

# MEXICO BEFORE ICSID REBEL WITHOUT A CAUSE?

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## I. INTRODUCTION

A few years ago I argued in favor of Mexico's adherence to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (*ICSID Convention*)<sup>1</sup> characterizing its reluctance as contradictory and embarrassing.<sup>2</sup>

The purpose of this note is to reexamine the position given the experience gained since, which is important.

## II. INVESTMENT ARBITRATION

To this date, 155 countries have signed the ICSID Convention. A moment's reflection on the implications of this fact is warranted. Few international instruments have commanded such acceptance. And when achieved, the topic is usually less controversial. That this level of support has been mustered by ICSID is impressive given the backdrop history and politics.

Investment arbitration is a sensitive topic for most States. The reactions to the phenomenon are aplenty, and range from alacrity to hostility.

Mexico done away with xenophobic whims and embraced foreign investment. As to investment arbitration, the approach has been intelligent.

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<sup>1</sup> The ICSID Convention of 18 March 1965, which entered into force on 14 October 1966.

<sup>2</sup> THE MEXICAN EXPERIENCE WITH INVESTMENT ARBITRATION. A COMMENT, *Journal of World Investment*, 3 J.W.I. 3. 2002, pg. 473; THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. THE MEXICAN EXPERIENCE, *Journal of International Arbitration*, 2002, 19(3), pg. 227; and ARBITRAJE DE INVERSIÓN A LA MEXICAINE, *Jurídica* 35, 2005, pg. 165.

Essentially,<sup>3</sup> it has harnessed a team of qualified experts, sought top external counsel,<sup>4</sup> secured insurance<sup>5</sup> and resisted the temptation to resort to populist rhetoric or chicanery.<sup>6</sup> Given said strategy, the failure to adhere to ICSID raises eyebrows. And the surprise turns into astonishment when one learns that Mexico has included ICSID in most all of its investment treaties.<sup>7</sup> However, because ICSID arbitration is only available when the Host State is party to the ICSID Convention,<sup>8</sup> the ICSID option becomes theoretical. The investor may only avail itself of the second best: the Additional Facility.

The contradiction is glaring. Assuming sophistication one is forced to ask the motives behind the omission. Perhaps a public policy exists that dictates said outcome?

The result is equally appalling: no official position exists.<sup>9</sup> Hence, a less plausible—but more realistic—conclusion is begged: the omission is the product of neglect.

I wish to contextualize the attitude with the experience of three countries: Canada, Argentina and Bolivia.

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<sup>3</sup> I elaborate on the specific steps and their accurateness in APORTACIÓN DE MÉXICO AL ARBITRAJE DE INVERSIÓN, Anuario Mexicano de Derecho Internacional, UNAM, VI, 2006, pg. 651.

<sup>4</sup> The *Dirección de Negociaciones Comerciales Internacionales*, a division of the Ministry of the Economy, formed a team of well-trained lawyers, headed by Hugo Perezcano who gained the reputation of a seasoned and astute international litigator.

<sup>5</sup> As of 2004 Mexico is part of the OPIC (Daily Official Gazette, 14 June 2004) and is analyzing adherence to the Multilateral Investment Guarantee Agency (*MIGA*).

<sup>6</sup> Although setting-aside proceedings have taken place, by and large they cannot be characterized as mere dilatory tactics. Merit existed in the same — although I avow disagreeing with some. (I canvassed my position in THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. THE MEXICAN EXPERIENCE, *Journal of International Arbitration*, 2002, 19(3), pg. 227.)

<sup>7</sup> Mexico has entered into free trade agreements with 13 countries and investment treaties with 19 countries, all of which display ICSID as an option in investment cases. (A few other investment treaties have been finalized but, at the time of this note, had not been published for review.)

<sup>8</sup> Article 25(1) of the ICSID Convention.

<sup>9</sup> I have formally and informally enquired into the reasons behind the failure to adhere to the ICSID Convention. My research has included exercising my Constitutional Bill of Right to enquiry into matters of public interest (*derecho de petición*) under Article 8 of the Mexican Federal Constitution).

