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Latin American States, International Arbitration and Trade in Investment Agreements: Quo Vadis?

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International trade and investment arbitration in Latin America has come a long way over the last two decades as discussed in the book *Trade Agreements, Investment Protection and Dispute Settlement in Latin America*. More recently, new generation trade and investment agreements entered into by Latin American states have progressively included innovative dispute resolution mechanisms, shaping a new era for international arbitration.

Latin American states have been gradually deploying international arbitration to settle trade and investment disputes. However, this evolution has not been linear as international arbitration has also stirred controversy in the region. In particular, international investment law has proved to be of significant concern for some countries in the region, which have faced (and still face) claims before international arbitration tribunals. In the trade arena, Latin American states are increasing their participation in the World Trade Organization (WTO) dispute settlement system, with some states becoming figureheads in trade dispute resolution, such as Brazil, Argentina and Mexico. The rest of the states have followed their footsteps, albeit with fewer cases. This has led to a further intertwining relationship between the trade and investment realms in treaty provisions (particularly TRIMs and trade in services chapters), which can also be seen in cases such as *soft drinks/corn syrup.*

Clearly, there has not been one single approach to international arbitration in the investment and trade agreements concluded with both regional and extra-regional partners. Hence, more than one stance on international arbitration can be observed. In the 1990s, Mexico led the way for change when it signed NAFTA, one of the first treaties comprising both trade and investment arbitration provisions. Central American countries have turned out to be a laboratory for new treaty models, as the agreement with the European Union and, CAFTA-DR with the US and Canada, were negotiated in parallel. In South America, however, there seems to be a split in regard to the various trade and investment agreements. Whereas the FTAs signed with the US favoured the settlement of disputes through traditional mechanisms, those concluded with EU parties incorporate other alternative means. Three South American states have denounced the ICSID Convention. In turn, MERCOSUR has developed its own model of arbitration for intra and extra regional agreement disputes, while it is negotiating a new treaty with the EU.

Seeking to Speak With a Single Voice?

It is not just a stereotype to assert that "Latin America is not a country." There are almost as many approaches to international dispute resolution as countries in the region, which has led to various dispute resolution mechanisms designed in international treaties regulating foreign investment.

Certainly, there is no single model of international investment treaty, but rather clusters of different agreements ranging from the classic BIT, to new-generation international trade and investment agreements, to International Investment Agreements (IIAs) concluded in various stages since the 1990s. An overview of these different investment agreements may be helpful to better grasp the complexity of the current landscape. Some regional integration agreements regulate intra and extra regional investments, such as the Intra-Mercosur Investment Facilitation Protocol (MERCOSUR Protocol) or the Central American Agreement on Investments and Trade in Services. Extra-regional trade and investment treaties, such as those signed between Latin American states and the EU and the US, have incorporated the traditional investor-state dispute resolution clause in favour of ICSID arbitration, or ad-hoc arbitration under the UNCITRAL Rules, along with chapters on arbitration of trade disputes and international commercial arbitration favouring out-of-court dispute settlement between businesses.

In terms of the impact of foreign investment policies on IIAs in Latin America, from the NAFTA model to the United States, Mexico and Canada Agreement (USMCA), considerable modifications have been introduced to dispute settlement mechanisms regulated therein. In addition to the US, the EU has been actively promoting its model and the reform of the global ISDS system. In contrast, while China's investments have grown in the region, the same 1990 BIT model is still in force in most Latin American countries, with some exceptions (like Costa Rica and Mexico).

Re-shuffling and Re-defining the Roles

Over the first two decades of this century, Latin American countries have performed in a considerable variety of ways in the field of international arbitration. So far, Latin America states have appeared most of the time as respondents in the ISDS system. Deviation from the global ISDS occurred when Bolivia (2007) and, subsequently, Ecuador (2009) and Venezuela (2012) denounced the ICSID Convention. Argentina, for a long time in the spotlight of international investment arbitration, came to terms with ISDS by settling some of the high-profile investment arbitrations arising out of the 2001 economic crisis. Mexico joined the ICSID Convention last year, on July 27, 2018, marking a new turn in the region. Colombia has recently appeared as a respondent before ICSID: see, for instance, *Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41*.

In turn, Brazil has led a new path in understanding international investment arbitration. Still consistent with its traditional slant on IIAs (signature but no-

ratification of treaties), Brazil has moved on to take up an active role in the redefinition of international investment arbitration. The Brazilian BIT, created through the adoption of the Cooperation and Facilitation Investment Agreements (CFIA), has been incorporated into the Intra-Mercosur Investment Facilitation Protocol, highlighting some peculiarities concerning the regulation of foreign investment.

While ICSID continues to be predominantly the forum for the settlement of investor-state disputes, the PCA has emerged as another setting for international investment arbitration under UNCITRAL Arbitration Rules (2013).

Other recent developments consist of the increasing participation of Latin American states in mega-regionals such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); and the launch of new initiatives, like the Pacific Alliance, also incorporating dispute settlement mechanisms.

Keeping Up With New Trends in International Arbitration

Overall, Latin American states have contributed to new waves or paradigms in international arbitration which can be observed in a wide range of areas. Emphasis on conflict prevention and the reliance on other ADR methods are addressed in more recent agreements (*e.g.* some treaties provide for international conciliation and mediation). For instance, institutional dialogue and cooperation mechanisms are set forth in the MERCOSUR Protocol focusing on conflict prevention. The Protocol foresees the creation of a National Focal Point or Ombudsman in each Member State tasked with the responsibility of providing support to foreign investors. Additionally, there is a procedure for dispute resolution between states to be implemented by the Administrative Commission of the Protocol in intra-regional investment.

Despite the struggles and heated debates over international investment arbitration, state practice shows that Latin American states are becoming more active in the proceedings, by challenging the awards and even suing the foreign investor.

In terms of its contribution to International Arbitration 2.0 (a more flexible and efficient system), the enforcement of arbitral awards still remains controversial in some countries. International conflict prevention and resolution mechanisms bring legal certainty; however, this is thwarted if no effective enforcement is granted in domestic jurisdiction.

Other aspects that deserve mention are those related to due diligence and obligations on the part of the foreign investor. The Brazilian CFIA model embodies obligations for foreign investors. Recent cases like *Álvarez y Marín Corporación S.A. and others v. Republic of Panama, ICSID Case No. ARB/15/14,* have unveiled the relevance of the due diligence that must be exercised by foreign investor and state behaviour when an illegal investment is made.

Some Latin American states are engaging with the proposals for the establishment of an international investment court, having a say in the reform of the world investment system.

The enforcement of norms and the operation of the institutional settings remain key to articulating an efficient system. New initiatives which have been launched, such as the proposed UNASUR Centre for the Settlement of Investment Disputes, did not offer a thick institutional framework. Despite never being implemented, it revealed states' approaches to international arbitration with the introduction of specific procedural norms. Other initiatives, like Prosur (Forum for the Progress and Development of South America), are rather more a political statement of purpose concerning regional integration and development**.**

Conclusion: What Lies Ahead for Latin America in International Arbitration?

Latin American states are contributing in various ways to the development of international arbitration by bringing new approaches to international dispute settlement and taking their own stance on crucial legal aspects. Although there is a distinctive regional approach, as discussed before, it is segmented.

Whether a new distinctive take on trade and investment dispute settlement develops further will depend on the evolution of the international agreements. The consolidation of positions in a particularly dynamic scenario for trade and investment remains key to Latin American countries.

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