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Arbitrating in Mexico: No Draw-backs for International Arbitration

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The seminar "International Arbitration in Mexico – Latest Developments" took place on March 21, 2019 in New York City (the "Seminar"). International and Mexican practitioners gathered to discuss issues such as the relevant investment climate in Mexico, policy changes from the current administration, as well as, relevant developments in commercial arbitration in the country.

Donald Donovan (Debevoise, NY) introduced the panel, which included Judge Bernardo Sepúlveda Amor and Carlos E. Martínez-Betanzos (Creel, Mexico City) as Speakers, Laura Sinisterra (Debevoise, NY) as Discussant, and Dietmar Prager (Debevoise, NY) as a Moderator, outlining the current situation of Mexico.

Mr Donovan introduced Judge Sepúlveda, to whom he attributed been the key precursor for Mexico joining the ICSID Convention last year, on July 27, 2018. Judge Sepúlveda served as a Judge for the International Court of Justice in The Hague from 2006 to 2015. In the Seminar, Judge Sepúlveda addressed the relevance of Mexico as a key player in international investment law.

We will first refer to the remarks related to investment arbitration and subsequently to the developments in international commercial arbitration.

Mexico as a Relevant Actor in the Investment Treaty Arena

On the investment treaty side, Dietmar Prager began the panel asking about the latest developments in investment arbitration in Mexico, a topic covered by Judge Sepúlveda. He began his presentation mentioning that since President Andrés Manuel López Obrador (also known as "AMLO") assumed office on December 1, 2018, Mexico has been facing a period of uncertainty as many feared a change in certain policies. However, the outlook so far has been positive – with minimal exposure to foreign investment.

Judge Sepúlveda continued explaining that Mexico is treaty bound by a large number of treaties. In the last 20 to 25 years, Mexico has entered into a series of free trade agreements ("FTAs") and bilateral investment agreements ("BITs") containing an arbitration clause. The first and most iconic treaty was the North American Free Trade Agreement ("NAFTA") from 1994, which entered into force immediately after its signature. According to Judge Sepúlveda, the entering into this treaty implied a change in mentality for Mexicans as it was the first time Mexico accepted to

protect foreign investment. Now, after two years of negotiations, this treaty has been replaced. We discuss this further below.

Judge Sepúlveda also referred to the ICSID Convention. He tried to address the reasons why Mexico had only ratified this instrument one year ago. “It is complex”, he said. According to Judge Sepúlveda, politically, the ICSID Convention was not seen as resource needed by the state. Those days are over, Mexico is now a Contracting Party and Mexican investors are relying on it in a claim against Spain.[1)]

The third major agreement discussed in the Seminar was the Trans-Pacific Partnership 2.0 (“TPP 2”), which was originally promoted by the U.S. to cover trade in the trans-pacific region. President Trump, however, on January 23, 2017 – the third day of his presidency – withdrew the U.S. from it. Notwithstanding, from its 11 original members, 7 states, including Mexico, have so far ratified the TPP 2 (Chile being the last one). These constitute promising news for Mexico as the TPP 2 will certainly strengthen its trade relationships in the trans-pacific region.

Fourthly, Judge Sepúlveda pointed to a treaty that is currently being negotiated with the European Union to replace the EU-Mexico Global Agreement which entered into force in 2000.

The participation of Mexico in all of these major trade agreements shows the country’s relevance in international arbitration and its important commitment towards it.

The UMSCA: A Review of Chapter 14

The United States-Mexico-Canada Agreement (“USMCA”) or, as Mexicans like to refer to it “T-MEC” for its name in Spanish, went through a long negotiation of over 2 years to be finally signed on November 30, 2018. As described by Judge Sepúlveda, this treaty had several political implications given the latest tensions between the governments of the U.S. and Mexico, one of those being the lack of enthusiasm from the U.S. government.

In relation to international arbitration, Chapter 11 from NAFTA has been replaced for Chapter 14, a 41-page long document, together with annexes and appendixes. Chapter 14 largely replicates the protections from NAFTA, which are typically found in BITs: minimum standard of treatment (including, fair and equitable treatment, full protection and securities), national treatment (“NT”), most-favored-nation (“MFN”) protection, and protection against expropriation.

