Is Investment Arbitration in crisis in Latin America?

by

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Over the years Latin American countries have played an increasingly relevant role in the International Centre for Settlement of Investment Disputes (the "ICSID"), with the highest proportion - 27% - of all cases handled by the Centre. Despite the high percentage these same countries have been increasingly expressing their dislike about having to resolve their disputes through the ICSID, notwithstanding the fact that in certain Latin American countries this hostility has steadily diminished through the adoption of protective Arbitration Laws or the signing of Bilateral Investment Treaties (BITs).

The reason for this resentment is mainly because some of these governments associate the ICSID system with a common and adverse political orientation based on which they have evolved what is, in my view, an erroneous perception of the ICSID system. This unfortunate attitude has led certain countries to implement political measures such as the denunciation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") by the Plurinational State of Bolivia, the Republic of Ecuador and the Bolivarian Republic of Venezuela. These denunciations have brought about a decline in the filing of new claims against Latin American States before the ICSID. For example, in 2013 Venezuela saw only one case brought against it, compared to nine cases filed in 2012. These statistics could lead us to think in terms of a revival of Calvo Doctrine among Latin American countries.

The reasons alleged for such measures by these countries are diverse, for instance, one of the reasons that the President of Bolivia, Evo Morales has particularly emphasized is that "out of 232 cases, 230 have been in favour of firms representing foreign investors". In fact, the same reason was subsequently given by Venezuelan Foreign Ministry's in a press-release where it stated that "ICSID has ruled 232 times in favor of transnational interests out of the 234 cases filed throughout its history".[1]

However, this opposition to the ICSID Convention among Latin American countries is not at all new, in fact their distaste goes back 50 years to the 1964 Annual Meeting of the World Bank in Tokyo, when the ICSID Convention was proposed before the Board of Governors of the World Bank, and the Chilean delegate stated that "…all Latin American States voted 'no' to the ICSID Convention. This was the first time in the Bank's history that a final resolution had met with substantial opposition on a final vote". [2] This has come to be known, historically, as the "Tokyo No"[3] and it occurred at a time when Latin America was heavily influenced by the Calvo Doctrine.

This merely reflects that there is a shared view by this group of countries, but the facts show that there is a manifest misrepresentation of the ICSID's record, as the latest annual review by the United Nations Conference on Trade and Development of investor-State dispute settlements (published in No. 1, April 2014), found that approximately 43% of cases were decided in favour of the States and approximately 31% in favour of the investors. In the specific case of Venezuela, of the 8 cases ruled on by the ICSID, four were won by Venezuela against the foreign investors. [4] These facts simple go to show that the hostility of some States or resistance, in general, towards the ICSID is more closely related to a concerted political position than to proven facts.

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[1]See: "*Gobierno Bolivariano denuncia convenio con CIADI*", available at: http://www.mre.gov.ve/index.php?option=com_content&view=article&id=18939:mppre&catid=3:comunicados&Itemid=108

[2]See: Andreas F. Lowenfeld "The ICSID Convention: Origins and Transformation" (2009)38_ *Georgia Journal of International and Comparative Law*_47-62.

[3] See: Fiezzoni, Silvia "The Challenge of UNASUR Member Countries to Replace ICSID Arbitration (2011)2_*Beijing Law Review*_134-144.

[4] See: *Opic Karimum Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/14); *Highbury International AVV and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/1); *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3); *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6)

Inevitably, then, the question raised is what will the future hold for investment arbitration in Latin America? The States in question think that the answer could still be arbitration, but managed through a regional center like the one proposed by Ecuador in 2009, organized by the Latin America Union of South American Nations (hereinafter "UNASUR") provisionally know as the "UNASUR International Centre for Conciliation, Mediation and Arbitration". The proposal at the V Summit of Judicial Powers of UNASUR is that the regional mechanism, will allow for the processing of claims by Investor-State and State-to-State arbitration when this is provided for in contractual provisions or an international instrument[5]. The new mechanism will, among others (i) establish an appeals mechanism to permit the review of questions of law based on a precedents system by an appellate tribunal; (ii) entail an examination of the likelihood of an arbitrator having a state of mind or prejudgment that favours one side in the dispute; (iii) make proceedings public (this includes documents, records, evidence, hearings and awards) except for those matters relating to defense and state security and in special cases that the parties may determine by mutual agreement; and (iv) provide that the only basis for denying recognition and enforcement of the award will be when, according to the host state's constitution or its laws, the subject of the dispute is not arbitrable or is contrary to public policy.

Some may think that investment arbitration has achieved a "universal legitimacy" but one has to wonder if this supposed general acceptance - or at least acquiescence - is not in fact in crisis in Latin America. I do believe that some countries are agreeable to resolving their disputes through the ICSID. Investors in Latin America should anyway bear in mind, when pondering the measures taken by certain countries, that there are many options open to them other than resorting to the ICSID. In fact most of the investment arbitration cases in recent years have been based on consent established through an offer of arbitration contained in a BIT. Therefore, those countries in Latin America that have entered into BITs (which are still in force) and have denounced the ICSID Convention, can still offer investors a way out, strictly depending on the provisions in the BITs, whereby they will not to be at the mercy of their changing politics. In such countries in Latin America there are alternative arbitration avenues, with many BITs providing the investor with different options for submitting claims to international arbitration, such as the ICSID Additional Facility, *ad hoc* arbitration under UNCITRAL Rules, the Stockholm Chamber of Commerce or ICC Arbitration, among others. I do believe, therefore, that although one door in Latin America may be closing or barely ajar it does not necessarily mean that others can't be opened and that there is indeed a future in Latin America for investment arbitration, as ongoing attempts are made to finally get out from under the dark shadows of the Calvo Doctrine.

[5] Fiezzoni, *op. cit.*, pp. 140-142. According to this author, this documentation was obtained in May 2011 from a member of UNASUR's Working Group on Investment Dispute Settlement. However, it must be pointed out that there is still no "official" public proposal regarding this Centre.