC v. Paraguay*, and *CMS v. Argentina* to provide a thorough panorama of the matter.

In Chapter Nine, Frankfurt-based *Yael Ribco Borman*, co-coordinator of the Guide, addresses defenses and exceptions to the responsibility of States under international law. The author first addresses the states' right to regulate, including



an analysis of the requirements set forth by the tribunal in the landmark case of *Philip Morris v. Uruguay*. Ms. Ribco Borman then refers to the International Law Commission's Draft Articles on State Responsibility⁴ as the starting point for her analysis of the exceptions of state of necessity and force majeure. While there is no investment case law on force majeure, Ms. Ribco Borman addresses the differing views on state of necessity adopted by the tribunals on *LG&E v. Argentina* and *CMS v. Argentina*. Finally, Ms. Ribco Borman deftly summarizes the main points of concern regarding the much-debated topic of the impact of corruption claims in investment arbitration. As Ms. Ribco Borman explains, analyzing several relevant cases on the matter, the consequences of a finding on corruption may vary, depending on the specific factual circumstances and the language of the investment treaty (*e.g.*, whether it requires an investment to have been legally made for it to be entitled to protection).

Chapter Ten of the Guide turns to the subject of damages. In it, Madrid-based *Krystle Baptista Serna* and *Cruz Bosch Albarracín* address the foundations of damages in investment arbitration. The authors begin by describing the standards of compensation provided by investment treaties, particularly with regards to claims for unlawful expropriation. Mses. Baptista and Bosch also address the full compensation principle, as developed by the Permanent Court of International Justice in its pivotal *Chorzów* factory case,⁵ and the forms of reparation available in international law. Among other topical issues, the authors address the limits to compensation, including causation, contributory negligence, and failure to mitigate. The Chapter also addresses issues of quantum, such as the concept of fair market value and the relevant timing for damage assessment. In their comprehensive overview, the authors also address the issue of moral damages in investment arbitration, referring to the seminal cases of *Lemire v. Ukraine* and *Desert Line v. Yemen*. Finally, the authors briefly explain the different types of interest, while pointing out arbitral

⁴ International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. Doc. A/56/10 (2001) II(2) ILC YB (hereinafter "Draft Articles on State Responsibility").

⁵ *Factory at Chorzów (Ger. v. Pol.)*, 1928 P.C.I.J. 17 (Judgement of Sept. 13).



tribunals' tendency to award simple interest and provide a short overview of the principles on cost allocation generally applied by investment tribunals.

Chapter Eleven of the Guide provides a much-needed yet often-overlooked perspective in the literature on damages in investment arbitration: that of quantum experts, such as the Chapter's co-authors, *Daniela Bambaci* and *Alejandro Martinolich*. Precisely, the authors begin by addressing the role of the quantum expert to provide independent damage assessments in view of the full compensation principle. The experts describe the theoretical framework for damages calculations, including the concept of *Fair Market Value*, the relevance of the *but-for scenario* and the differences between *ex-ante* and *ex-post* approaches, including figures that clearly depict how these concepts interact. In the second section of the Chapter, the authors explain how the different valuation methods operate in practice, comparing income approaches (simplified DCF,⁶ APV⁷ and CCF⁸), market valuation approach and the cost approach.

The last three chapters of the Guide focus on the practice of investment arbitration, providing useful guidelines and methods for drafting persuasive memorials (Chapter 12), preparing for hearings (Chapter 13) and making the most of cross-examinations (Chapter 14).

In Chapter Twelve, US-based attorneys *Ari D. Mackinnon*, *Elisa Zavala A.* and *Alejandro Nava Cuenca* provide techniques for drafting persuasive memorials by telling a compelling story and having a strong theory of the case, that will assist any practitioner at every stage of the drafting process: from brainstorming, to defining a memorial's structure and drafting itself. The authors insist on the importance of drafting clearly and avoiding complicated ideas and burdensome phrasing, providing a useful checklist of drafting *do's and don'ts*.

