

New Trends in International Investment Law Treaty Practice: where does Latin America stand?

Novas Tendências na Prática do Tratado do Direito Internacional do Investimento: onde fica a América Latina?

Mara Valenti¹

¹ Università degli Studi di Milano – Milão, Itália.

Abstract: Latin-American countries' attitude towards international investment law has undergone an evolution. During the 90s, those countries stipulated many Bilateral Investment Treaties (BITs), subscribed to the Washington Convention, and, recently, they have been up front in the process of reconsideration regarding the legal system revolving around the BITs. Their recent negotiating practices represent good examples of a new generation of investment treaties. In particular, a glance at the main clauses of the MERCOSUR Protocol will reveal the member States' intent to severely limit the extent of the treatment and the protection to be granted to foreign investors.

Keywords: Foreign Investments. Negotiating Practice. Mercosur.

Resumo: Os posicionamentos dos países latino-americanos no que se refere a regulações de investimentos internacionais sofreram uma recente revolução. Durante os anos de 1990, esses países assinaram diversos Tratados Bilaterais de Investimentos (TBIs), tornaram-se signatários da Convenção de Washington e, atualmente, tomam frente em um processo de reanálise do sistema legal que permeia os TBIs. Suas recentes práticas de negociação são bons exemplos do surgimento de uma nova geração de tratados de investimentos. Nesse sentido, a análise das cláusulas principais do Protocolo do Mercosul revela a intenção de fortemente limitar a extensão de tratamento e de proteção garantida a investidores estrangeiros.

Palavras-chave: Investimentos Estrangeiros. Negociação. Mercosul.

Recebido em: 10/03/2018

Revisado em: 30/06/2018

Aprovado em: 10/07/2018



Direito autoral e licença de uso: Este artigo está licenciado sob uma Licença Creative Commons. Com essa licença você pode compartilhar, adaptar, para qualquer fim, desde que atribua a autoria da obra, forneça um link para a licença, e indicar se foram feitas alterações.

1 The Parabola

Latin-American countries' attitude towards international investment law can be illustrated as a line, which is similar to a parabola.

In the past, such countries kept a skeptical approach to the rules concerning the treatment and the protection of foreigners and their investments. The "Calvo doctrine" originated here and for a long time they maintained that no international customary standard of treatment for foreign investors existed. According to the Calvo doctrine, the activities carried out by foreign investors were to be regulated only by domestic legislation. They could not expect a different or better treatment than domestic investors. Any dispute between the foreign investor and the host State was to be settled by domestic tribunals, which would only apply domestic legislation.

When, in the 60s most countries began to stipulate bilateral investment treaties (BITs) and ratified the Washington Convention establishing the International Centre for the Settlement of Investment Disputes (ICSID), Latin-American countries did not follow that trend.

Latin-American countries left their reticence during the 90s, when they stipulated many BITs and subscribed to the ICSID Convention (apart from Brazil that has never concluded any BIT, despite having negotiated some of them over the years). This change in attitude was due to their desire to attract the foreign investments necessary to finance some measures of economic policy. In particular, foreign capital was badly needed in the context of the privatization of important sectors of the domestic market. Undertaking by treaty to grant to foreign investors a favourable treatment and an enhanced protection in case of non-commercial risk seemed to be the best way to attain the purpose.

In this same period, the legal system revolving around BITs became very successful since foreign investors all over the world became fully aware of their potential. One must consider that such treaties grant to foreign investors not only substantial benefits, with regard to the treatment and the protection of their activities on the territory of the host contracting State, but also the opportunity to challenge, before an international

tribunal, the measures of the host State which have a negative effect on their investments. The right to initiate an arbitral proceeding against the State at the international level – especially within the ICSID – Is one of the main features of this kind of treaties. The so-called “treaty-based” arbitration underwent a tremendous expansion: since the end of the 90s more and more investors have filed a claim at ICSID and many tribunals have been established; as a consequence, since the beginning of the XXIst century, many awards have been rendered¹.

