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Contract-based Arbitration: Lessons Learned from Bolivia’s Extractives Industries

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Bolivia has undergone a significant shift in its approach to investment dispute resolution, moving away from reliance on Bilateral Investment Treaties (BITs) and international arbitration towards domestic mechanisms and contract-based arbitration. This shift, driven by a desire to assert greater state sovereignty over natural resources, seeks to align dispute resolution with national development priorities while reducing the costs associated with international arbitration. The recent *Shell Bolivia Corporation v. YPF Bolivia* case highlights the complexities inherent in contract-based arbitration within the extractive sector, emphasizing the need for meticulous contract drafting and a clear definition of arbitrable disputes within the framework of Bolivian law.

This article analyses Bolivia's transition from reliance on international investment treaties and arbitration to a domestic, contract-centred approach for resolving disputes in its extractive industries. The article examines how the legal framework adopted by Bolivia highlights the role of contract-based arbitration in addressing disputes related to investment, production, technology transfer, environmental and social impacts, labour relations, and contract interpretation. The article draws lessons from other developing countries’ experience, recommending that Bolivia further strengthen its investment framework by adopting clear protection standards, prioritizing fair administrative procedures, and emphasizing domestic remedies. This approach seeks to balance attracting responsible investment with protecting state sovereignty and promoting sustainable development in Bolivia's extractive industries.

La Bolivie a considérablement modifié son approche en ce qui concerne le règlement des différends en matière d'investissement, s'éloignant des traités bilatéraux d'investissement et de l'arbitrage international pour se tourner vers des mécanismes nationaux fondés sur la conclusion de conventions d’arbitrage. Ce changement, motivé par la volonté d'affirmer une plus grande souveraineté de l'État sur ses ressources naturelles, s’inscrit dans le cadre des priorités définies en matière de développement et vise à réduire les coûts associés à l'arbitrage international. La récente affaire Shell Bolivia Corporation c. YPF Bolivia a permis de mettre en lumière les complexités inhérentes aux conventions d’arbitrage dans le secteur de l’extraction de matières premières et la nécessité d'une rédaction méticuleuse des contrats et d'une définition claire des litiges susceptibles de donner lieu à un arbitrage en droit bolivien.

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La présent article analyse la transition opérée par la Bolivie, qui est passée d'une dépendance aux traités internationaux d'investissement et à l'arbitrage international à une approche nationale centrée sur la conclusion de conventions d'arbitrage pour résoudre les litiges susceptibles de survenir dans le secteur de l'extraction de matières premières. Il examine le cadre juridique adopté par la Bolivie et le rôle joué par les conventions d'arbitrage dans le traitement des litiges liés à l'investissement, à la production, au transfert de technologie, aux impacts environnementaux et sociaux, aux relations de travail et à l'interprétation des contrats. Tirant les leçons de l'expérience d'autres pays en développement, il formule des recommandations sur la manière dont la Bolivie peut renforcer son cadre d'investissement en adoptant des normes de protection claires, en privilégiant des procédures administratives équitables et en mettant l'accent sur les recours internes. Dans cette optique, l'objectif est, pour la Bolivie, de trouver un équilibre entre la nécessité d'attirer des investissements responsables, de protéger sa souveraineté et de promouvoir un développement durable dans le secteur de l'extraction de matières premières.

Bolivia ha experimentado un cambio significativo en su enfoque de la resolución de disputas sobre inversiones, pasando de la dependencia de los Tratados Bilaterales de Inversión (TBI) y el arbitraje internacional a los mecanismos nacionales y el arbitraje basado en contratos. Este cambio, impulsado por el deseo de afirmar una mayor soberanía estatal sobre los recursos naturales, pretende alinear la resolución de disputas con las prioridades nacionales de desarrollo, reduciendo al mismo tiempo los costes asociados al arbitraje internacional. El reciente caso Shell Bolivia Corporation contra YPF Bolivia pone de relieve las complejidades inherentes al arbitraje contractual en el sector extractivo, haciendo hincapié en la necesidad de una redacción meticulosa de los contratos y una definición clara de las disputas arbitrables en el marco de la legislación boliviana.

