ICSID and Latin America:
Criticism, withdrawal and the search for alternatives

At issue

BRETTON WOODS project

BY NICOLAS BOEGLIN

DECEMBER 2013

Latin American states have consistently resisted the World Bank-hosted state-investor dispute mechanism, the International Centre for the Settlement of Investment Disputes (ICSID), because they claim it favours investors. Nicolas Boeglin reveals Latin American countries are actively exploring alternatives to ICSID and explains why Bolivia, Venezuela and Ecuador have already withdrawn from the mechanism - with Argentina maybe joining them in the future.

The International Centre for Settlement of Investment Disputes (ICSID) between investors and states was established under the 1965 Washington Convention as an arbitration mechanism under the auspices of the World Bank to resolve disputes between a state and a foreign investor. Initial drafts of the ICSID convention were prepared in 1963 and were approved by the board of governors of the World Bank at its 1964 annual meetings in Tokyo. In the 1960s and 1970s Latin American countries strongly opposed the creation of this body. In what is known as the "Tokyo No", nineteen Latin American countries voted against it, including Argentina, Brazil and Mexico. Iraq and the Philippines also voted against the proposal.

Critiques of ICSID

ICSID has been criticised by many developing states and authors, as well as NGOs and civil society leaders. According to professor Fach Gomez of the University of Zaragoza in Spain, the main critiques include:

- "a lack of financial and management structure to face its increasing workload;
- ICSID's umbilical cord with the World Bank;
- a lack of transparency by arbitration panels;
- concerns by some Latin American states that hostility toward ICSID may hamper access to World Bank credit;
- the pressure on developing countries to resort to assistance from extremely expensive foreign law firms;
- non-commercial interests, such as health or environmental protection have not received adequate attention;
- a shadow of arbitrator bias in favour of the investor, with different ad hoc tribunals analysing similar cases and reaching disparate results;
- the absence of an appeals process, and only a limited annulment procedure;
- failure to take into account situations of massive economic downturns;
- cracks in its system of voluntary enforcement and compliance with the award, with some foreign investors losing their faith in Argentina's willingness to honour ICSID awards".

The lack of effective civil society participation in the arbitration mechanism remains unresolved. For example, only in 2007 were third

Nicolas Boeglin is a professor of public international law at the Law Faculty of the University of Costa Rica (UCR). He has served at the Inter-American Institute of Human Rights (IIHR) and was appointed a member of IUCN World Commission on Environmental Law in 2007.

parties allowed to submit their point of view as an *amicus curiae* to ICSID arbitrators. The lack of sensitivity shown by members of the ICSID tribunals in their decisions on issues relating to the defence of collective interests (human rights, environment, indigenous peoples rights and access to water) has also been condemned. The image of Salvadorian Catholic Church authorities imploring the "mercy" of ICSID arbitrators in the case of Canadian mining company Pacific Rim in 2010 is still very vivid in Central America. In a later development Pacific Rim filed a claim for $315 million in damages against the El Salvadorian government in April, claiming it breached the Salvadoran investment law by refusing to issue a mining license for the El Dorado gold project[v]. Pierre Mayer, who has served as an arbitrator and as counsel in ICSID cases, argues: "the state is placed in an uncomfortable position, because the government is under severe pressure to fulfil its commitments when concluding bilateral investment treaties (BITs) in order to attract foreign investors to its territory" (author's free translation).

The 2012 report *Legalised profiteering* by European NGO Transnational Institute shows how international law firms are involved in fuelling international investment disputes "with devastating social, environmental and budgetary impacts" for states and populations. This report and many other articles and documents are probably forcing decision makers to think about the necessity to re-orient arbitration disputes. Two cases highlight how urgent this is. In May 2013 an ICSID case against Costa Rica by a Swiss gas distribution company followed another claim presented in February 2012 by a Spanish company involving vehicle tariffs.