At the beginning of the XXIst century, however, a process of reconsideration took place at the international level. States began to question the whole system and the process is still underway. There are several reasons behind such a process. The case-law of arbitral tribunals has definitely played an important role in it. Inconsistency between awards dealing with the same or similar events; an interpretation of the applicable rules perceived as excessively investor-oriented; the obligations considered more and more as an undue interference in the State’s regulatory power; the very large amount of money to pay as compensation or reparation are just some of the controversial issues².

Latin-American countries have been up front in this movement³. In this third phase, they are perfectly aligned with other States, such as

¹ The literature on international investment law is plentiful and it has undergone an evolution: at the beginning, focused on the analysis of the legal instruments regulating the treatment and the protection of foreign investments; more recently, taking into consideration also the case-law on the interpretation of those rules developed by arbitral tribunals. See, *i.a.*, R. Dolzer, M. Stevens, *Bilateral Investment Treaties*, The Hague, 1995; G. Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, in *Rec. Cours*, 1997, vol. 269, p. 255-460; R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2012; M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, 2017.

² Scholars have reported about the new trend; see *i.a.*, G. SACERDOTI, P. ACCONCI, M. VALENTI, A. DE LUCA (ED.), *General Interests of Host States in International Investment Law*, Cambridge University Press, 2014.

³ For a thorough analysis of the process in Latin America, see M.G.O. GIUPPONI, *The Protection of Foreign Direct Investment in Latin America: Where Do We Stand on International Arbitration?*, in *Journal of International Arbitration*, 2015, p. 113-142; C. TITI, *Investment Arbitration in Latin America*, in *Arbitration International* 2014, p. 357-386.

the USA, Australia⁴ or South Africa. The reason for the position taken by Latin-American countries lies in the fact that they had to face a lot of treaty-based arbitrations in the previous years⁵.

Looking at the attitude of Latin-American countries towards international investment law, we can, therefore, sketch a line which is similar to a parabola. At the beginning, they were reluctant to endorse commitments by treaty. For a long time, they had been advocating the national treatment standard as the proper principle to regulate economic activities carried out by foreign investors on their territories. Subsequently, during the 90s, they undertook by BITs to grant to foreign investors extensive advantages and guarantees. At present, Latin-American countries seem to be going back to previous stances. In that respect, scholars have already talked about “Calvo revival”⁶.

2 Two Approaches

The new attitude revealed by Latin-American countries led to the following of two different paths: the so-called *withdrawal* approach and the *reform* approach⁷.

The *withdrawal* approach has been followed by States who wanted to pull back, that is simply to leave the system. Such States terminated

⁴ For a detailed analysis, see J.KURTZ, *Australia’s Rejection of Investor-State Arbitration: Causation, Omission and Implication*, ICSID Review, 2012, p. 65-86; L.E. TRAKMAN, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?*, Journal of World Trade, 2012, p. 83-120.

⁵ In the list of the most frequent respondent States in Investor-State Dispute Settlement (ISDS), there are: **Argentina; Venezuela;** the Czech Republic; Spain; Egypt; Canada; **Mexico; Ecuador;** Russia ... **Bolivia** (16th) (data available at: <http://investmentpolicyhub.unctad.org/ISDS>).

⁶ See, e.g., G. BOLIVAR, *Sovereignty v. Investment Protection: back to Calvo?*, ICSID Review, 2009, p. 464-488; W. SHAN, *From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, in *Northwestern Journal of International Law & Business*, 2007, p. 631-664.

⁷ For this terminology, A. LÓPEZ ORTIZ, J.J. CAICEDO, W. AHERN, *Two Solutions for One Problem: Latin America’s Reactions to Concerns over Investor-State Arbitration*, in *Transnational Dispute Management*, June 2016, Vol. 13, issue 2.

their BITs and rescinded the ICSID Convention, in order not to be bound anymore by their obligations nor be brought before an international tribunal by foreign investors. Such a move is aimed at regaining both the jurisdiction to legislate and the jurisdiction to adjudicate in the field of foreign investment. In fact, it is not as simple as that since contracting States may still be bound by a treaty for a certain period after termination and the same holds true as far as the consent to arbitration is concerned.