Este artículo analiza la transición de Bolivia de la dependencia de los tratados internacionales de inversión y el arbitraje a un enfoque nacional centrado en los contratos para resolver las disputas en sus industrias extractivas. Examina cómo el marco legal adoptado por Bolivia destaca el papel del arbitraje contractual en el tratamiento de disputas relacionadas con inversión, producción, transferencia de tecnología, impactos ambientales y sociales, relaciones laborales e interpretación contractual. El artículo extrae lecciones de la experiencia de otros países en desarrollo, recomendando que Bolivia fortalezca aún más su marco de inversión mediante la adopción de estándares claros de protección, la priorización de procedimientos administrativos justos y el énfasis en los recursos nacionales. Este enfoque busca equilibrar la atracción de inversiones responsables con la protección de la soberanía estatal y la promoción del desarrollo sostenible en las industrias extractivas de Bolivia.

Introduction

Bolivia's extractive industries are a cornerstone of its economy. In 2007, Bolivia initiated a re-nationalisation programme of investments in the extractive sector to consolidate the State's ownership over natural resources; it also eliminated concessions, promoting a mining regime based on shared production contracts and leases[1].

The outcome of these actions was not the complete nationalisation of the mining operations but rather the rise of the State's role in the day-to-day operations, thereby increasing the State's revenue from the mining sector while promoting the development of policy measures in strategic sectors. Bolivia has had a complex relationship with investor-State dispute settlement (ISDS) under bilateral investment treaties (BITs).[2] It withdrew from the International Centre for Settlement of Investment Disputes (ICSID) as part of this process and reached settlement agreements with major foreign investors, including Energy International and Shell[3].

Pursuant to the adoption of the new Constitution in 2009, Bolivia took a more assertive stance on State sovereignty and control over natural resources. Article 366 of the Constitution provided that foreign enterprises carrying out activities in the hydrocarbon production chain would be subjected to the laws and authorities of Bolivia and forbade that any claim be submitted to foreign courts or jurisdictions. Consequently, the government announced its intention to denounce or renegotiate all existing BITs, as they were deemed incompatible with the new constitutional framework. Today, Bolivia has terminated most of its BITs. It has turned to resolving investment disputes under its domestic legal system or through newly negotiated agreements and contracts that align with its development priorities and constitutional principles.

[1]See: Murat Arsel and others, "Property rights, nationalisation and extractive industries in Bolivia and Ecuador", in Maarten Bavinck, Lorenzo Pellegrini and Erik Mostert, eds., *Conflicts over Natural Resources in the Global South: Conceptual Approaches* (1st edition, CRC Press, 2014), p. 118.
[2] Bolivia has faced nineteen ISDS cases since 2002. Although it has settled the majority of those cases, Bolivia was found liable for damages amounting to almost USD $100 million. See United Nations Trade and Development (UNCTAD), Investment Policy HUB at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/24/bolivia-plurinational-state-of/respondent and https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/932/bbva-v-bolivia.
[3] See: Jose Carlos Bernal Rivera, "Bolivia's Step Back in State Arbitration", Kluwer Arbitration Blog, 15 May 2017 at https://arbitrationblog.kluwerarbitration.com/2017/05/15/bolivias-step-back-state-arbitration/ (accessed on 19.08.2024).

Lessons Learned from Investment Contract Arbitration

Many developing countries have reviewed their national regimes to offer a friendly environment for foreign investment while encouraging and supporting sustainable development[4]. This process included evaluating their BITs and participation in forums like ICSID to identify gaps and challenges. One of the prominent outcomes of this process is the identification of the costs of investment agreements for developing countries, particularly as related to ISDS claims. These costs include those deriving from the ISDS chilling effect and the effective reduction in some cases of the regulatory and policy space of States as well the detrimental effects of awarded compensations (often disproportionate) on the public budget[5]. This has led developing countries to reconsider the role of contractual relationships with foreign investors including by enhancing cooperation, communication, and trust between project parties.[6]

Reliance on investment contracts to resolve investment disputes has increased in recent years. According to the International Chamber of Commerce (ICC) dispute resolution statistics, almost 25% of claims heard by the ICC in 2022 involved States or State-owned entities, which amount to 34 States and 188 State-owned parties[7]. Similarly, in accordance with ICSID, almost 7% of cases registered in 2023 correspond to contract-based claims between investors and host States[8].

These disputes concern measures taken in the public interest and relate to investments in strategic sectors—for example, energy, telecommunications, construction, and mining sectors[9]. Dispute settlement provisions in investment-related contracts can lead to complex legal situations and create the risk of investors' claims for high compensations. Therefore, careful consideration in drafting, interpreting and implementing such provisions is needed. Likewise, tribunals hearing these contract-based claims should carefully consider not only the text of the contract but also the context in which these agreements operate[10].