Judge Sepúlveda explained that all of these protections are only afforded to investors of specific sectors, so-called “privileged sectors”: oil and natural gas, power generation, telecommunications, transportation and infrastructure. The background to these provisions is that U.S. enterprises are currently doing business in these sectors of the Mexican economy and therefore the U.S. was eager to afford them special protection. Investors from non-privileged sectors can only claim violations to NT, MFN protection and *direct* expropriation. Judge Sepúlveda shared that, this ‘privilege situation’ is found at in an annex to the treaty and needs to be carefully considered.

Another change in the USMCA is that the protections from Chapter 14 do not apply to Canadian investors doing business in the U.S. or Mexico. Canada has waived any right of its investors to seek relief against the U.S. or Mexico for violations to these protections through international arbitration. Canadian investors would then have to seek redress from local courts under this treaty.

Judge Sepúlveda explained, however, that there is another treaty that is applicable between Canada and Mexico to protect foreign investors: the TPP 2.

As to next steps, the USMCA has not yet been ratified by the legislative body of any of its signatory states. Judge Sepúlveda anticipates that the U.S. will face an important negotiation in Congress, now that it is ran by the Democratic Party. It is unclear what reactions or conditions the U.S. Congress might come up with, such as any related to labor or environmental matters under the treaty. In relation to the political strategy of Mexico, Judge Sepúlveda anticipated that Mexico would likely wait for the U.S. Congress to ratify the agreement before debating it before its national congress.

Latest Developments in Commercial Arbitration in Mexico

Once the discussion on investment arbitration concluded, Dietmar Prager continued asking questions about the latest developments in commercial arbitration in Mexico, topic addressed by Carlos E. Martínez-Betanzos.

Mr. Martínez-Betanzos started pointing out that commercial arbitration in Mexico has steadily increased in recent years and that it will likely continue growing with the new AMLO administration. He mentioned that this is also due to the fact that Foreign Direct Investment has continue to grow in Mexico and because of that there are more sophisticated foreign parties investing in Mexico that prefer having arbitration clauses in their commercial contracts.

He continued talking about the preferred international and domestic institutions in Mexico, mentioning that the ICC and the ICDR continued to be the preferred international institutions, with an increase in Mexican cases in 2017 and 2018, but he also mentioned that the LCIA had substantially increased its Mexican caseload in 2018, mainly because of the inclusion of LCIA clauses in CFE and PEMEX contracts. He contrasted the increase in numbers of international institutions with a smaller caseload of domestic institutions such as the Centro de Arbitraje de México (CAM) and the Cámara de Comercio de la Ciudad de México (CANACO).

Carlos emphasized that Mexico as a well-established arbitration system with an arbitration law based on the UNCITRAL model law and with a judiciary that, regardless of some setbacks, is in favor of arbitration. When asked about annulment proceedings in Mexico, he mentioned that annulment of arbitral awards is very rare and that most awards are complied with before even having to go to court for enforcement.

When asked by Dietmar Prager about the risk of "*Amparo* proceedings" in arbitration and how it affects the arbitration process, Carlos mentioned that they are often used by parties in an arbitration—once the award is before a Mexican court in an enforcement or an annulment proceeding—to delay these proceedings.

Laura Sinisterra then talked about the *Amparo* experience in other countries such as Peru, mentioning that in Peru because of the *"María Julia precedent"* an *Amparo* cannot be used to challenge an arbitral award and the annulment proceeding is the only way to challenge awards.

Conclusion

The overall conclusion of the Seminar was that it is indeed a benefit for Mexico that the USMCA was concluded. International investment arbitration is in the process of changing and USMCA is an example of the new provisions that are being brought to the system. USMCA is only an illustration of a change that is taking place over the world. For instance, UNCITRAL is working on the reform of investor-state dispute resolution. ICSID, as well, is in the process of review and consultation of its Arbitration Rules.

In the field of commercial arbitration, it is clear that it has steadily grown, and it is likely that it will continue growing in the foreseeable future. This is because Mexico has a legal system and a judiciary that generally favors arbitration (with the exception of some isolated setbacks in decisions) and it is becoming the preferred dispute resolution method for transnational transactions and sophisticated parties. There is, however, still some work to do by institutions and practitioners in the promotion and use of arbitration.

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References

?1 See GBM Global, S.A. de C.V., Fondo de Inversión de Renta Variable and others v. Kingdom of Spain (ICSID Case No. ARB/18/33)

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