Latin-American States following the withdrawal approach are Bolivia, Ecuador and Venezuela.

Bolivia denounced the ICSID Convention in May 2007 and later terminated some of its BITs. Ecuador sent a communication to the ICSID Secretariat in December 2007 in order to exclude the jurisdiction of the Centre with regard to disputes concerning oil, gas and mining; in July 2009 it denounced the Convention altogether. It also terminated some BITs. Venezuela denounced the ICSID Convention in 2012.

At the same time, such countries enacted investment Acts granting to foreign investors some of the benefits usually provided for by BITs and, sometimes, even the opportunity to initiate an arbitral proceeding against the State. It is obvious, however, that the guarantees offered by domestic legislation are weaker than those provided for by international treaties: the State can modify it more easily (*i.e.* depending on parliamentary will alone) than an agreement concluded with another State.

Moreover, domestic legislations providing for arbitration as a means to settle disputes between a foreign investor and the State either have a narrow scope or envisage strict conditions to comply with in order for the investor to initiate the proceeding.

In Bolivia, *e.g.*, international arbitration is allowed only for disputes concerning alleged direct expropriations without compensation; in Ecuador, in order to bring a claim before an arbitral tribunal, the investor has to exhaust all domestic remedies and eventually try to reach an amicable solution; a mandatory mediation procedure is also envisaged.

It may be worth mentioning that the withdrawal approach has been followed also by States outside Latin-America. South Africa and

Indonesia, for example, terminated some of their BITs, Russia in August 2009 suspended the provisional application of the ECT.

The will to keep on promoting capital inflows and to protect foreign investments regardless of the termination of BITs, however, clearly emerges from the provisions of the new legislations on the matter. In this respect, therefore, the *reform* approach seems to be more effective than the withdrawal one. States dissatisfied with the BITs regime started changing their Model BIT and negotiating new BITs with different provisions. The US has been the forerunner of this approach, launching a new Model BIT in 2004⁸. Such a Model treaty changed some provisions of the old text and inserted new provisions in order to take into account the concerns perceived by the US as a host State to foreign investors. In the past, the US played the role of “home” country concerned only with protecting its investors abroad. Within the NAFTA context, the US began experiencing the position of “host” country and when Canadian investors initiated arbitral proceedings against it according to the Additional Facility of ICSID (at the beginning Canada was not a party to the ICSID Convention, which it ratified on 1st November 2013), it firstly performed as Respondent State. Therefore, it become sensitive to some issues previously neglected, namely the attachment to the power to regulate without interference from outside or limitations agreed by treaties.

The changes brought to the treaties provisions are aimed at narrowing their scope of application. In the drafting of the new clauses, States paid a special regard to the outcome of the case-law. The language has been chosen more carefully than in the past, in order to avoid an interpretation of the rules perceived as too investor-oriented. In particular, the terms used in the treaty have been strictly defined and the rules embodied therein specified in writing, in order to prevent a broad application of the law.

⁸ In 2012, the US released a new Model BIT; see <https://www.state.gov>.

3 The Recent Negotiating Practice by Some Latin-American Countries and the Mercosur Protocol

In November 2016, Argentina concluded a BIT with Qatar. This is the first new treaty signed by Argentina after a period of 15 years (the last one was signed, and it is not yet ratified, in March 2001 with the Dominican Republic)⁹. Argentina faced several arbitral proceedings in the aftermath of the 2001 economic and financial crisis. The new treaty “reflects some of the lessons learned by Argentina in” those litigations¹⁰. Its provisions have been carefully drafted and specified, thus revealing the intent to prevent an interpretation too investor-oriented as it has happened in the recent past.