[4] See: Roslyn Ng'eno, "Preserving Regulatory Space for Sustainable Development in Africa", *SouthViews* No. 246 (Geneva, South Centre, 2023) at https://www.southcentre.int/wp-content/uploads/2023/04/SV246_230405.pdf (accessed 27.08.2024).

Legal Developments on Bolivia's Investment Regime

Law No. 516, adopted in 2014, deals with the treatment and protection of investments, including foreign and national investments. Article 5 of the law addresses the role of the Ministry of Planning and Development in directing investment towards economic activities that promote economic and social development and employment, and contribute to the eradication of poverty. Likewise, it recognises the State's rights to regulate the country's strategic sectors. It allows investors to participate in economic activities related to strategic sectors under the laws and policies adopted by the State. The Bolivian investment law also recognises that investment disputes, including investor-State disputes, can be solved according to the applicable law, particularly conciliation and arbitration.

Law No. 516 is intended to provide certainty and predictability for investors; it also identifies the need to strengthen the primary role of the State in directing such investment towards national development. It improves the relationship between the State and the investors by increasing transparency and engagement between investors and line ministries managing and directing such investments. It also shows that a suitable environment for investment protection can be established outside BITs.

[5] See: Roslyn Ng'eno, "Preserving Regulatory Space for Sustainable Development in Africa", *SouthViews* No. 246 (Geneva, South Centre, 2023) at https://www.southcentre.int/wp-content/uploads/2023/04/SV246_230405.pdf and David R. Boyd, Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment to the General Assembly, UN Doc. A/78/168 (2023) at https://documents.un.org/doc/undoc/gen/n23/205/29/pdf/n2320529.pdf (accessed 27.08.2024).
[6] See: Yulia Chernykh, *Contract Interpretation in Investment Treaty Arbitration: A Theory of the Incidental Issue* (Nijhoff - Brill, 2022) at https://brill.com/view/title/56164 (accessed 26 August 2024).
[7] See: International Chamber of Commerce (ICC), *ICC Dispute Resolution 2022 Statistics* (2024) at https://jusmundi.com/en/document/pdf/publication/en-2022-icc-dispute-resolution-statistics (accessed 22.08.2024).
[8] See: International Centre for Settlement of Investment Disputes (ICSID), *ICSID Case Load – Statistics* (2024) at https://icsid.worldbank.org/sites/default/files/publications/ENG_The_ICSID_Caseload_Statistics_Issue%202024.pdf (accessed 22.08.2024).
[9] ICC (2024).
[10] Chernykh (2022).

In addition, Bolivia adopted Law No. 708 on Conciliation and Arbitration. [11] It provides for the use of these mechanisms to resolve contractual and extra-contractual disputes, including those arising from conflicts between the State and investors, as set out in Law No. 516. It is worth noting that the Fourth Transitional Provision of Law No. 708 allows State-owned enterprises to include provisions for arbitration and conciliation as means of dispute resolution only to the extent that the seat of arbitration is Bolivia, and the applicable law is the Bolivian legislation.

Latest Contract-based Claim Against Bolivia: *Shell Bolivia Corporation v. YPF Bolivia* [12]

Although Bolivia's Law No. 708 on Conciliation and Arbitration excludes arbitration for resolving disputes related to natural resources, contract-based arbitration remains a viable mechanism for resolving disputes within the extractive industries, particularly in areas not directly tied to resource ownership. This mechanism is frequently used in cases related to possible breaches of contractual obligations on investment, production, or technology transfer, as well as disputes over environmental and social impact, conflicts about labour and community relations, and disagreements arising from the interpretation of contract provisions.

In early March 2020, Shell Bolivia Corporation (Shell) initiated arbitration proceedings against Yacimientos Petrolíferos Fiscales Bolivianos (YPFB) based on a services contract. The claim was presented to the International Chamber of Commerce (ICC), claiming a compensation of 26 million dollars. According to the claimant, the complaint was grounded on outstanding debts and production incentives owed by previous governments. This complaint added to several pending cases that Bolivia faced, totalling almost 1,000 million dollars in claims. It highlights the importance of strengthening dispute prevention and resolution mechanisms regarding foreign investors in international investment agreements and contracts.