Chapter Thirteen of the Guide, by Argentine attorneys *Luciana T. Ricart* (based in London) and *Fernando A. Tupa* (based in the US and Argentina), contains practical

⁶ Discounted Cash Flow.

⁷ Adjusted Present Value.

⁸ Capital Cash Flow.



advice on the preparation and celebration of hearings in investment arbitrations. As the authors note, hearings mark the end of the evidentiary phase and are a crucial part of the proceedings. As such, they should be prepared and planned for from the outset of the arbitration (including, for example, in the negotiation and drafting of the first procedural order). The authors address the changes brought by the COVID-19 pandemic, particularly in relation to the rise of remote hearings, which the authors consider *are here to stay*. The authors address the preparation of opening and closing statements, as well as the preparation, direct examination, cross-examination and re-direct examination of experts and witnesses. In their closing remarks, the authors also emphasize the importance of teamwork in the efforts required to prepare for and conduct a successful hearing.

In the Guide's final chapter, US-based *Mélida N. Hodgson* addresses cross-examination techniques, providing highly insightful recommendations and techniques. Ms. Hodgson explains the difference between *destructive* and *constructive* objectives in the preparation of cross-examinations, while emphasizing the importance of cross-examination to undermine the credibility of a witness or expert. The author compares the *common law* and *civil law* traditions regarding cross-examination, and briefly comments on the way that these have been balanced in the widely utilized IBA Rules on the Taking of Evidence.⁹ Ms. Hodgson also includes valuable advice regarding the preparation and conduct of cross-examinations, including the elaboration of questions and *cross outlines* as well as strategies to handle typical situations in which the witness attempts to gain control over the exercise. Finally, in a style that adequately reflects the Guide's spirit, Ms. Hodgson provides a highly illuminating list with the *principles of cross-examination*- a valuable resource for any practitioner's toolkit.

⁹ IBA Rules on the Taking of Evidence in International Arbitration (2020), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ibanet.org/MediaHandler?id=3E6FF222-61EB-4ED6-9A3D-67D642629539.



III. CONCLUSION

By providing comprehensive, well-researched and updated materials on many of the most salient aspects of investment arbitration, the Guide amply accomplishes what it set out to provide: an accessible yet thought-provoking quality source to expand the knowledge of investment arbitration for Spanish-speaking practitioners in the arbitration community. With collaborations from such a distinguished list of authors, the Guide will surely position itself as a near-mandatory text for legal education in investment arbitration in Spanish.

Hopefully, this initiative will be followed by many more of its kind, as the field of international investment arbitration continues to expand, both in size and diversity.



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**INSTITUTE FOR TRANSNATIONAL ARBITRATION
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The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

A. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

B. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a



free subscription to ITA's quarterly law journal, *World Arbitration and Mediation Review*, a free subscription to ITA's quarterly newsletter, *News and Notes*, and substantial discounts on all ITA educational online, DVD and print publications. Your membership and participation support the activities of one of the world's leading forums on international arbitration today.

C. THE ADVISORY BOARD

The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

D. PROGRAMS

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

E. PUBLICATIONS

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary international arbitration treaties, in ITA's quarterly newsletter, *News and Notes*. All ITA members also receive a free subscription to ITA's *World Arbitration and Mediation Review*, a law journal edited by ITA's Board of Editors and published in four



issues per year. ITA's educational videos and books are produced through its Academic Council to aid professors, students and practitioners of international arbitration. Since 2002, ITA has co-sponsored KluwerArbitration.com, the most comprehensive, up-to-date portal for international arbitration resources on the Internet. The ITA Arbitration Report, a free email subscription service available at KluwerArbitration.com and prepared by the ITA Board of Reporters, delivers timely reports on awards, cases, legislation and other current developments from over 60 countries, organized by country, together with reports on new treaty ratifications, new publications and upcoming events around the globe. ITAFOR (the ITA Latin American Arbitration Forum) A listserv launched in 2014 has quickly become the leading online forum on arbitration in Latin America.

Please join us. For more information, visit ITA online at www.cailaw.org/ita.



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