As far as the definition of investor is concerned, the new treaty considers eligible any juridical person “constituted or organized under the applicable law of that Contracting Party, which has its principle place of business in the territory of such Party”¹¹. The article specifies that a company having those requirements “shall not be deemed an “investor” under this treaty where it does not conduct substantial business activities within the territory of such Contracting Party”¹². To qualify as an investor of one contracting State, thus being able to benefit from the treaty, a company must not only be incorporated in that State, but also have its seat and carry out its main business activities there. The same provision further limits the definition providing that the company “shall not be deemed an “investor” under this Agreement where it is controlled by nationals of a third State or of the host State”¹³.

Some restrictions qualify the treatment and the protection to be accorded to the foreign investment. For example, fair and equitable

⁹ Information available on the UNCTAD database at: investmentpolicyhub.unctad.org.

¹⁰ L.E. PETERSON, *A look inside Argentina's first new Bilateral Investment Treaty in 15 years*, in *International Arbitration Reporter*, December 13, 2016.

¹¹ Art. 1(1)(b), *The Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar*, November 6, 2016.

¹² Art. 1(1)(d), *Argentina – Qatar BIT*.

¹³ *Ibidem*. Not easy to understand the need for a denial-of-benefits clause, such as that contained in article 9(2), since both articles seem to state the same rule.

treatment (FET) and full protection and security (FPS) are to be afforded only so far as they coincide with customary international law.¹⁴ Moreover, FPS is limited to “an adequate physical protection” of the investor.¹⁵ The most-favored-nation (MFN) treatment cannot be invoked in order to benefit from the FET standard provided for in other treaties or a different dispute settlement mechanism than the one provided for in the same treaty¹⁶.

The new treaty explicitly states the host contracting State’s right to regulate “[...] through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, the environment, public morals, social and consumer protection”¹⁷. Moreover, a so-called essential security exception clause has been inserted in the treaty. Following the debate developed during the several arbitral proceedings faced by Argentina in the aftermath of the economic crisis, the choice has been taken to render the clause self-judging. It means that the decision to resort to the measures that the contracting State considers necessary “for the protection of its essential security interests” cannot be questioned¹⁸.

Finally, two provisions are, in my opinion, noteworthy since they well reflect the new trend in BITs negotiating practice. Article 11 deals with the “Compliance with the laws of the host State”. Article 12 deals with “Corporate social responsibility”. Both provisions are aimed at enhancing the idea that investors too have responsibilities versus the host country. As treaty provisions concerning private parties, however, they cannot be mandatory. In fact, article 11 acknowledges a general principle, according to which foreigners must comply with the legislation in force in the host country and does not add any further obligation. Article 12, on the other hand, requires foreign investors to put in place their best efforts in order “to *voluntarily* incorporate internationally recognized

¹⁴ Art. 3(4) and (5), Argentina – Qatar BIT.

¹⁵ Art. 3(5), Argentina – Qatar BIT.

¹⁶ At. 4(4), Argentina – Qatar BIT.

¹⁷ Art. 10, Argentina – Qatar BIT.

¹⁸ Art. 13, Argentina – Qatar BIT.

standards of corporate social responsibility into their business policies and practices” (italics added).

The negotiating practice of Brazil is rather interesting. In fact, Brazil has negotiated and signed some BITs since the mid-90s; however, it has never ratified any of them. According to the news publisher IAReporter, at the end of 2016, Brazil and India concluded negotiations on a BIT (which has not yet been released publicly). “Most notably, several provisions that have been mainstays of earlier investment treaties are excluded from the” new text¹⁹. The new treaty thus moves forward in furthering the objective of limiting the scope of application, in order to prevent unwelcome interpretations of its provisions.

The present Brazilian attitude seems to have exerted considerable influence on the drafting of the newer Protocol issued by the Mercosur member States on January 2017.

The Protocol reveals that Mercosur States have learned perfectly from the past practice of BITs application, that is from the case-law of arbitral tribunals established in accordance with investment treaties’ dispute settlement clauses.

