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Topical issues in ISDS: Latin America – A Review of Recent Developments – A report from the CERSA

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The CERSA (CNRS-University Paris II Pantheon-Assas) organises a series of seminars on select topics in international investment law and investor-state dispute settlement (ISDS). The purpose of these seminars is to discuss and debate such topics bringing together academics, practitioners and policymakers in a small international group in Paris.

The conference about Topical issues in ISDS: Latin America – A Review of Recent Developments was held in Paris on 26 October 2018, moderated by Professor Catharine Titi (CERSA). Practitioners: Alvaro Galindo (Dechert, Washington, D.C.), José Ricardo Feris (Squire Patton Boggs, Paris) and Alejandro López Ortiz (Mayer Brown, Paris) gathered to discuss the latest reforms in investment arbitration in the Latin American (LATAM) Region.

I. A general comparison between the historical and current trends in Europe/the United States versus Latin America

Lessons learnt from the first wave of calls for ISDS reform in the LATAM Region

Alvaro Galindo commented there was a first reaction in the LATAM region around 2007, when a multitude of cases were brought against Ecuador, Argentina, Venezuela and Bolivia among others. LATAM States started to react to the system as a consequence to those claims by denouncing some of their BITs and the ICSID Convention. Retrospectively , it was thought this reaction was irrational, but going back to 1964 during the Convention's negotiations in Tokyo, all Latin American states voted no to the resolution.

That paradigm moved to another region of the World, Europe and particularly the European Union via the European Commission. The European Commission is to officially table the multilateral investment court's (MIC) proposal in the upcoming UNCITRAL Working Group III (WGIII) with some countries aligned, however the US position is still unclear. The Achmea Decision has also brought a loud discussion in the last months. If the EU is to succeed with the creation of a Multilateral Investment Court, we will have a parallel arbitration world, with a MIC system on one side, and further "contractualization" of investment arbitration on the other.

After Venezuela leaving ICSID, is the Achmea Decision a legitimization to leave existing ISDS mechanism?

Alejandro López Ortiz stated that LATAM countries can be criticized from a political perspective, but the treaties provided for exit mechanisms and those were triggered legitimately. Later on when European states started to be on the receiving end of ICSID, the European institutions started their own crusade with a rationale similar to the one in Latin America. This trend culminates in the Achmea decision, where the CJEU annulled consent of an intra-EU BIT, on the basis of the superiority of EU law.

This resonates with the Rosatti Doctrine [1)]; Rosatti by then Minister of Justice of Argentina, in 2005 during the eve of the CMS award, sustained that investment arbitration awards were against the constitution of Argentina.

Brazil for decades has remained outside of the traditional system but is now leading with a facilitation agreement without ISDS, is this a viable approach?

José Ricardo Feris observed Brazil has maintained a very pragmatic position as it does not need to attract investments through investment treaties, it rather relies on its history of not expropriating, having an independent judiciary system, and a pro-arbitration regulatory framework. There has been a new wave of treaties to promote investments within LATAM countries creating a multi-tiered system before the Ombudsman and a Joint Committee prior to State-to State arbitration (in certain treaties only). In the latter, the remedy consists in the removal of the measure but no economic compensation for the investor, which might be insufficient to incentivize investors to use this mechanism.

II. Concrete recent reforms in ISDS in the US and LATAM region

The new USMCA and possible influence on Treaty making in the LATAM region

Alejandro López Ortiz recalled the difficult context of the USMCA negotiations, which lead to a somewhat "schizophrenic" dispute settlement mechanism, with three parties but two different mechanisms, and three separate regimes with the new Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) treaty. Arbitration remains only between US and Mexico. The new USMCA excludes the minimum standard (FET) and indirect expropriation from arbitration reducing the possibility of claims, considering that FET is the most invoked provision by investors.

Concerning USMCA influence, NAFTA modeled some LATAM Treaty making. For instance, NAFTA served as a basis for Mexico's investment treaties. As the new treaty, the new model BIT of Ecuador also excludes indirect expropriation.

