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ISDS landscape in Latin America for 2022

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For the last 20 years Latin America has been a fertile ground for ISDS. From the cases against Argentina in the early 2000s, to those against Venezuela, Ecuador, Mexico and Bolivia in subsequent years, and more recently Peru and Colombia, investment treaty disputes in the region have continued to arise. While the seeds of the backlash against the system were planted in this region too, for example with Venezuela, Ecuador and Bolivia's denunciation of the ICSID Convention and some BITs, and Brazil still not adopting ISDS, none of this has had any major impact on the ISDS landscape.

Investment arbitrations against Latin American States represent the largest share of cases when comparing caseloads by region. For example, out of 66 cases registered by ICSID in 2021, 24 were against Latin American States, an increase from the 20 registered in 2020. Furthermore, some of the few successful intra-Latin American integration efforts like the Pacific Alliance between Chile, Colombia, Mexico and Peru have ratified the inclusion of the current arbitration system for ISDS. Even one of the Latin American States that led the regional backlash against ISDS, Ecuador, is now returning to the system and last year re-ratified the ICSID Convention, and recently saw an ICSID arbitration commenced against it (*Corporación Nacional del Cobre de Chile and others v Ecuador*).

In this post, we discuss some of the trends Latin American countries have experienced in the past years and which we might continue to see in the course of 2022. For instance, we deal with the impact of 'environmental, social, and governance' ("ESG") related measures (including climate change related ones) on the energy industry. We also refer to potential disputes triggered by States' measures to reform pension funds regulations. Finally, we refer to the rise of tech and telecom ISDS disputes.

Energy-sector disputes, ESG, counter-reform measures and tariff freezes

In some countries, mainly Europe, ISDS cases are arising in relation to ESG regulations enacted primarily in response to the energy transition (e.g., cases relating to the phase-out of coal in the Netherlands). This has not yet been the case in Latin America. However, similar disputes are likely to arise in the region as States continue to move forward with energy transition measures (e.g., Chile's decision to phase out all coal-based power plants by 2025). Other disputes may arise from movements attempting to reverse reforms in the sector, for example in relation to the cancellation of incentives for renewable energy projects (e.g. Mexico). Recently, investors have started arbitrations in connection with hydroelectric powerplants (*Energía y Renovación v Guatemala*; *ESSA2 and Enel v Costa Rica*). Treaty claims may also be filed in relation to the endemic tariff freezes in the Argentine gas and electricity sector (*Orazul International España Holdings S.L. v Argentina*; *AES Corporation v Argentina*).

COVID-related disputes

Despite predictions of a landslide of cases, up to now there has been a limited amount of investment arbitrations concerning COVID-related measures. However, investment disputes require time to mature, so it could be that cases are still brewing. Cases are unlikely to challenge the measures put in place by States to stem the spread of the pandemic, but will rather focus on the little or lack of accompanying State measures providing relief to affected business (eg *ADP International S.A. and Vinci Airports S.A.S. v Chile*). The next few months will provide insight on whether such claims are likely to pile up.

Financial and pension services disputes

Financial institutions are increasingly structuring (or restructuring) their cross-border investments in Latin America to take advantage of investment treaties. This is already leading to the start of investment-treaty claims in the region (*HSBC Latin American Holdings v El Salvador*). We expect this trend to continue as States still grapple with the continued pandemic and the disruption in global supply chains by changing regulations affecting financial institutions. For example, by suspending or limiting their ability to collect on debt, including mortgages, or prohibiting the collection of fees on public projects, with a detrimental impact on the project financing for those projects.

A particular financial sector that has seen treaty cases is that of the administration of pension funds. The cases have arisen from the decision by States to reverse the privatization of pension services and create a public entity to take over from the private administrators (*MetLife v Argentina*; *BBVA v Bolivia*; *Zurich v Bolivia*). We expect more such disputes as similar measures are planned in other States, like Chile where the reform is being discussed by the Constitutional Convention that will propose a new constitution later this year. The role and remuneration of private pension funds is also under scrutiny in Colombia, El Salvador, Mexico, Peru and Uruguay, which might lead to further investment disputes if changes are adopted.

Coupled with the above, COVID-19 has also led States (eg Chile, Peru) to allow contributors to extraordinarily withdraw a certain amount of funds from their private insurance pension schemes, thus directly interfering with insurance contracts. This led last year to two notices of dispute against Chile submitted by the local subsidiaries of pension insurance companies (Ohio National Financial Services and Zurich Insurance Company under the Chile-USA Free Trade Agreement and the Chile-Switzerland BIT, respectively).

Tech disputes

Unlike energy and industrial sectors, tech companies have not relied traditionally on investment treaties to protect investments against interference by foreign governments. That is now changing. Tech companies are becoming more aware of investment treaty protection and are making use of it to face adverse government action, including in response to concession cancellations, unfair and discriminatory data laws, and the protectionist use of tax, antitrust and foreign investment regulation.

A high-profile example is Uber’s January 2020 threat to bring a claim against Colombia under the US-Colombia Trade Promotion Agreement. In response to a complaint filed by a local competitor, the Colombian competition authority imposed a nationwide ban on Uber’s ride-hailing app. The ban was overturned shortly after Uber threatened to commence investment treaty arbitration against Colombia. More recently, Canadian and US investors filed claims against Mexico under the NAFTA and the United States–Mexico–Canada Agreement (USMCA) following Mexico City’s cancellation of a concession to replace all analog taximeters with digital ones and develop an accompanying ride-hailing app (*Espiritu Santo Holdings v Mexico* and *L1bre Holding v Mexico*, now consolidated into one single case).

Telecoms disputes

“Spectrum” is being increasingly viewed as a scarce resource that should be allocated in accordance with public interest principles, with maximum value extracted for the benefit of State coffers. States are thus seeking to revoke spectrum previously allocated to investors or claw back some of the profits earned by investors who were allocated operating licenses and spectrum years ago when their potential value was not so apparent (eg *Telefonica v Peru*; *Telefonica v Colombia*). We foresee an increase in “spectrum value extraction” measures, reminiscent of the sorts of resource nationalism measures we have seen in the energy sector over the years, and an associated increase in investor-State disputes.

Conclusion

ISDS in Latin America is here to stay. While disputes in sectors such as pensions and telecoms are becoming more common in the region, we expect to see a ripening of COVID-related disputes, the consolidation of renewable energy disputes and the birth of new types of disputes in sectors like tech.

Further, the ongoing war in Ukraine has brought oil and gas prices to peaks not seen in recent years. Traditionally, in Latin America, high energy prices have led to government measures seeking to collect all or part of such price increases, from plain and simple expropriations to windfall taxes or contractual renegotiations. This, coupled with political changes such as the recent government change in Chile or the upcoming elections in major resource-rich economies like Brazil and Colombia, can bring a revival of traditional resource nationalism affecting foreign investors.

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