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Investment Arbitration and Latin America: Irreconcilable Differences?

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On April 22, 2013, representatives of Members States of the Bolivarian Alliance for the Americas ("ALBA" for its acronym in Spanish) met in Guayaquil, Ecuador. The purpose of the meeting was to discuss the manner in which their interests are affected by the activities carried out by transnational companies, under a reunion known as the First Ministerial Conference of Latin American States affected by Transnational Interests.

Founded in 2004, ALBA is an international cooperation organization which is mainly associated with socialist and social democratic governments, being its main purpose to achieve regional economic integration based on a vision of social welfare. Its current members are Bolivia, Cuba, Ecuador, Nicaragua, Dominica, Saint Vincent and the Grenadines and Venezuela. However, this particular conference also counted with representatives from Argentina, Guatemala, El Salvador, Honduras and Mexico.

The important result of the discussion was the subscription of a Declaration which "*supports the establishment and implementation of regional bodies for the solution of investment disputes*," with the caveat that such bodies will have to ensure fair and balanced rules for the settlement of conflict between transnational corporations and States. This desire to create an alternate instance is somehow explained in the preamble of the above mentioned Declaration, where it is stated that "*recent developments in various Latin American countries, concerning disputes between States and transnational corporations, have shown that decisions that violate international law and the sovereignty of States persist, due to the economic power of certain companies*".

Therefore, the States gathered in Guayaquil decided to call to action the Union of South American Nations ("UNASUR"), another international organization existing in the region composed by Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela. Such encouragement specifically refers to the creation of a regional dispute resolution mechanism which apparently is under negotiation.

In this sense, it must be highlighted that recent reports have confirmed that UNASUR has announced that it is very probable that its own investment arbitration center will open this year, if its establishment is approved in the July meeting of the Foreign Ministers of the organization. Obviously, this is an effort to limit the reach of ICSID which is currently administering a considerable amount of disputes involving Latin American countries. According to the Uruguayan expert Cecilia Olivet, Latin America is the region with the largest number of arbitration

proceedings, with Argentina, Venezuela, Ecuador, Mexico and Bolivia "monopolizing" 27% of all the investment disputes in the world.

Although the main functioning conditions of this centre are not yet entirely clear, some reports seem to suggest that under UNASUR's arbitration centre rules, greater deference will be given to the sovereign and regulatory needs of States, and an appeal and precedent scheme will be implemented. Furthermore, it is possible that such novel centre will also have jurisdiction in relation to commercial disputes in the region, as well as to regional and international trade matters.

Until such option is implemented, it is important to be aware that under the Declaration, the States congregated in Guayaquil decided to create an Executive Committee responsible, among other things, of "*coordinating the joint defense and exercise of legal actions through international legal teams of experts and professional lawyers*," and designing communication strategies, as a counterweight to the global campaigns allegedly undertaken by transnational companies, with the objective of disseminating the legal, technical and political aspects of the different cases. Also, the conformation of an International Observatory is expected for the purposes of auditing and monitoring international arbitral tribunals' actions in relation to worldwide investment disputes.

All these actions reveal how some States that have several pending ICSID cases are already paving their way in order to confront possible adverse awards. For example, since 2012, Venezuela is expecting decisions of arbitral tribunals in the cases brought by ExxonMobil and ConocoPhillips after the expropriation of their projects in the Orinoco Oil Belt, which could eventually order the payment of compensation to such companies for a staggering amount of forty billion dollars.

Will all this fuss lead anywhere? Or better yet, will this mean the end of ICSID at least in Latin America? In principle, it is obvious that the main promoters of all these radical ideas are States which are not very glad with some decisions taken by arbitral tribunals under ICSID facilities or fear future decisions which could seriously affect their economic interests. However, the proposed creation of an alternative investment dispute resolution forum which promotes sovereignty over transnational standards is doomed to fail, because as with the large majority of national courts of Latin American States, investors will not consider such a forum to be an impartial venue to resolve an eventual dispute.

Precisely, the key feature of ICSID and more specifically of the vast majority of BITs currently in effect, is that they recognize that the international investment regime must grant certain minimal conditions to investors, in order to promote their investment in a foreign territory. Changing such status quo will simply bring a decrease or the disappearance of international investment in the region. And that, for the sake of the Latin American future, is something that should not happen.

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