### III. THE CANADIAN CASE

On 15 December 2006 Canada became the 155<sup>th</sup> signatory of the ICSID Convention. The step is not only praiseworthy, but makes Mexico look as the black sheep of the (North American Free Trade) international herd.

Canada is more of an example if we consider its background: Canadian constitutionalism makes adherence to an international convention of such importance to have considerable local implications.<sup>10</sup> Given Canada's internal composition, the difficulties were both legal and political.<sup>11</sup> This explains why it took Canada almost 20 years of negotiations between the federal government and its provinces and territories.<sup>12</sup>

Mexico has no such hurdles to overcome. ICSID can be adhered to in a manner no different than most other treaties.<sup>13</sup>

### IV. THE CASE OF ARGENTINA AND BOLIVIA

In addition to the 155 countries that have signed the ICSID Convention, more than 2,500 investment treaties exist,<sup>14</sup> which majority refer to ICSID. The experiences stemming from these instruments are sparse. Two stand out: Argentina and Bolivia.

#### A. ARGENTINA

Argentina is involved in 38 investment arbitration cases. The claims stem from the measures Argentina implemented in 2002 to face a financial crisis. The stakes are

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<sup>10</sup> See Frederic Barchand, *Revue de L'Arbitrage*, 2007.

<sup>11</sup> *Inter alia*, the act implied the need of issuing a uniform law that facilitates the application and harmonizes Canadian laws according to such convention.

<sup>12</sup> The complexity was magnified given that the ICSID Convention lacks of a federal clause.

<sup>13</sup> Article 133 of the Mexican Federal Constitution and the Treaty Execution Act (*Ley de Celebración de Tratados*) requires only that the treaty be signed by the President and approved by the Senate.

<sup>14</sup> 2,573 according to the last count (UNCTAD World Investment Report, Transnational Corporations, Extraction Industries and Development, october 2007, pg. 16-17, <http://www.unctad.org>).

impressive. And a lot could be said of the same. However, in this context, the only lesson I wish to draw from the experience is that, absent ICSID, the result would be frustration, impunity, investment loss, ostracism and political pressure. Fortunately, a neutral and legalistic approach exists: ICSID.

The affirmation does not presuppose liability. The author cannot pass judgment on the matter (that is the arbitrators' mission). But what is indisputable is that having 'someone' impartially judge the matter is better than the alternative.<sup>15</sup>

## B. BOLIVIA

Bolivia recently (2 May 2007) denounced the ICSID Convention. Hence, as of 3 November 2007 it no longer forms part of the same. Although I shall not address the reasons provided,<sup>16</sup> I would however like to contextualize the step with Mexico's reluctance: in a world where (blind) adherence to ICSID is no longer a given, does it still make sense to become party to ICSID?

## V. LEARNING FROM FOREIGN EXPERIENCE

Mexico's reluctance to adhere to the ICSID Convention is a mistake. Investment arbitration fosters the Rule of Law. Without it, a genre of conduct would not find adequate remedies. The result: in the best of cases, impunity and frustration. In the worst, international pressure, diplomatic protection and hostilities. And in all

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<sup>15</sup> Besides, there is a positive side. International crisis generate knowledge. They are sources of law. Different cases may be quoted in support of said affirmation. Argentinean cases have dealt with open and important subjects. For example, the (controversial) jurisdiction requirements, 'umbrella' clauses, the exhaustion of local remedies (including the polemical 'fork in the road'), the differentiation among contractual and international claims, the scope of the most favored nation clauses, the content of minimum treatment, fair and equitable treatment, full protection and security, measures tantamount to expropriation, state responsibility, state of emergency and its international consequences. And these appear to be the tip of the iceberg.

<sup>16</sup> The official reasons are that Bolivia considers that ICSID favors investors over host States, that the World Bank's function makes it incompatible to administer arbitrations, confidentiality, it dislikes arbitrators acting as parties' representatives, the content of some disciplines and that "there is no case where the World Bank has sanctioned investors for not fulfilling their contracts".

cases the constant is less foreign investment – which (the accepted paradigm dictates) benefits all involved, particularly the Host State.

