

# Notes on the Persistent Latin American Countries' Attitude Towards Investment Arbitration and ICSID

## **Kluwer Arbitration Blog**

July 24, 2014

Ricardo Dalmaso Marques (Pinheiro Neto Advogados)

*Please refer to this post as: Ricardo Dalmaso Marques, 'Notes on the Persistent Latin American Countries' Attitude Towards Investment Arbitration and ICSID', Kluwer Arbitration Blog, July 24 2014, <http://arbitrationblog.kluwerarbitration.com/2014/07/24/some-notes-on-the-latin-american-countries-a-ttitude-towards-investment-arbitration-and-icsid/>*

---

Investment arbitration is a crucial and sensitive dispute-resolution method, notably because the treatment given to foreign investment matters may materially affect the economic and social realities of a country or region, particularly those in development. In the last decade, however, as already reported and addressed in this blog by, among many others, Vanessa Giraud and Carlos González-Bueno, countries in Latin America — a true hot-spot for foreign investment<sup>[fn]</sup>Unit on Investment and Corporate Strategies of the Division of Production, Productivity and Management of the Economic Commission for Latin America and the Caribbean (ECLAC), *Foreign Direct Investment in Latin America and the Caribbean 2012* (2013), (reporting that, in 2012, Latin America received US\$ 173.361 billion in investments, an increase of 5.7% from the previous year, as opposed to a worldwide foreign direct investment decrease of 14%).<sup>[fn]</sup> — have been either ignoring, denouncing or resisting the International Centre for Settlement of Investment Disputes (“ICSID”), the dispute-resolution framework for investment protection enacted under the Washington Convention of 1965.<sup>[fn]</sup>While ICSID is not the only international arbitral forum available, it is certainly the most prominent option. See ICSID, *ICSID Caseload - Statistics, Issue 2013-2*, 7 (2013), (reporting that, as of June 30, 2013, ICSID had registered 433 cases under the ICSID Convention and Additional Facility Rules). See also Sergio Puig, *Emergence and Dynamism in International Organizations: ICSID, Investor-State Arbitration, and International Investment Law*. *Geo. J. Int'l L.* 44, 531, 597 (2013), (affirming that “time has proven the deep reach of the Convention, as well as ICSID’s status as not simply another arbitration facility”).<sup>[fn]</sup>

The most notable examples of this Latin American trend include: (i) Brazil’s refusal to ratify the ICSID Convention, purportedly for both political and economic reasons;<sup>[fn]</sup>Gilberto Giusti & Ricardo Dalmaso Marques. *Dispute Resolution, in BRAZILIAN COMMERCIAL LAW - A PRACTICAL GUIDE*, 271, 331 (Silvia Fazio ed., Kluwer Law International 2013) (describing that, despite the fact of having its economic growth based on a market economy supported by incoming capital flow, Brazil has not ratified the ICSID Convention, and signed fourteen (14) Bilateral Investment Treaties - BITs, but never ratified them).<sup>[fn]</sup> (ii) Bolivia’s, Ecuador’s and Venezuela’s withdrawal from the ICSID Convention, due to alleged structural and legal problems with it;<sup>[fn]</sup>Ignacio Vincentelli, *The Uncertain Future of ICSID in Latin America*, *Social Science Research Network (SSRN)*, 13 (February 20, 2009), (detailing this movement and reporting that some of these countries even initiated a widespread termination of BIT’s that provided for the ICSID dispute-resolution method).<sup>[fn]</sup> and (iii) Argentina’s threat to withdraw, according to a bill pending before its Congress.<sup>[fn]</sup>Argentinean Congress (March 21, 2011).

See also *Argentina acuerda pagar 500 mln dlr por demandas ante paneles Banco Mundial*, ONU, Reuters (October 19, 2013), (outlining that, albeit Argentina has recently accepted to fulfill the payment of agreements arising from ICSID arbitrations in the amount of US\$ 500 million, the Argentinean Finance Minister affirmed that the settlement was reached “under local legislation” and that such attitude illustrates a “ratification of Argentina’s position towards ICSID.”).<sup>[fn]</sup> The legal problem to be addressed, therefore, is the apparent reluctance of Latin American countries to subject themselves to ICSID as an effective international investment protection forum. Accordingly, Latin American countries must determine whether avoiding ICSID is the appropriate solution, given the need for foreign investment in the region.

Although not expressly acknowledged, this dissatisfaction of certain Latin American countries clearly results from the exponential increase of ICSID arbitrations brought against these countries. These cases have arisen mostly from financial crises, as well as nationalization and expropriation initiatives.<sup>[fn]</sup> Katia Fach Gómez, *Latin America and ICSID: David versus Goliath?* (November 12, 2010), Social Science Research Network (SSRN), 3, (emphasizing that, among the main criticisms made by these countries against ICSID are the alleged: (i) concerns that hostility toward ICSID might impede access to World Bank credit; (ii) pressure to hire expensive foreign law firms; (iii) lack of attention to non-commercial interests, such as health or environmental protection; (iv) arbitrator bias in favor of the investor; and, maybe more decisively, (v) lack of sensibility by the tribunals on issues relating to collective interests, such as human rights and indigenous peoples).<sup>[fn]</sup> Brazil, however, is a different story; its decision not to adhere to ICSID seems to be more closely related to its actual advantages, considering that the country is already a major recipient of investment in Latin America and one of its largest economies.<sup>[fn]</sup> Gilberto Giusti & Adriano Drummond C. Trindade, *As arbitragens internacionais relacionadas a investimentos: a Convenção de Washington, o ICSID e a posição do Brasil*, *Revista de Arbitragem e Mediação* 7, 45, 48 (2005) (detailing the legal, economic and political reasons for Brazil’s decision not to ratify the ICSID Convention nor the fourteen BITs previously signed).<sup>[fn]</sup>

The facts that only Latin American countries have withdrawn from the ICSID Convention and that Brazil is one of the only world economic forces not to adhere to it are not *per se* indications of a bad policy. Indeed, ICSID is not the only investment protection system available, and should not be treated as such. On the other hand, as previously addressed in this blog by [Mariano Tobías de Alba Uribe](#), UNASUR’s<sup>[fn]</sup> [The Union of South American Nations](#), an intergovernmental union integrating Mercosur and the Andean Community of Nations (CAN) as part of a continuing process of South American integration, and inspired and modeled after the European Union. UNASUR’s members are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Panama and Mexico hold an observer status. <sup>[fn]</sup> announced desire to create its own (regional) investment arbitration center to replace ICSID, in fact, seems to deserve some criticism.

