

Here to stay

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The rise of nationalism first cast doubt on the future of investment treaties and investor-state dispute settlements in Latin America more than a decade ago. But despite international trade agreements now appearing to fall out of favour in the US, such pacts and the investment arbitration they endorse look set to stand the test of time in Latin America.



Juan Manuel Marchán-Maldonado, Ignacio Torterola, Marike Paulsson, Patrick Pearsall, Mark Kantor and Jonathan Hamilton

When the nationalist governments of Evo Morales, Rafael Correa and Hugo Chávez opted to no longer resolve clashes with foreign investors through the International Centre for Settlement of Investment Disputes (ICSID), observers feared the worst for the future of dispute resolution between states and corporates. Going hand-in-hand with the movement toward open markets and changing macroeconomic policies ushered in by the end of the Cold War in the 1990s, the broader historical moment represented by investment arbitration was one where states looked outward, not inward, and facilitated and supported cross-border investment.

But with President Trump in the White House, the country that once championed the Washington Consensus, a set of principles that promised economic advancement through trade and investment, no longer appears to be backing its cause. Some fear that Trump will hold good on his promise to terminate NAFTA if US lawmakers fail to ratify the new pact hashed out between the US, Mexico and Canada – leading the US president to join the list of leaders in the Americas that have unilaterally terminated major treaties.

A panel at Latin Lawyer-GAR Live 3rd Annual Arbitration Summit – which took place earlier this year in Miami – considered whether the assumptions that first gave rise to investment treaties have changed, as well as what the rise in nationalism means for the future of investment treaties. Jonathan Hamilton, partner and head of Latin American arbitration at White & Case LLP and distinguished faculty chair of the International Arbitration Institute at the University of Miami, moderated the panel. He also co-chaired the event, along with José Daniel Amado of Miranda & Amado Abogados in Lima. Speaking alongside Hamilton were Mark Kantor, an independent arbitrator based in Washington, DC; Juan Manuel Marchán-Maldonado of Pérez Bustamante & Ponce in Quito; Marike Paulsson of Albright Stonebridge Group in Miami; Patrick Pearsall of Jenner & Block's Washington, DC office (and former chief of investment arbitration in the US state department); and Ignacio Torterola, partner at GST in Washington, DC. The panel of experts put it to delegates to decide: was investor-state dispute settlement (ISDS) just a historical phase for the Americas, or is it here to stay?

The origins of investment arbitration in Latin America

Jonathan Hamilton: Why did investment disputes emerge in the first place and do those needs still exist?

Mark Kantor: One of the original objectives was for lawyers to resolve foreign investment problems instead of soldiers and politicians. Is that still the case today? Well, on the one hand, yes, but on the other hand, no. If you stop and think about the nature of an investor-state dispute, the negotiation of the project – if the government was involved – is inevitably political in part. Dispute resolutions that trigger formal proceedings involving the government, are inevitably political in part. Settlement of a dispute in the shadow of the law is inevitably political in part because the respondent in ISDS is the state. If a dispute is not covered by ISDS then it will default back to national courts and national rules regarding deference to host state measures. The assumption that national courts are automatically political depends entirely on perceptions of the independence and impartiality of the particular national court. To me, there has always been an element of politicisation of these disputes. Right now, we are certainly seeing the needle move more towards national sovereignty – in some cases, very strongly towards that – but I don't think we could ever say that ISDS was intended to eliminate the political element. At best, it was intended to confine it for the areas that I've just described.

Hamilton: Do you think the same fundamental objectives of ISDS to protect and promote investment remain relevant today?

Jose Daniel Amado: I think that's a stronger motivation for several Latin American countries today than it was 10 years ago because of changes in government. Will we see changes in government again in 10 years from now? Quite likely. Where we will be 10 years from now, I'm not smart enough to answer.

Hamilton: Do you think that development and investment in Ecuador [which withdrew from the ICSID Convention in 2009] today still depend in part on access to arbitration?

Juan Manuel Marchan-Maldonado: The reality is that investment arbitration is still around. New investment in recent years has relied on contractual international arbitration, and investment arbitration has been channelled in that direction. So yes, you need arbitration, but the form of arbitration is adapting.

Hamilton: A quick anecdote sums this up. There was a years-long renegotiation of the concession for Quito Airport, which generated thousands of jobs and a positive economic development plan. That airport would not be standing there today if it were not for: one, access to investment arbitration (we actually had to file arbitration on the eve of the effective date of the notification of Ecuador's denunciation of the ICSID Convention); and two, if the government had not ratified and affirmed access to arbitration going forward.