This last claim has been criticized. Some believe the correlation between the availability of investment arbitration treaties and actual investment is questionable or nonexistent.<sup>17</sup> The argument deserves two answers. First, given that it is a recent phenomenon, we do not have enough information to conclusively evidence the nexus.<sup>18</sup> Second, such empirical argument overlooks an important point: there is nothing to compare it with. We do not know how much investment has been lost simply because we have not adhered to ICSID. In contrast, the conceptual argument has force: the international community is sophisticated. When assessing the viability of an investment, the element of ‘risk’ includes the political one—which is reduced with the existence of investment arbitration.

Should the conceptual argument be deemed insufficient, I would point to the empirical evidence: the instances of strategic conduct engaged in by investors to secure investment-treaty protection.<sup>19</sup>

If the foregoing were not enough, *status quo* is suboptimal. ICSID arbitration is sophisticated and insulated. It is one of the exceptional cases where the delocalization dream has been achieved. And history shows that, given the stakes involved in investment arbitration, the autonomy of ICSID arbitration is a benefit worth having. By failing to form part of the ICSID Convention, the wings of the procedure are pruned.<sup>20</sup>

So much for exogenous benefits. But endogenous benefits also exist, which are foregone by not forming part of the ICSID mechanism. To begin with, the challenge of awards mechanism. Absent adhesion, setting-aside proceedings are

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<sup>17</sup> Besides, foreign investment has been found to pour in jurisdictions having ratified not one single investment treaty (for instance, Brazil).

<sup>18</sup> Although there have been a few. The author is aware of four, which shed contradictory results.

<sup>19</sup> Which I must describe generically for confidentiality reasons.

<sup>20</sup> Some argue that the Additional Facility option reduces the impact of the failure to adhere. The argument is astray: absent ICSID Convention ratification the award is not insulated. It is treated as a New York Convention award and the benefits of ICSID mechanism are foregone.

governed by the *lex arbitri* and are followed before the courts of the place of the arbitration. The outcome is unfortunate. Lord knows what domestic court may end up judging the validity of the award. Given that investment awards involve sensitive issues governed by international law, not all domestic courts are equipped to adequately deal with the matter. And the risk of parochialism and bias are not theoretical. Moreover, experience shows that the proceedings are time-consuming<sup>21</sup> and uncertain. The reasons are precisely those already canvassed. More importantly, the outcome cuts against the *leitmotiv* of the discipline: impartiality—and appearance of it.

When faced with the ICSID regime, the opportunity cost becomes apparent.

But the most important reason to adhere is the message it sends: belief in the international Rule of Law. Preference for legalistic—instead of casuistic—solutions. And acts speak louder than words.

## **VI. FINAL COMMENTARY: WILL MEXICO REMAIN AS THE BLACK SHEEP OF THE INTERNATIONAL HERD?**

After Canada's adherence to the ICSID, Mexico became the maverick of the North American Free Trade flock. It is time (actually, it is late—but not too late) for Mexico to remedy this contradiction.

ICSID arbitration fosters the Rule of Law. Both national and international.<sup>22</sup>

In a series of conferences sponsored by the Mexico City Chamber of Commerce Arbitration Commission (CANACO) in January 2005 an important Mexican jurist, currently Judge before the International Court of Justice (Ambassador Bernardo Sepúlveda Amor), seized the question and forcefully argued in favor of Mexico's adherence to such international instrument.<sup>23</sup>

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<sup>21</sup> For example, the annulment of the cases of *S.D. Myers, Inc. v. Canada* and *Feldman Carpa v. Mexico* took approximately three years.

<sup>22</sup> A recent and eloquent essay defends the proposition: Jan Paulsson, ENCLAVES OF JUSTICE, *Transnational Dispute Management*, June 2007.

<sup>23</sup> In addition to agreeing with the arguments sketched herein, Judge Sepulveda's analysis finds solid organic and political advantages to become part of ICSID. (Bernardo Sepúlveda

It is time to correct the contradiction. Mexico has a choice: to be identified as a law-abiding State, supportive of the global Rule of Law, or to be signaled-out as the black sheep of the international herd.

The option is ours.