Basically, the “Protocolo de cooperación y facilitación de inversiones intra-mercosur” contains a narrow definition of the investments covered and restricts considerably the scope of the standards of treatment and protection granted by the substantive provisions.

A glance at the main clauses of the Protocol is therefore interesting since it represents a good example of the new generation of investment treaties.

The Protocol’s preamble recognizes the fundamental role of investment in promoting sustainable development, economic growth, reducing poverty, creating jobs, increasing the capacity and for human development.

¹⁹ J. DAHLQUIST, *Brazil and India conclude bilateral investment treaty*, in International Arbitration Reporter, November 28, 2016.

The Preamble also stresses that investors shall display responsible social behavior and contribute to the host States' sustainable development. It is interesting to note that a specific article is devoted in the Protocol to the corporate social responsibility. Article 14 requires the foreign investors to make efforts to adopt a high degree of socially responsible practices and to comply with eleven voluntary principles and goals. The article is rather articulate, thus aiming, somehow, at giving substance to the Preamble's exhortation and at getting round the unavoidable lack of mandatory character of the provision.

In the Protocol, other provisions concerning the investors' behavior can be found. Article 13 is expressly entitled "Obligations of the investors" and provides that foreign investors shall comply with the relevant rules and regulations of the host State. This provision does not place upon foreign investors obligations provided for in the treaty itself; it states instead the well-established principle according to which a foreigner has to abide by the domestic legislation of the territorial State. The article is noteworthy, in my opinion, since it takes a stand on the disputed issue about the right to regulate of the host contracting State. A debate on the erosion of the jurisdiction to legislate as a consequence of the stipulation of BITs has recently taken place. Arbitral tribunals have already adjudicated on the matter acknowledging States' sovereignty under that respect. Article 13 of the Protocol, thus, puts down in writing what tribunals had to infer from treaty provisions silent on the matter²⁰.

As far as the definition of investment is concerned, the Protocol adopts the usual economic definition of foreign direct investment, according to which the investments covered are to be characterized by a contribution of capital, time, risk and the expectation of gain or profit²¹. Such a definition is in line with the actual trend in international

²⁰ See the case-law on the legitimate expectations of foreign investors. For a comment on it, see, *i.a.*, A. DE LUCA, *Indirect expropriations and regulatory takings : what role for the "legitimate expectations" of foreign investors?*, in G. SACERDOTI, P. ACCONCI, M. VALENTI, A. DE LUCA (ED.), p. 58-75; M. VALENTI, *The protection of general interests of host States in the application of the fair and equitable treatment standard*, in *ibidem*, p. 26-57.

²¹ Art. 3(3), MERCOSUR Protocol.

investment treaties. One may note that, despite the preamble's emphasis on the role of investments for the host State's sustainable development, this is not mentioned as a mandatory element of the investments covered, as sometimes required by arbitral tribunals and especially of those established within the ICSID.

After the usual non-exhaustive list of assets that can be considered as investments for the treaty purposes, the provision excludes, "for greater certainty," sovereign debt from the scope of the treaty itself²². This choice has probably been taken as a consequence of the several ICSID claims over sovereign debt following Argentina's economic and financial crisis of 2001.

The same provision also excludes portfolio investments, money claims under a commercial contract for goods or services and costs incurred by an investor as a prelude to the investment operation itself, including costs incurred in complying with domestic legislation²³. The *ratio* behind such a provision is to be found again in the past case-law, which tended to adopt a broad interpretation of not so restrictive provisions defining investments for the purposes of the applicable treaty. The drafters' intent is clearly to prevent people, making investments not having an effective impact on the host contracting State's economy, to benefit from the advantages of the Protocol.

As far as the definition of investors is concerned, the Protocol distinguishes, as usual, between physical and legal persons. As regards these latter, it provides that they must be constituted in accordance with the legislation of a contracting State. Moreover, legal persons must have their seat and substantial business activity in their claimed home State²⁴. The requirement of a link between the investor and its claimed home State is common with some recent investment treaties and can be considered as an attempt to prevent companies from enjoying the treaty's benefits simply playing with corporate nationality. The Protocol, however, does not contain any denial-of-benefits clause.