The status of the Washington Consensus

Hamilton: The US marketed the Washington Consensus, a set of free-market economic policies, to the region. Is the US now backtracking?

Patrick Pearsall: I don't think we are "backtracking" in any meaningful way. Even pre-Trump, ISDS had started to lose its way in the US. The key to its unmooring is that many no longer believe investment protection promotes investment or that investment is necessarily a good thing. Instead, in a post-2016, post-cosmopolitan world we are challenging as "elitist" what were otherwise formerly considered democratic institutions. That's resulted in a real inquiry into what foreign direct investment (FDI) is meant to accomplish. It is no longer universally accepted that FDI is good and that more FDI is better; instead, people have questions about who is investing and where money is going. They understand that spending secures a geopolitical relationship. That's always been an undercurrent in global economics but, but now it is really acute and it has to do with the rise of China as the second largest FDI exporter in the world. FDI has become a new battleground.

One of the founding needs of ISDS was to be an alternative to diplomacy. Perhaps we are going back to that concept as the core need for ISDS. When I was chief of investment arbitration [for the US] and a US investor had a problem in a jurisdiction in Latin America or elsewhere where there was no bilateral investment treaty, they would call me and I would get on the phone with the embassy and find out with whom I needed to talk to use soft power diplomacy to assist the US investor. But if you combine that kind of diplomacy with today's perspective – the US president is a self-professed nationalist – what today's State Department might do in situations like these to protect an investor may be worrisome for developing economies and capital importers.

Hamilton: Is it fair to say that the US sold the bill of goods to Argentina and the rest of Latin America and now it's gone into reverse?

Ignacio Torterola: FDI, regardless of geopolitical conditions, is still important for Latin American countries. They are not fighting a geopolitical fight at this point; they like attracting foreign investment and are willing to keep bilateral investment protections. Some of them are so concerned about sending the wrong message to foreign investors that they do not want to change old bilateral investment treaties just to avoid doing that.

Hamilton: So you're saying that in Latin America there is still a desire for FDI and there's still an understanding that having some kind of system for dispute resolution is part of the calculus for developing FDI.

Politics and investment disputes

Hamilton: If the point of this field was to channel investment disputes into a neutral dispute forum, why are politics and diplomacy still so involved today? Marike, if we have a system that is designed in principle to channel these issues away from pressure politics and encourage the rule of law, what is the role of politics in the world of investment arbitration?

Marike Paulsson: When you talk to investors, some of them will say, "I don't want to walk away from my investment with damages, I want to stay in that country and find a way to put all my issues on the table to see which ones I can negotiate so I can stay." It's in those circumstances that ISDS is not always enough. What's called corporate or commercial diplomacy is a way of helping investors deal with the government to find a way forward. It's a good way to help investors keep everything on the table and not just walk away with damages. That doesn't mean diplomacy competes with arbitration; it's what we call a carrot-and-stick approach. What you can see is that the strong, powerful, big international oil companies in the world can effectively design their own foreign policy. They look at the map and think "OK, where should we pull out, where shall we stay?" But small and medium-sized enterprises cannot design their own foreign policy or opt for contract-based arbitration, if the UNCITRAL Working Group III [which is looking into possible reform of ISDS] establishes a multilateral investment court. That's why we still need ISDS; without it, the SMEs will be most likely to pay the price.

Governments in transition

Hamilton: We've seen major transitions in Ecuador and Argentina, with mixed results in both instances, and in Venezuela, chaos. How do these transitions help to understand investment arbitration and where it's headed in Latin America?

Torterola: In Latin America we have states that decided to play within the game – like Argentina – and states such as Venezuela, Ecuador and Bolivia, which decided to terminate the ICSID Convention. Let's look at Venezuela. The most important question is whether it was sensible for Venezuela, in order to deal with its ICSID disputes, to terminate the ICSID Convention. The response is that it was a political decision made with a political intention.

Why then did Argentina – which faced, at that time, 48 claims against the country – decide to play within the rules of the game? Argentina had its own internal team and made its own internal decisions; you can blame the government at that time for many things, but the message that we sent internally – that it was senseless to terminate the ICSID Convention – was heard. On the other hand, Venezuela has never had one team dealing with its disputes. It has always had many different law firms and teams that have changed over time.

