Regionalism in Investment Arbitration
Recent Developments in Latin America

Dispute Resolution Mechanisms

1. Latin America and ICSID
2. Sub-regional mechanisms
   • Mercosur
   • Andean Community
3. New initiatives
   • Unasur
   • ALBA
4. ADR and Dispute Prevention Policies
5. Parallel/complementary mechanisms
1. Latin America & ICSID

Geographic distribution of all ICSID cases by state party involved

Source: ICSID
1. Latin America & ICSID

Denunciation of the ICSID Convention

**Bolivia**
- Notice of denunciation: 2 May 2007
- In effect as of 3 November 2007

**Ecuador**
- Notice of limitation of consent: 4 December 2007
- Notice of denunciation: 6 July 2009
- In effect as of 7 January 2010

**Venezuela**
- Law approving Venezuela’s withdrawal: February 2008

**Nicaragua**
- No longer refers to ICSID – uses ICC arbitration
- Filing of claim against Spanish investor: June 2008

2. Sub-regional mechanisms

**MERCOSUR – Mercado Común del Sur**

Protocol for the Mutual Protection and Promotion of Investments in MERCOSUR (*Colonia Protocol*)
- Courts of host party
- International arbitration (ICSID * UNCITRAL)
- Permanent dispute settlement mechanism to be established within framework of the Treaty of Asunción

Protocol for the Protection and Promotion of Investments Coming from States Not Parties to MERCOSUR (*Buenos Aires Protocol*)
- Courts of host party
- International arbitration (*ad hoc* * institutional)
2. Sub-regional mechanisms

ANDEAN COMMUNITY

Decision 291: Common Investment Regime

- Guarantees foreign investors equal and non-discriminatory treatment
- Gives member countries the freedom to define their investment policies through their own national legislation
- Application of AC law
  - Occidental v. Ecuador
  - Encana v. Ecuador

3. New initiatives

UNASUR – Union of South American Nations

- June 2009: Ecuador proposes at the OAS General Assembly that UNASUR create an arbitration centre as an alternative to ICSID
- December 2010: Ecuador, chair of the Working Group on dispute resolution and investment, submitted a proposal for a set of rules for the system
- Proposal is currently being fine-tuned for submission to the UNASUR member countries for their consideration
3. New initiatives

UNASUR

Ecuador's proposal

- Set of rules for the arbitration centre
- Code of conduct for UNASUR arbitrators and mediators
- Creation of an advisory centre for settling investment disputes

Rules for the arbitration centre

Jurisdiction:
- Excludes matters such as health, energy and taxation
- Excludes competence over disputes relating to the legitimacy of internal laws or their economic effect
- States can require the exhaustion of local and administrative remedies

Appointment of arbitrators:
- Disclosure of interest, relation or issue that may affect independence
- Examination of possible predisposition that might favour one party
3. New initiatives

UNASUR

Rules for the arbitration centre

Coherence and consistency of the system:
- Consolidation of proceedings with common questions of fact or law on the same measure or decision
- Establishment of appeal mechanisms with a system of precedents

Transparency:
- All arbitration proceedings should be public
- Exceptions: defense or security of states and agreement by the parties

Recognition and enforcement of awards:
- Denial when the dispute is not arbitrable or is contrary to public policy

ALBA - Bolivarian Alliance for the Peoples of Our America

Energy Council of South America
- Announcement of creation of alternative dispute resolution mechanism to settle disputes related to the energy sector

2007 ALBA Congress
- Evo Morales announces that ALBA members have agreed to withdraw from ICSID
4. ADR and Dispute Prevention Policies

The case of Peru

Figure 7: Peru’s International Investment Disputes State Coordination and Response System

Coordinator: Ministry of Economy and Finance

Special Commission:
Permanent members:
• The Ministry of Economy and Finance (Chair)
• The Ministry of Foreign Relations
• The Ministry of Justice
• The Private Investment Promotion Agency – PROINVERSION

Case Specific:
• Involved Agency / agencies
• Ministry of Foreign Trade and Tourism (in case of FTA)

All the agencies at all levels of government that negotiate agreements or enter into contracts that provide for investor-state international arbitration in the case of investment disputes.

5. Parallel/complementary mechanisms

Ongoing investment arbitrations & additional proceedings

• Chevron v. Ecuador
• Renco Group Inc v. Peru

Investment conflicts & human rights complaints

• Marlin mine in Guatemala - Goldcorp
• Dam along the Teribe-Changuinola Rivers in Panama - AES Corporation
• El Dorado mine in El Salvador – Pacific Rim Corp.