²² Art. 3(3)(1)(i), MERCOSUR Protocol.

²³ Art. 3(3)(1)(ii), (iii), (iv), MERCOSUR Protocol.

²⁴ Art. 3(4), MERCOSUR Protocol.

Article 4 of the Protocol is entitled “Treatment” and requires the contracting Parties to ensure that investors have access to the local judicial remedies and be granted treatment consistent with due process²⁵. As it is well known, these ones are components of the so-called “international minimum standard” of treatment. The article, however, does not mention that principle and specifies - “for greater certainty” – that the standards of “fair and equitable treatment” and “full protection and security” are not covered by the Protocol; nor does protection extend to the pre-establishment stage²⁶.

In article 5, entitled “No discrimination,” the Protocol provides for national treatment and most-favored nation treatment. Interestingly, the “better” treatment is defined and it is described as a treatment that modifies the conditions of competition in favor of national or third-party investors.

According to paragraph 6, the article cannot be used to invoke a better treatment provided for in another investment treaty, in a treaty against double taxation or in any other treaty concluded prior to the Protocol’s entry into force. Paragraph 7 specifies then that the article cannot be used to incorporate substantive provisions or provisions concerning dispute settlement not found in the Protocol. “These clarifications should be read in light of the Protocol’s deliberate exclusion of the fair and equitable treatment standard and investor-state dispute settlement mechanism, while the MFN clause in BITs has often been invoked to fill similar gaps”²⁷.

It is interesting to note that quite the same provision can be found into the Comprehensive Economic and Trade Agreement (CETA) concluded between Canada and the EU in provisionally entered into force on September 21, 2017. The insertion of a similar provision, moreover, has been discussed with reference to the Transatlantic Trade

²⁵ Art. 4(1), (2), MERCOSUR Protocol.

²⁶ Art. 4(3), MERCOSUR Protocol.

²⁷ D. CHARLOTIN, L.E. PETERSON, *In new Mercosur Investment Protocol, Brazil, Uruguay, Paraguay and Argentina radically pare back protections, and exclude investor-state arbitration*, in *Investment Arbitration Reporter*, May 4, 2017.

and Investment Partnership, under negotiation between the EU and the USA since June 2013. The limitation in question sounds quite strange, since claimant investors have usually invoked the MFN clause precisely in order to “import” any better treatment provided for in other treaties. Scholars have already put forward their perplexities about a provision²⁸ whose application alone could reveal its exact scope. However, since the entry into force of the CETA does not seem an easy outcome and the prospects of concluding the TTIP’s negotiation have by now almost faded, the interpretation of the new clause will not come anytime soon. MERCOSUR Countries have nonetheless appreciated that formulation, thus revealing to be perfectly in line with the more recent negotiating practice of States²⁹.

Paragraph 8 specifies that the article will not be interpreted in order to require the contracting States to exclude any admission procedure, provided that it is not discriminatory. Paragraph 9, finally, specifies that nothing in the Protocol prevent contracting States from applying to investors the sanctions envisaged by domestic legislation, provided that they are not discriminatory. These last two provisions seem to me either a mere specification of other provisions of the Protocol (such as article 13 quoted above on the compliance by the foreign investor with domestic legislation), or the denial of rules that could anyway be easily excluded given the silence of the Protocol itself (such as the lack of an obligation concerning the admission of foreign investments). It is interesting that the Mercosur States felt the need to make those assumptions explicit.

Article 6 concerns expropriation and it is drafted in the common way. Expropriation measures are allowed provided that the usual conditions are met, namely that the measure be taken for a public interest, be not discriminatory, be taken in accordance with a due process of law and under the payment of an effective compensation. What surprisingly differentiates article 6 of the Mercosur Protocol from most investment

²⁸ A. REINISCH, *Putting the Pieces Together ... an EU Model BIT?*, The Journal of World Investment & Trade, 2014, p. 696 f.