In August 2024, the ICC tribunal notified Bolivia of the final arbitral award that obliges it to pay Shell 10 million dollars in compensation. Although the amount granted is less than initially claimed, the Bolivian State intends to exhaust all legal remedies to reverse this decision. The Attorney General's Office requested amendment, interpretation, and clarification of the award, and it is expected that, once these requests are resolved, an annulment action will be filed before the Bolivian jurisdictional authority[13].

Conclusions and Recommendations

Bolivia's investment dispute resolution landscape has undergone significant reform, in particular by shifting from a blind reliance on BITs and international arbitration towards domestic mechanisms and contract-based arbitration. Although Bolivia still faces several cases and challenges regarding this reform, recent developments signal a positive trajectory.

One of the latest cases faced by Bolivia is the Shell case. This case is a reminder of the complexities involved in contract-based disputes in the extractive sector and the complexities related to these claims, including the political and social context. The legal developments in Bolivia demonstrate that contract-based arbitration could be a valuable tool for resolving disputes. Still, contracts should also be drafted meticulously, clearly defining the scope of arbitrable disputes and aligning them with Bolivian legal provisions. Capacity-building initiatives to enhance the expertise of Bolivian institutions and professionals in investment arbitration and investment contract drafting would help to craft adequate provisions and also promote better coordination among government institutions. It would also be essential to foster open dialogue and collaboration between investors and the Bolivian government to establish trust and facilitate amicable dispute resolution, thus reducing the need for formal arbitration.

[11] Law No. 708, Law on Conciliation and Arbitration (Bolivia), June 25, 2015.
[12] *Shell Bolivia Corporation v. Yacimientos Petrolíferos Fiscales Bolivianos (YPFB)*, ICC Case No. 25146/JPA (2024).

13] See: Sputnik, "Bolivia pierde laudo contra Shell y buscará revertir pago de $10 millones", 14 August 2024 at https://www.elpais.cr/2024/08/14/bolivia-pierde-laudo-contra-shell-y-buscara-revertir-pago-de-10-millones/ (accessed 21.08.2024).

Bolivia can strengthen its investment framework by adopting clear protection standards, emphasising fair administrative procedures, and prioritising domestic remedies. Although it has taken significant steps towards modernising its investment regime, it could also consider the efforts taken by other States to clarify the protection standards provided for investors at the domestic level and include them in their legislation. For example, South Africa has taken actions towards protecting and promoting investments in its territory by adopting the Protection of Investment Act (the Act).[14] The Act recognises the sovereign right of the State to regulate investments in the public interest. It provides clarity and certainty regarding the protection standards applicable to all investments in the country.

One of the essential provisions to consider is Section 6 on Fair Administrative Treatment, which represents a substitute to the vague provision on fair and equitable treatment usually included in BITs. According to this provision, the government guarantees the protection of investors by ensuring fair and transparent administrative and judicial procedures, preventing arbitrary decisions and upholding the minimum standard of treatment, which includes reasoned and motivated decisions and possible review; timely access to relevant government information; and disputes resolution through fair public hearings before a court or independent tribunal, except where specified otherwise. Likewise, the Act includes Section 13, which outlines a dispute resolution for foreign investors, including mediation within six months of the dispute. If mediation fails, the investor can approach domestic courts or, with government consent, pursue international arbitration after exhausting local remedies.

The experience of South Africa can serve Bolivia and other developing countries by updating its arbitration framework to attract responsible investment, promote sustainable development, and protect the interests of both investors and the State. On the one hand, South Africa's approach focuses on fair administrative procedures, including transparency and reasoned decisions. Access to information offers a concrete alternative to the broad and often contentious concept of fair and equitable treatment. This approach can also provide better-defined protection standards and a clear framework for investors, contrasting with the vagueness frequently found in BITs.

Including core provisions on dispute resolution directly in the law can also strengthen domestic dispute resolution systems. South Africa's Act prioritises domestic dispute resolution mechanisms, with international arbitration only being possible after exhausting local options and with government consent. Bolivia could also consider this approach, as it reinforces State sovereignty while providing avenues for investor protection.

Taking inspiration from countries like South Africa, which have successfully modernised their investment regimes, Bolivia can create an environment that fosters responsible investment, promotes sustainable development, and protects the interests of investors and the State.

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[14] See: Act No. 22 – 2015 (Protection of Investment Act), Official Gazette, Vol. 606, No. 39514.

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