We are going to keep seeing investment disputes in Latin America. States – and Argentina is an example – keep signing bilateral investment treaties. Old bilateral investment treaties will be replaced with new ones, and ICSID is still going to be there. Maybe we will see some kind of change in the next 10 years in which a form of appellate mechanism is introduced, bringing investment arbitration closer to the public international law system.

Hamilton: Venezuela's former oil minister said over a decade ago, "Arbitration is over for Venezuela." But that has not been the case. When Bolivia denounced the ICSID Convention in 2007, then Ecuador in 2009, and then eventually Venezuela in 2012, many said that the sky was falling. But that has not happened. There's been mutation, but there's been survival.

Kantor: There are many people in this room who have problems with the mechanics of the system and would like to see it reformed. But the pressures ISDS is under are not from technical problems, they are from people outside [the world of investment arbitration]. Those are the people who are putting real pressure on ISDS. If we went through all of the remedies to the technical problems, we would not do a single thing to affect the pressure to get rid of ISDS.

New treaties and the risks of hard exits

Hamilton: We've heard pretty persuasive arguments that investment arbitration in Latin America is not on the verge of blowing up anytime soon. Do you think there is a scenario whereby the US is the one terminating these treaties? If, as it appears might be the case, the new NAFTA is never ratified, will Trump between now and his re-election campaign simply terminate NAFTA? There is a risk of a hard exit from NAFTA, just as the risk of a hard Brexit haunts Europe.

Kantor: Trump will make his calculation about whether or not to terminate NAFTA based on what he thinks it will do for his re-election in November 2020. There is a risk he would unilaterally terminate NAFTA to try to force the US Congress to grapple with new NAFTA. There is a serious risk that he could act impulsively with regards to DR-CAFTA too. But I don't think the same calculation applies to standalone bilateral investment treaties. If you're engaged in an electoral calculus, which is what I think Trump is engaged in, it's what motivates the voters that matters. The voters care about NAFTA and they care about DR-CAFTA, but they haven't the faintest idea what's going on with the Argentine–US bilateral investment treaty.

Hamilton: The government has been trying to change the posture of Ecuador in the eyes of investors. What does this mean in terms of the future of investment protection there?

Marchán-Maldonado: The government knew that, while you do not necessarily need investment arbitration, you need to provide the investor with some sort of independent method for dispute resolution. All state contracts contain arbitration clauses, with Chile commonly the seat of arbitration. In most cases, these have followed UNCITRAL rules, but the ICC is becoming the preferred dispute resolution method for most public contracts. As a public policy, the attorney general has been very clear that Ecuador is going to still be in the arbitration arena. At the end of the day, the sky did not fall in Ecuador. Arbitration is very much alive.

Paulsson: I don't think it's all rosy in Latin America. The scenario just described in Ecuador sounds similar to that of a Gulf Cooperation Council member state. Arbitration clauses in contracts with government entities are imposed and only provide for institutional arbitration of that seat. If a state insists on contract-based arbitration with Chile as the seat, I'd wonder to what extent that's really based on an agreement by all the parties and thus based on party autonomy. Second, with respect to contract-based arbitration, there is a lack of deference by enforcement courts of developed countries with respect to arbitrations and subsequent annulments in territories that are considered less compliant with the rule of law. Even if Ecuador might think it can resolve issues by mandating contract-based arbitration, subsequent enforcement is complex. You have a lot of hurdles post-award that you need to deal with.

Marchán-Maldonado: What we've seen in Ecuador is that investors want the contract; they want to do the public works or the infrastructure or whatever and if the clause provides for the basics for arbitration they will take it. As long as they have a minimum standard clause they will go for it – and then they will hire us to get them out of hot water if they need to.

Kantor: The four sentences I'm going to end on are: China is the largest supplier of FDI in Latin America. China believes strong investment protection is in its state interest. China has a very robust SME economy. And China is not a democracy.

Tortorola: Arbitration works fantastically in Peru. It has a commission to handle investment disputes; there is a policy for how disputes are handled and it's mandatory for the investor to have a conversation with the commission, providing a good opportunity to settle disputes. Providing a forum to have a conversation with a positive outcome is a great thing and it's something that needs to be copied by many states.

Hamilton: What I hear in these various comments is a perspective that investment arbitration is something that is institutionally rooted in governments and how they manage, not only disputes, but also investment in different sectors. International arbitration, including investment arbitration, has become deeply rooted into the way that Latin America does business and the way that governments manage investment and economic development as well.