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The Trajectory of International Arbitration in Latin America and Current Trends in ISDS

Ana Toimil Cervantes, Alexander David Barnes (Von Wobeser y Sierra, S.C.) · Tuesday, February 26th, 2019 · Young ITA

On 7 February 2019, Young ITA Talks Mexico conference addressing investor-state dispute settlement ("ISDS") in Latin America was organized at Greenberg Traurig S.C.'s Mexico City office.[1)] The panellists, including leading practitioners and government officials, discussed the development of and approaches to international arbitration and ISDS in Latin America, and how these are influenced by divided global political stances.

Traditionally, Latin America has been renowned for its scepticism of and disengagement with ISDS. After the famous "Tokyo No" meeting in 1964, all Latin American countries voted against the ICSID Convention. Brazil, the largest economy in Latin America, has still never signed the ICSID Convention, and controversially it also did not ratify the BITs it had entered into. Indeed, in Brazil it is considered unconstitutional to provide investment protections to foreign investors that do not exist for Brazilian investors.

Until recent times, this Latin American posture against foreign investor protections was in clear contrast to the one adopted in Europe and the U.S., which have always been considered strong proponents of ISDS. The very origin of treaty-based ISDS was the result of the lobbying of European-based multinational companies for protection against the expropriation of their assets in the developing world. Kabir Duggal, of Arnold & Porter LLP, opined that a significant degree of the Latin American apathy for ISDS was due to the broadly-held view that the US and EU dominated the system to the exclusion of developing states.

Moving into the early 1990s, however, most Latin American countries showed some signs of softening their stances towards ISDS and started entering trade agreements with investment protections and BITs. Ecuador, for instance, entered into 26 of the 29 BITs in its history from 1993 to 2002.

Various recent events have, however, raised concerns about the new course that not only Latin American countries are taking, but also Europe and the U.S.

In Europe, the *Achmea* decision of the European Court in 2018 and the subsequent termination of all intra-EU BITs have caused significant upheaval. The EU now proposes a multilateral investment court, but it remains far from clear whether this will come to fruition. Brazil, Chile and India have each already rejected the proposal, and it has attracted strong criticism in academic circles and among many stakeholders. The US, too, in coordination with its increasingly inward-looking policies, has left the TPP and is presently replacing NAFTA with the new USMCA. The latter is particularly flavoured with the current US regime's desire to keep investment domestic, as it provides for no ISDS between Canada and the US and a differentiated scope of investment protections between Mexico and the US, which are indeed less favourable provisions for foreign investors than the ones under NAFTA.

In Latin America, we have seen the denunciation of the ICSID Convention by Bolivia (2005), Ecuador (2009) and Venezuela (2012), and both Ecuador and Bolivia have torn up their BITs. Of the aforementioned 29 Ecuadorian BITs, according to Investment Policy Hub, only three remain in force. Dra. Blanca Gomez de la Torre, of González, Peñaherrera & Asociados, observed that, as of today, the Ecuadorian government's sole option (under their Constitution) is to individually agree investment contracts with investors. The denunciation of ISDS mechanisms has also been accompanied by more restrictive reforms to the mechanisms that remain in force. For instance, the New Bolivian Arbitration Act, enacted in 2015, allows foreign investment only in certain public sectors and orders that all investment arbitrations be seated in Bolivia.

While certain stakeholders consider the present climate to represent an ongoing withdrawal from ISDS and a regression to the Calvo doctrine, Imad Khan, of Hogan Lovells, expressed a more optimistic outlook regarding its future in Latin America. Rather than a withdrawal from ISDS, he considered that states are engaging in a 'renegotiation' of it. He noted that because most BITs were entered in the 1990s, it makes sense for states to now redefine the rights, obligations and remedies of investors to better suit them in 2019. This viewpoint finds support in the fact that Chile, Mexico and Peru recently entered CPTPP, and also that both Ecuador and Bolivia have recently drafted Model BITs. He also noted that in the discussions regarding the proposed amendments to the ICSID Rules, Argentina and Costa Rica have been active in suggesting reforms to limit legal fees that investors may incur and to increase transparency requirements for proceedings, respectively.

It is also worth noting that not all Latin American states have gone about such remodelling of their ISDS landscapes. Mexico, more so than most, has recently demonstrated no shortage of support for ISDS. Hugo Romero, of the Mexican Ministry of Economy, stressed that in negotiating USMCA Mexico gave the protection of FDI a high priority and that it continues to view ISDS as valuable in contemporary treatymaking. This is reflected in the ISDS provisions it played a role in negotiating in CPTPP and USMCA, and that in August 2018 Mexico finally ratified the ICSID Convention.

All of this suggests that many Latin American states are seeking to improve the system, not to reject ISDS altogether.

Nevertheless, globally there has been a recent reduction in investor protections. Aside from a growing tide of nationalism, the second panel of the Young ITA Talk suggested that reductions in investor protections also have something to do with changing attitudes among states to the effects that having such protections have.

Patrick Pearsall, of Jenner & Block LLP, observed that when ISDS came to prominence the prevailing attitude was that such protections provide guarantees for foreign investors that positively engender FDI. 30 years on, he says this so-called ´Washington Consensus', has eroded, and that they are now wise to the fact that the existence of a lucrative opportunity (oil, gas, etc.) is what overwhelmingly draws investment. ISDS protections are no longer seen as key. The example of Brazil offers credence to that view. Despite its general aversion to protecting foreign investors with

ISDS mechanisms, as recently as 2017 Brazil received USD 62.7 bn in FDI, becoming the state with the world's 7th highest FDI inflow (World Investment Report, 2018

Kate Brown, of DLA Piper, however, explained that while investor protections do not lead investors to positively decide to invest, the cost of investment is much higher if protections are not provided for. In that sense, their lacking is only a good reason to decide *not* to invest in a given state. Mr. Pearsall also noted that without investment treaties governments would instead face the reality of engaging in "gunboat diplomacy" – which was common before ISDS was created.

In this respect, a possible radical change is coming for ISDS system instead of a disappearance from it. Mr. Pearsall suggests that this is likely to consist in the system shifting away from the private sector to become a truly public international law system. This change will, he says, be triggered by states' influence on the system, resulting from their increasing sophistication on the area.

When this will happen and the features that this changed-ISDS system will have remain to be seen. For now, stakeholders have more questions than answers.

References

?1 *While the content and subject-matter of this report stem from the discussions at the #YoungITATalks event, the views and analysis expressed herein are those of the authors.*

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