In recent years, ICSID arbitrators have been invited by scholars to try to 'green' their decisions. Some scholars have been called to "reconceptualise international investment law" from a sustainable development perspective. These questions constitute a real challenge for the peculiar ICSID mechanism created in the 1960's in an era of nationalisation and expropriation of companies engaged in the exploitation of mineral and oil resources. This was a time when

History of ICSID

The decolonisation process that took place in the 1950s and 1960s resulted in tensions as these newly created states nationalised many foreign companies, adopted discriminatory legislation and suspended exploration permits as well as mining and oil concessions. Domestic tribunals seemed unable to adequately resolve the compensation claims presented by investors. The ICSID convention stipulated that arbitration tribunals were to be formed of three arbitrators: one nominated by the claimant (the foreign investor), one by the state and one by the World Bank. It also established procedural rulings and other formal procedures.

When the ICSID convention was adopted in 1965 there were no general universal human rights instruments in force. The 1948 UN Declaration of Human Rights was the only general text at the UN. There were only a few international treaties on specific categories of victims or crimes (refugees, genocide, war crimes, for instance) in force. Topics like the protection of indigenous people's rights, the protection of the environment and the status of water resources were completely absent from discussions by the international community.

The first case presented before ICSID in 1972 was Holiday Inns S.A. against Morocco. This was followed by four cases in 1974. But many 'non cases' or 'empty' years followed: 1973, 1975, 1979, 1980, 1985, 1988, 1990 and 1991.[xvi] This led to academics Michael Waibel and Yanhui Wu from Bonn University commenting, "for a while it seemed as if ICSID was bound to become a dormant and an underutilised institution".[xvii] The spectacular increase in the number of cases before ICSID since 1996 (10 cases per year since 1997 and 38 cases per year since 2011) has much to do with the effect of BITs on protection and promotion of investment. These treaties represent 63 per cent of the basis of consent of states' acceptance of ICSID jurisdiction.[xviii] This percentage increased to 78 per cent for the cases registered in 2011. In early November Canada became the latest country to ratify the ICSID convention.

environmental and social consequences of extractive projects were just ignored and no consolidated rules on environmental and human rights existed.

Latin American resistance to ICSID: Non-ratification and withdrawal

Contrary to the perception that ICSID has been accepted in the majority of Latin America countries, many states in the region continue to be extremely distant. Cuba, Mexico and Dominican Republic have not ratified the ICSID convention. In the case of Mexico, this attitude was viewed by a Mexican author as "wise and rebellious". In addition several Caribbean states, such as Antigua and Barbuda, Belize, Dominica and Suriname, remain outside the ICSID jurisdiction. Latin America's dominant economy Brazil, now the sixth largest economy in the world, has not approved the ICSID convention nor has it ratified any BITS despite having signed many treaties.

Bolivia was the first state to withdraw from the ICSID convention in 2007. Ecuador withdrew in 2010 followed by Venezuela in January 2012. Argentina seems ready to withdraw from ICSID in the near future. In January 2013 an Argentinian Treasury official said ICSID is "a tribunal of butchers" that only rules in favour of multinational companies". However, in October 2013 the government agreed to pay $677 million to settle several disputes.[xv] Argentina currently has over 40 out of the 175 pending ICSID cases.

A 2009 protest in El Salvador against the Canadian mining company Pacific Rim.

As long as states like Argentina accumulate a large amount of cases against them or obtain negative decisions before ICSID arbitrators, it is possible that this list of ICSID withdrawals will increase in the Americas. This option could interest countries in the future, particularly when the previous government has signed concession contracts (including clauses that are clearly abusive), in defiance of public opposition. Avoiding these arbitrations would allow subsequent governments to minimise the effect of possible future demands of foreign investors and to ensure favorable public opinion.

Alternatives to ICSID?

Latin American countries were involved in 25 of the first 100 ICSID cases. According to the ICSID website, by the end of August 2013, 82 out of a total of 269 concluded cases (30.5 per cent) had involved Latin American countries. The numbers of cases has dramatically increased in recent years with Latin American countries currently involved in 74 out of 175 pending cases (43.5 per cent).

