Investment Arbitration in Latin America

Alejandro Escobar

Investment Arbitration Workshop · 24 August 2019

BAKER BOTTS

Outline

I. Introduction
II. History of investment arbitration in Latin America
III. International Investment Agreements
IV. Current situation of investment arbitration in Latin America
V. Future challenges of investment arbitration in Latin America
VI. Discussion and Q&A

Introduction

- Investment Arbitration means:
  - Arbitration under the provisions of an investment protection treaty
  - ICSID Convention arbitration based on contract or agreement

- Latin America refers to the Spanish-speaking countries of the Americas
  - Brazil does not have investment treaty arbitration provisions in force

- Legal developments in this field occur in a certain context:
  - A history of mistrust towards international claims for foreign investors
  - The parallel evolution of international economic relations
  - The particular social and economic conditions of each country
  - The relative strengths and weaknesses of local institutions and courts

Introduction

- Investment arbitration in Latin America has developed in parallel with closely related legal disciplines

- International Commercial Arbitration
  - *New York Convention*
  - *Panama Convention*
  - *UNCITRAL Model Law*

- Participation in the WTO dispute settlement system (e.g., Argentina, Brazil, and Mexico)

- Bilateral and multilateral comprehensive "free trade" agreements

History of Investment Arbitration in Latin America

- Part of the development of international law concerning the treatment of foreign investors and their property
- **1868-1974**: Calvo Doctrine and Calvo Clause
  - A legal reaction against the use and abuse of diplomatic protection as a means of foreign intervention in domestic affairs
  - Calvo clause elements:
    - Disputes are to be settled by domestic courts
    - Applicable law is the domestic law of the host state
    - Investor may not apply to its home government for diplomatic protection
  - 1962: Permanent sovereignty over natural wealth and resources (UNGA 1803)
  - 1964: All Latin American countries voted against the ICSID Convention (Tokyo)
- Reflected in the *Cartagena Agreement* (1970) and the *UN Charter of Economic Rights and Duties of States in the UN General Assembly Resolution 3281* (1974) reinforced the Calvo doctrine

History of Investment Arbitration in Latin America

- **1980s**: Region began to recognise the need to provide greater protection for foreign investors
  - Debt crisis
  - Collapse of the Soviet Union
- **1990s**: Latin American states began to negotiate and conclude BITs and IIAs
  - 1992: NAFTA (in parallel to Mercosur)
  - By 1995: Argentina, Bolivia, Ecuador and Venezuela ratified the ICSID Convention
- Latin American countries sign an increasing numbers of BITs for the promotion and protection of investment
  - 1996: 103 treaties signed
  - 2000: 219 treaties signed
  - 2002: 380 treaties signed

International **Investment Agreements**

- BITs provide minimum standards of investment protection for investors of one of the state signatories in the territory of the other state signatory

- BITs typically give investors the right to resolve through arbitration investment disputes arising with the host State of the investment
  - This right does not depend on the existence of an investment contract
  - It does not require confirmation by the host State or the home State
  - Usually no need to have recourse to local remedies
  - There is no preliminary "screening" of the merits of a claim

- The scope of protection afforded by BITs to foreign investment codifies *and* goes beyond the minimum standards of customary international law

International **Investment Agreements**

- BITs include consistent type of protection, but with varying language and scope:
  - National treatment
    - Investments must receive equal treatment to domestic investments
  - Most favoured nation treatment
    - Investment from one country may not be treated worse than the best treatment afforded to the investment of any third country
  - Fair and equitable treatment
  - Full protection and security
  - No impairment of investment by arbitrary and discriminatory measures
  - Observance of specific investment undertakings
  - No expropriation without prompt, adequate, and effective compensation
  - The right to transfer investment-related funds into and out of the host state

International **Investment Agreements**

- "Free Trade" Agreements have governed investment protection in Latin America since the early 1990s
  - NAFTA / DR-CAFTA / others promoted by Canada, Mexico and the U.S.

- Features include:
  - Detailed provisions on dispute settlement (reflected in later BITs)
  - Express protection of indirectly controlled investments
  - Requirement to waive other remedies
  - Possibility of interpretation between State Parties

- Source of the first investment treaty claims between developed countries: Canada and the U.S.

International **Investment Agreements**

Country	Bilateral Investment Treaties	Treaties with Investment Provisions
Argentina	61	18
Bolivia	23	10
Brazil	24	19
Chile	55	33
Colombia	19	20
Costa Rica	23	17
Cuba	60	3
Dominican Republic	15	6
Ecuador	29	10
El Salvador	23	10

Source: Investment Policy Hub, UNCTAD (2019)

International **Investment Agreements**

Country	Bilateral Investment Treaties	Treaties with Investment Provisions
Guatemala	21	11
Honduras	12	12
Mexico	35	18
Nicaragua	20	11
Panama	25	12
Paraguay	26	17
Peru	33	30
Uruguay	36	19
Venezuela	30	5

Source: Investment Policy Hub, UNCTAD (2019)

Current Situation of Investment Arbitration in **Latin America**

- Latin American states have engaged with and participated in investment arbitration.
- Overall, this has contributed to building a consensus on the proper scope and application of substantive standards of protection.
- There is no bid for introducing regional "exceptions" to treaty protection.
  - Contrast the debate over so called "intra-EU" investment protection
- The consensus seems to be aided by a more tempered approach to investment protection in the 21st century by Canada and the U.S.
- This has allowed cooperation on investment protection agreements beyond the Americas
  - E.g., the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP)
  - Ironically now without the participation of the U.S.

Salient decisions

- *Commerce Group Corp. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March, 2011
- *Siemens A.G. and The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007
- *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000
- *MTD Equity Sdn. Bhd et al. v. República de Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004
- *Philip Morris Brands Sarl et al. v. República Oriental del Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016

Future Challenges of Investment Arbitration in Latin America

- Critique of investment arbitration
  - Denunciation of the ICSID Convention and termination of BITs
  - Mooted regionalism: e.g., UNASUR
  - Questions regarding conflicts of interest

- Investment arbitration and issues of public interest
  - *Aguas del Tunari v Bolivia*
  - *Lucchetti v Peru*
  - *Chevron v Ecuador*

- Reform
  - Some Latin American states are engaging with the proposals for the establishment of an international investment court

Future Challenges of Investment Arbitration in Latin America

- New generations of jurists and public administrators
  - BITs are largely still in place
  - Intensive practical cooperation with "Northern Hemisphere" colleagues
  - Pragmatic approach to the need for investment and finance

- The persistent role of international arbitration
  - The need for fair and neutral dispute resolution
  - International arbitration as a signal for business confidence
  - Arbitration as a catalyst for improved governance

- A possible renewed consensus
  - Well-tempered investment arbitration may provide legal continuity for strengthening international economic cooperation instruments and institutions

AUSTIN

BEIJING

BRUSSELS

DALLAS

DUBAI

HONG KONG

HOUSTON

LONDON

MOSCOW

NEW YORK

PALO ALTO

RIYADH

SAN FRANCISCO

WASHINGTON

bakerbotts.com