²⁹ In that regard, see M. VALENTI, *Le norme sul trattamento e la protezione degli investimenti nel TTIP*, in P. BILANCIA (ed.), *I negoziati per il partenariato transatlantico sul commercio e gli investimenti*, Kluwer / Cedam, 2015, p. 215-231.

treaties is that it can be applied only to direct expropriations. Besides the title of article 6, which is clearly limited to “direct expropriation”, paragraph 6 – “for greater certainty” - explicitly excludes indirect expropriation from the scope of the article.

Article 12 on the security exception is another important provision in the Mercosur Protocol. It allows contracting States to adopt any necessary measure in emergency situations. As already mentioned, the correct interpretation of investment treaties’ clauses on security exception has been the object of debate, following the Argentine crisis. Although the first paragraph of Article 12 does not use the language employed by the Argentine recent BIT in order to render the clause self-judging,³⁰ according to the second paragraph, the measures that a contracting State will adopt shall not be subject to the dispute settlement mechanisms provided for in the Protocol. In other words, those measures cannot be challenged by foreign investors on the basis of the Protocol.

Part III of the Protocol concerns the procedural issues connected with the management (*Administración*) of the Protocol itself. It basically provides for the establishment of a Commission made up by the representatives of the Contracting States, whose functions are listed in article 17. The NAFTA model is, under this respect, evident.³¹

As far as the settlement of disputes is concerned, one may notice at first that article 23 states the proceeding to be followed in order to prevent disputes. States are the protagonists of the procedure and it will be conducted within the Commission. According to article 24, in case the dispute cannot be settled in accordance with such a procedure, it could be submitted to the proceedings and mechanisms of dispute settlement (State-to-State) envisaged within the MERCOSUR. Article 24’s heading

³⁰ Art. 12(1) does not say that the contracting State will adopt the measures *it considers necessary* in order to face emergency situations. The Article provides that nothing in the Protocol will be interpreted to prevent a contracting State to adopt or maintain measures aimed at facing those situations.

³¹ Other articles contained in this Part of the Protocol concern: the ombudsman (art. 18); information exchanges among contracting States (art. 19); the treatment of classified information (art. 20); interaction with the private sector (art. 21); intergovernmental cooperation on investment promotion (art. 21).

is “Dispute settlement among contracting States” and the Protocol does not provide for any investor-State dispute settlement mechanism.

According to the fork-in-the-road clause found at paragraph 4 of article 24, a dispute submitted to the dispute settlement mechanisms envisaged in articles 23 and 24 cannot be submitted to arbitral proceedings envisaged in BITs or in other investment treaties binding the contracting States of the Protocol. Such provision reveals the purpose of taking into account other undertakings that may bind the contracting States. The Protocol, thus, acknowledges the need for coordination among different treaties in force.

The Protocol will enter into force 60 days after the deposit of the second ratification instrument. Hopefully, the destiny of this Protocol will not be the same as the Protocols concluded within the Mercosur in the 90s to regulate the investments among the Member States (Colonia Protocol – January 1994) and with third States (Protocol of Buenos Aires – August 1994) which never entered into force at fault of ratification by all Mercosur member States.

One can notice that the previous Protocols kept respectively to the US BITs and the European BITs. The new Protocol, on the contrary, sounds original in that respect. Although other investment treaties have already been shaped in the new form, the Mercosur Protocol seems to go a step further. Drawing on all the consequences from the past case-law, it displays a restrictive scope as far as the extent of the treatment and the protection to be granted to foreign investors are concerned.

It seems curious to me that the Protocol, having such far-reaching implications, is meant to regulate the investments among the Mercosur member countries and not the investments coming from outside the free trade area. In other words, it sounds quite strange the skepticism displayed by the Mercosur countries *vis-à-vis* each other. In fact, Mercosur countries have stipulated many BITs with third countries, most of them including a clause containing the contracting States’ consent to

investor-state arbitration³². Unless those treaties are terminated, it may happen therefore that the regulation of investments made by investors from another Mercosur State will be stricter than the one applied to third countries' investors.