The increasing importance of Latin American states in ICSID proceedings in recent years, and the unfavourable decisions obtained, probably explains their recent discussions on an alternative regional framework to deal with state-foreign investor disputes outside of the ICSID framework. These discussions have taken place in the ALBA framework (Bolivarian Alliance for the Peoples of Our America), UNASUR (Union of South American Nations) and the recently created CELAC (Community of Latin American and Caribbean States) which was established as an alternative to the Organisation of American States (OAS) in 2011. In a January 2013 meeting between CELAC and the European Union in Chile the need for a new mechanism was part of the discussion between UNASUR member states.

Argentina is also studying the option of formally terminating or withdrawing from BITs as another mechanism for reducing ICSID's power. This has already been used by Venezuela, Ecuador and Bolivia. Venezuela terminated its BIT with the Netherlands in 2008. The fact that Brazil, the state with the highest volume of foreign investors in Latin America, has refused to join ICSID or sign BITs partially explains Argentina´s current thinking.

ICSID and Costa Rica

The case of Costa Rica's access to ICSID is illustrative: Costa Rica signed the ICSID convention in 1981 but only ratified it 12 years later in 1993. This was due to Costa Rica's reluctance to accept the ICSID mechanism as long as the Santa Elena case remained unresolved before national courts. The Santa Elena case dealt with the expropriation ordered by Costa Rica when creating the Santa Rosa National Park in 1978. This decision gave rise to a $6.4 million claim by the development company of Santa Elena SA which was held by US citizens. The state offered $1.9 million, given that the property had been acquired in 1970 by Santa Elena at a price of $395,000.

Following Costa Rica's 1993 ratification of the ICSID convention, in 1995 the company brought a $41 million claim against the Costa Rican government. The ICSID arbitration ordered Costa Rica to pay compensation of $16 million. A 2005 memorandum of the Global Committee of Argentina Bondholders stated that Costa Rica's decision to ratify the ICSID convention in 1993 resulted from direct US pressure related to the Santa Elena expropriation case. In the 1990s, following the expropriation of property allegedly owned by an American investor, Costa Rica refused to submit to ICSID arbitration. Following the American investor delaying a $175 million loan from the Inter-American Development Bank, Costa Rica consented to the ICSID proceeding.

In January 2013 ICSID ruled in favour of Venezuela, in a case against Canadian mining company Vanessa Ventures, resulting in questions being asked in Costa Rica. The same company presented a claim against Costa Rica in 2003, which it later dropped in 2005, alleging the government violated the Costa Rica-Canada Bilateral Investment Treaty relating to the Las Crucitas mining project. In 2010 an administrative court suspended all permits and concessions relating to the project. The company wanted $1 billion in lost profits and claimed it had costs of $92 million. It should be noted that in its decision rendered in November 2010, the court also recommended the investigation of 15 officials, including for president Oscar Arias (2006-2010) and his environment minister Roberto Dobles for alleged irregularities over the granting of the mining concession. During the company's annual shareholders meeting in Calgary in late November NGOs from Canada and Costa Rica demanded the company drop the case against Costa Rica.

With Latin American states increasingly being affected by ICSID cases they have a strong motivation to consolidate plans for alternatives to ICSID and make them a reality.

December 2013

A fully referenced version of this briefing is available at: http://www.brettonwoodsproject.org/2013/12/icsid-latin-america/

BRETTON WOODS project

The Bretton Woods Project is an ActionAid hosted project, UK registered charity no. 274467. This publication is supported by a network of UK NGOs, the C.S. Mott Foundation and the Rockefeller Brothers Fund.

Bretton Woods Project
33-39 Bow ling Green Lane
London EC1R 0BJ
United Kingdom
Tel: +44 (0)20 3122 0610
info@brettonwoodsproject.org

@brettonwoodspr
facebook.com/BrettonWoodsProject
www.brettonwoodsproject.org