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A REPORT ON PROFESSOR ALVAREZ'S OPENING REMARKS "ISDS REFORM: THE LONG VIEW"

by Fabian Zetina

Delivered at the 18th ITA-ASIL Conference on March 23, 2021.

What are the long-term goals of those seeking to change how investment disputes are resolved? Should today's proposed reforms be best understood as seeking to advance lawyerly goals like 'rule of law' or 'sovereign equality'? Or are they about securing economic fairness or justice in the sense of political economy? Prof. José E. Alvarez will put the reforms being considered in places like UNCITRAL in historical context to consider where we might be going and why.

This piece is a Synopsis of what we can expect from the current reform efforts: is there a risk that if ISDS reformers succeed, shortfalls in capital flows (such as universal access to education, clean water, or internet) will not be filled or worse still, only get worse?

I. INTRODUCTION: THE TWO MONSTERS IN THE ISDS REFORM

This year, Prof. José E. Alvarez joined the 18th ITA-ASIL conference to deliver the initial remarks, with a thought-provoking presentation about the outcomes the international arbitration community can expect from the efforts leading the reform of the investor-state dispute resolution system ("ISDS"). To introduce the topic, Prof. Alvarez mentioned that the foreign investment regime has been under the shadow of—what he calls—"two hydra-headed monsters." The first and biggest monster is the set of existing international investment agreements ("IIAs"), which some have criticized as neocolonial exercises that are necessary to build capital. The second monster is what currently is being considered and discussed as part of the ISDS reform in settings such as ICSID, UNCTAD, and UNCITRAL. Such discussions focus on making ISDS more subject to the rule of law.

While many of the stakeholders in the foreign investment regime are more worried about the "big monster" (*i.e.*, the substantive provisions of IIAs), these are not the current discussions at the level of the ISDS reform.

II. THE LARGER MONSTER: NO NEED FOR IIAS OR ISDS

According to Prof. Alvarez, many political economists and scholars are re-thinking the fundamental premises of the investment regime. He discussed four of these original premises. First, foreign direct investment ("FDI") does not necessarily need special or supranational protection because the "obsolescing bargain model" is a myth. Second, IIAs do not attract foreign direct investment or attract the type of investment that contribute to economic development. Third, they sometimes violate "private law" concepts, such as national laws on corporations or intellectual property. Fourth, there is no proof that foreign investment really "de-politicizes" investment disputes. Whether we agree or not with these critics, the truth is that reformers are working under a broader legitimacy crisis, as the supposed benefits of these treaties have not materialized as clearly as the thousands of investors' claims that have resulted in substantial awards against many developing countries.

III. THE SMALLER MONSTER: THE RULE OF LAW CHALLENGES TO ISDS

Prof. Alvarez next turned to what he calls the "smaller monster" or the rule of law challenges to ISDS. To a great extent, this concern reflects the current efforts and agenda at UNCTAD, UNCITRAL, and ICSID regarding ISDS reform, including issues of the inconsistency or fragmentation of the resulting law, the problem of multiple proceedings, insufficient transparency, diversity of arbitrations, and costs, among others.

The UNCITRAL Working Group III's agenda focuses on fixing ISDS's perceived rule of law flaws. The group members agree that ISDS poses important legitimacy challenges but differ on the steps that need to be taken to achieve a real solution (*i.e.*, just reforming ISDS or taking more radical steps). According to Prof. Alvarez, they are split into two big groups: those for a multilateral investment court and those who retreat from binding international dispute settlement altogether. Another proposal that has been discussed is the creation of an assistance facility–inspired by the World Trade Organization's assistance facility model–to help smaller and developing countries participate more equitably in ISDS.

IV. ADDITIONAL OUTCOMES OF THE ISDS REFORM EFFORTS

In addition to the assistance facility model, Prof. Alvarez outlines five other different outcomes or alternatives that we can expect from the ISDS reform efforts.

First, the end of a supranational review model. This implies a return to a world where FDI host states rule on foreign investment claims applying domestic law. This model already exists between some developed states, such as the European Union-China Comprehensive Agreement on Investment, or in the Brazilian cooperation and facilitation agreements that anticipate non-binding conciliation with ultimate state-to-state dispute settlement.

Second, ISDS as a last resort. This effort retreats from ISDS by imposing restraints and restrictions on claims, which in some cases requires a long period for the exhaustion of remedies. An example of this is the United States-Mexico-Canada Agreement ("USMCA") and the India Model Bilateral Investment Treaty. According to Prof. Alvarez, this idea might not appeal to states that have already embraced ISDS and might wonder the point of entering into agreements with such restricted forms of ISDS.

Third, ISDS severely reformed as we know it. This effort suggests the creation of an appellate mechanism with the power to review awards. It also contemplates the idea of accepting respondent state counterclaims, limitation on certain damages, and imposing time limits on claims, among others. An example of this effort is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") or the 2012 US Model Bilateral Investment Treaty, on which the CPTPP was modeled. Prof. Alvarez believes that it might still take some time for states to adopt what he calls a reformed ISDS, as in recent years several investment treaties have adopted the traditional ISDS as we know it.

Fourth, the creation of an international investment court. The creation of a single multilateral investment court as an alternative of ISDS, consisting of a standing panel of full-time judges serving 6-to-9-year terms and complemented with an appellate panel with a similar composition of judges. According to Prof. Alvarez, its proponents believe that only a court of such nature would solve all the rule of law problems

related to ISDS that would help to overcome the major issues, such as inconsistency and fragmentation, the problem of multiple proceedings, lack of arbitral independence, and insufficient transparency, among others. An example of this effort is the Canada-European Union Comprehensive and Economic Trade Agreement ("CETA").

Prof. Alvarez predicts that a single multilateral investment court would not displace ISDS over the next ten years. This is mainly because different questions arise, such as whether investors and states would be satisfied with a system that prevents them from selecting arbitrators or if the court would actually diversify the adjudicators, among others unresolved issues. Also, Prof. Alvarez is particularly skeptical that a single multilateral investment court would produce the harmonious investment law that is expected, as this court would not interpret a single set of investment treaties or multilateral agreement but rather different texts with different variations of standards (*e.g.*, different formulations of fair and equitable treatment standards).

Fifth, a plurilateral investment agreement. This option has as its favorite model the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency") and includes, in general, all the previous efforts. This investment agreement would include different choices for states. For example, states would be able to keep as many investor rules as possible or varieties of standards, retain traditional ISDS for certain treaties or resort to non-binding conciliation or mediation in some instances.

V. CONCLUSION

Considering the outlined options, Prof. Alvarez's view is that it is unlikely that in the following ten years any of the previous options would fully displace ISDS as we know it today. In fact, he anticipates that it will look as it does today, as a "confusing spaghetti bowl" of different IIAs, with diverse substantive standards and different adjudicating mechanisms. It seems like the "spaghetti bowl" will become even more complex, with more substantive and procedural options and mechanisms—not less.

As an example of the above, between 2018 and 2020, Brazil signed seven treaties

with no ISDS, the E.U. signed two treaties with an investment court, other states signed treaties with some form of ISDS, and others ratified treaties with traditional ISDS. The interpretation of substantive standards and treaties by all these new adjudicators is not likely to produce the predictable, consistent, and stable interpretation of rules that the reformers seek. According to Prof. Alvarez, the reformers appear to let a good crisis go to waste and not necessarily to address or confront the most critical challenges ISDS faces.

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INSTITUTE FOR TRANSNATIONAL ARBITRATION
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THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

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B. *Why Become a Member?*

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The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary

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