Commentary of the New Bolivian Arbitration Act of 2015

José Ricardo Feris noted the New Bolivian Arbitration Act contains an investment arbitration chapter. But it must be noted that Bolivia has restricted the areas and the way in which foreign investors can operate in Bolivia. Foreign investors may only act in certain sectors through PPPs. Disputes between the PPP members will be subject to this chapter as an investment dispute. Notably, the Act establishes that all of these investment arbitrations shall be seated in Bolivia. It is questionable whether investors

would be attracted to these provisions, as these awards will be controlled by Bolivian courts. However, it is not uncommon for foreign investors to submit contractual disputes with State entities to arbitrations seated in the host State and subject to its law.

Argentina and Uruguay late adoption of UNCITRAL model arbitration law in the region possible positive spillover effects

The Argentinian adoption of UNCITRAL model Law is welcomed, but some reticence from Argentina to fully embrace international arbitration remains. This new law covers only international commercial arbitration, the local arbitration law still has a limited arbitrability involving the public administration. The approach concerning the setting aside of international awards based on "Argentinean public policy" grounds as opposed to the standard of "Argentinean international public policy" established for the enforcement of foreign awards may be a cause of concern, as it may not particularly promote Argentina as a potential arbitration seat.

Where does Ecuador stand today on foreign investment protection and how is that reflected in Ecuador's proposal for a new model BIT?

Alvaro Galindo remarked the government sent messages to the international community that Ecuador is trying to move away from policies taken for the last decade through systemic changes in the legislation and the new model BIT. In August the new administration brought back to life a rule expelled from the legislation a few years ago for the recognition and enforcement of foreign awards in compliance with the New York Convention.

Concerning the new Ecuadorian draft BIT, the definition of an investment is quite restricted, the text conditions the investment to a positive contribution to the host state, and requires respect to human rights and the environment. A similar provision is contained in the Colombian model BIT. The draft excludes indirect expropriation. Also, the compensation evaluation based on the market value mandates to take in consideration the conduct of the investor and any damage caused by the investor to the environment or local communities. Those provisions are taking into account lessons learnt from the Occidental and Chevron cases.

III. Key recent decisions in Latin America:.

Chevron v Ecuador

The Chevron saga with Track 3 for damages still pending, has an undeniable impact on the current Ecuadorian administration. The dispositive of the award rendered on August 30th provides Ecuador should take steps to leave without effect the 9.5 Billion USD judgment issued by a local court. Compliance with this decision seems problematic for Ecuador.

Philip Morris v Uruguay

José Ricardo Feris commented Uruguay is perceived as a safe investment-hub, it is

also one of the countries most affected by the consumption of Tobacco backed by the World Health Organization Convention. The Philip Morris case was a welcome decision for Latin American and States worldwide confirming the states right to regulate, particularly on public health issues, and also confirming the application of a high standard when it comes to denial of justice.

Pacific Rim v El Salvador, David Aven vs. Costa Rica and Álvarez y Marín Corporación S.A. v Panama

Alejandro López Ortiz mentioned the three claims were rejected, as the tribunal enforced local laws aimed at protecting the environment or local communities.

In a nutshell, the Pacific Rim v El Salvador case dealt with the denial of an underground mining concession. The tribunal, acting on the basis of the local investment law, rejected the claim for lack of compliance with the local mining law.

In David Aven v Costa Rica (ICSID Case No. UNCT/15/3), the arbitral tribunal dismissed the claim that Costa Rica had revoked touristic development permits as it found that the investor was in breach of local law which protected wetlands and forests.

Finally, in Álvarez y Marín case against Panama, the tribunal rejected jurisdiction to hear claims for the expropriation of a tourist development, apparently for the breach of applicable laws protecting local communities.

Even if these cases do not have the worldwide impact of Philip Morris, they showcase the tendency for arbitral tribunals to uphold environmental law or the legality of the investment requirements, when the treaty contains clear provisions in that sense.

References

↑1 Herz, Mariana, Recognition and Enforcement of Icsid Awards, Rosatti Doctrine and National Legislative Projects. El Derecho Vol. 214, p. 799, 2006. Available at SSRN: https://ssrn.com/abstract=917462

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