An investment dispute-resolution forum that favors sovereign power and regionalism over international standards will inevitably raise questions as to its neutrality and, as a result, fall into disuse. Hence, the instability and lack of clarity concerning investment protection caused by this “regionalization” of justice is expected to decrease the amount of foreign investment in the region, with a severe impact on its social reality — which is marked by alarming rates of poverty, unemployment and illiteracy.<sup>[fn]</sup> Economic Commission for Latin America and the Caribbean (ECLAC), *Social Panorama of Latin America 2012* (2013) (reporting that 167 million Latin Americans (28.8% of the region’s population) were living under the poverty line in 2012, including 66 million (11.4% of the region’s population) living in indigence). <sup>[fn]</sup> This is an unfortunate truth even in Brazil, which, though not currently in a position where it needs to encourage foreign investment, perhaps won’t be able to sustain the current level of investment in the long-term.<sup>[fn]</sup> More than that, Brazil also has been playing an important role as an “exporter” of investment, and these investments will also require

protection beyond “shell and holding companies”, as asserted by Jean Kalicki in discussions held at the IBA Annual Conference, 2013, in Boston. *IBA panel shares arbitration tips for energy lawyers*, Global Energy Review (October 14, 2013).<sup>[fn]</sup> Latin America has, in fact, demonstrated a growing acceptance of international commercial arbitration (as reported, for instance, by Manuel A. Gómez), but that alone may not be enough.

Moreover, by isolating Latin America from the international investment standard, Latin American policymakers may undermine the enforcement of rule of law in the region, which would negatively impact the region’s economic and social development.<sup>[fn]</sup>David W. Rivkin, *The Impact of International Arbitration on the Rule of Law: The 2012 Clayton Utz/University of Sydney International Arbitration Lecture*, Arbitration International 29, 327, 340, (LCIA 2013) (stressing that investor-state arbitration is a “different animal” than international commercial arbitration, not only because it involves sovereign states and “public goods and money”, but also due to the fact that it has a profound impact on the development of public international and national laws; a true impact on the enforcement of rule of law).<sup>[fn]</sup> Without a doubt, a rebirth of the so-called Calvo Doctrine — which, for some, has never vanished completely within the region — is not an adequate solution, given especially the existing competition over FDI with African and Asian countries (a number of them parties to ICSID and to BITs).

In brief words, such an extreme position would likely have serious repercussions on the welfare of the region by impacting (i) the countries’ receipt of foreign investment, and (ii) the development of international and domestic law. It is manifest that Latin American countries cannot afford such an important loss right now. The proper answer, instead, seems to be related to the ability of Latin America to establish a legal framework that enables it to refuse unwanted investments, and that gives preference to the needs of the host states. Latin American countries could repeal ICSID, as long as they take other relevant measures to ensure investments’ growth and stability — which unfortunately has not yet been the case.<sup>[fn]</sup> One cannot disregard that the Latin American countries could benefit from establishing a new and more balanced system of international investment, mainly in virtue of the many unfavorable BIT’s to the region signed in the past — for some, practically allowing the abuse of the first world in Latin America through the exploitation of resources by foreign companies. See Katia Fach Gómez, *Latin America and ICSID: David versus Goliath?* (November 12, 2010), Social Science Research Network (SSRN), 26.<sup>[fn]</sup>

Besides, if thoroughly analyzed, the Latin American countries’ complaints about ICSID — or at least the ones based on scientific and logical grounds, and not on ideological components — seem not to be sustainable if an investment protection framework beneficial to both investor and State is enacted. And even if the “structural” dissatisfaction with ICSID could be considered justifiable, BIT’s options for *ad hoc* arbitration proceedings under the auspices of UNCITRAL or ICC Rules, for instance, are still a valuable option, along with investor-state mediation, which has demonstrated a high percentage of effective results (as reported by Muniz Maniruzzaman).

As a preferable solution, therefore, Latin American should focus on the fact that, to ensure economic and social development, these countries must enact substantive laws to protect investments, rather than “concentrating” investment justice in the region’s own hands.<sup>[fn]</sup>Jonathan C. Hamilton. *A Decade of Latin American Investment Arbitration*, in LATIN AMERICAN INVESTMENT TREATY ARBITRATION: THE CONTROVERSIES AND CONFLICTS, 69, 78 (Mary H. Mourra, ed., Wolters Kluwer 2008) (expressing his similar view in the sense that “(a)s that (ICSID) system confronts certain stresses, it is important to recall the complexities of the era that lacked such a system and the fact that the legal framework for investment disputes put into place over many years is not likely to be quickly deconstructed”).<sup>[fn]</sup> While some may view ICSID as expendable in the region, one thing is for certain: the enforcement of rule of law is not.

*The author deeply thanks Fernanda Marques Dal Mas, associate at Pinheiro Neto Advogados (São*

*Paulo, Brazil), for her kind and crucial assistance in the revision of this post.*