References

BOLIVAR, G. Sovereignty v. Investment Protection: back to Calvo? **ICSID Review**, [S.I.], p. 464-488, 2009.

CHARLOTIN, D.; PETERSON, L. E. In new Mercosur Investment Protocol, Brazil, Uruguay, Paraguay and Argentina radically pare back protections, and exclude investor-state arbitration. **Investment Arbitration Reporter**, [S.I.], May 4, 2017.

DAHLQUIST, J. Brazil and India conclude bilateral investment treaty. **International Arbitration Reporter**, [S.I.], November 28, 2016.

DE LUCA, A. Indirect expropriations and regulatory takings: what role for the "legitimate expectations" of foreign investors? *In*: SACERDOTI, G. *et al.* (Ed.). **General Interests of Host States in International Investment Law**. Cambridge: Cambridge University Press, 2014. p. 58-75.

DOLZER, R.; SCHREUER, C. **Principles of International Investment Law**. Oxford: Oxford University Press, 2012.

DOLZER, R.; STEVENS, M. **Bilateral Investment Treaties**. The Hague, 1995.

GIUPPONI, M. G. O. The Protection of Foreign Direct Investment in Latin America: Where Do We Stand on International Arbitration? **Journal of International Arbitration**, [S.I.], p. 113-142, 2015.

KURTZ, J. Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication. **ICSID Review**, [S.I.], p. 65-86, 2012.

³² According to the UNCTAD database, Argentina has 52 BITs in force, Paraguay 22 and Uruguay 28.

LÓPEZ ORTIZ, A.; CAICEDO, J. J.; AHERN, W. Two Solutions for One Problem: Latin America's Reactions to Concerns over Investor-State Arbitration. **Transnational Dispute Management**, [S.l.], V. 13, issue 2, June 2016.

PETERSON, L. E. A look inside Argentina's first new Bilateral Investment Treaty in 15 years. **International Arbitration Reporter**, [S.l.], December 13, 2016.

REINISCH, A. Putting the Pieces Together ... an EU Model BIT? **The Journal of World Investment & Trade**, [S.l.], p. 696 f, 2014.

SACERDOTI, G. Bilateral Treaties and Multilateral Instruments on Investment Protection. **Rec. Cours**, [S.l.], v. 269, p. 255-460, 1997.

SACERDOTI, G. *et al.* (Ed.). **General Interests of Host States in International Investment Law**. Cambridge: Cambridge University Press, 2014.

SHAN, W.. From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law. **Northwestern Journal of International Law & Business**, [S.l.], p. 631-664, 2007.

SORNARAJAH, M. **The International Law on Foreign Investment**. Cambridge: Cambridge University Press, 2017.

TITI, C. Investment Arbitration in Latin America. **Arbitration International**, [S.l.], p. 357-386, 2014.

TRAKMAN, L.E. Investor State Arbitration or Local Courts: Will Australia Set a New Trend? **Journal of World Trade**, [S.l.], p. 83-120, 2012.

VALENTI, M. Le norme sul trattamento e la protezione degli investimenti nel TTIP. *In*: BILANCIA, P. (Ed.). **I negoziati per il partenariato transatlantico sul commercio e gli investimenti**. Kluwer: Cedam, 2015. p. 215-231.

VALENTI, M. The protection of general interests of host States in the application of the fair and equitable treatment standard. *In*:

SACERDOTI, G. *et al.* (Ed.). **General Interests of Host States in International Investment Law**. Cambridge: Cambridge University Press, 2014. p. 26-57.

Mara Valenti é doutora em Direito Internacional Econômico pela Università Luigi Bocconi de Milão. Atualmente é Professora de Direito Internacional na Università degli Studi di Milano na Itália.

E-mail: mara.valenti@unimi.it.

Endereço profissional: Via Festa del Perdono, 7, I-20122 – Milão, Itália.