# Kluwer Arbitration Blog

## 2019 in Review: Latin America and Investment Arbitration

Enrique Jaramillo (Locke Lord LLP) · Friday, January 17th, 2020

**Introduction**

In 2019, we witnessed a number of interesting developments in the field of investment arbitration in Latin America. While some of them were in line with expectations, some jurisdictions did deviate from their usual or expected approach to ISDS and surprised us in positive, but also in negative ways. Our authors did a tremendous work covering and sharing their insights on the most important developments affecting our industry. In this post, we aim at giving you a quick look back to some of our most impactful publications in 2019.

**USMCA will not enter into force before May 2020**

Although USMCA was originally signed in November 2018, 2019 went by without its provisions coming into force. According to its text, the treaty takes effect three months after ratification by all three signatories. By the end of 2019, however, neither the United States Congress nor the Canadian Parliament has been able to pass such ratification. This delay was caused mainly by U.S. House Democrats who insisted on modifying the first version of the treaty on a number of issues related – mainly – to including stronger enforcement of labor provisions, and stricter environmental protections.

In December 2019, all three parties signed a Protocol amending the original text of USMCA. Chapter 14 – the section of the treaty dealing with ISDS, which we covered extensively in 2019 (see here, here and here) – is not modified by the Protocol. On the other hand, Chapter 31 – applicable to disputes between signatories – did suffer some minor modifications oriented to eliminate signatories' ability to delay or to block the establishment of a dispute panel. It does so by 1) modifying certain language to ensure the automatic establishment of panels at the parties' request; 2) requiring parties to establish a roster of dispute settlement panelists; and, 3) allowing the roster to be established even if consensus is not reached on the appointments made by each party.

As of today, the updated version of USMCA was already ratified by both the Mexican Senate, the U.S. House of Representatives and the Senate; ratification pending only by the Canadian Parliament. The latter might be the last to ratify the treaty, since it is in recess until January 27, 2020. This being the case, USMCA would not enter into force at least until May 2020 – three months after the potential ratification by all three parties. Under this state of affairs, the North

American Free Trade Agreement (NAFTA) – along with all its substantive and procedural protections – remains in effect.

**Investment Arbitration and claims by dual nationals**

In October 2019, we reported on a PCA Tribunal's award on jurisdiction dealing with a treaty provision allowing dual nationals to bring claims against one of their home states (Lisa Ballantine and Michael Ballantine v. The Dominican Republic). The case is the first publicly known investment arbitration that deals with a provision like this and will most likely be taken as a precedent for similar cases.

The claim was submitted by the Ballantines, citizens of both the U.S. and the Dominican Republic, against the latter, under the Dominican Republic – Central America – United States Free Trade Agreement (the "DR-CAFTA"). DR-CAFTA allows claims by dual nationals, as long as the claimant's "dominant and effective nationality" is that of the non-host country. The Tribunal concluded it did not have jurisdiction to hear the claim, deciding that the claimants did not meet the dominant and effective nationality test. The tribunal reached its conclusion by addressing two substantive issues.

First, the Tribunal concluded that according to both the terms of the specific treaty and the UNCITRAL Rules, the nationality requirement must be fulfilled, first, at the moment the notice of arbitration is received by the respondent and, second, at the date in which knowledge of the breach is or should have been acquired, which is when the alleged breach was committed. Second, the Tribunal decided that – given DR-CAFTA's silence on the matter – analyzing the legal standard for the dominant and effective nationality test required resorting to the customary rules of international law for which "customary international law cases are instructive." Consequently, the Tribunal identified four elements to determine effective and dominant nationality: (i) the state of habitual residence; (ii) the circumstances in which the second nationality was acquired; (iii) the individual's personal attachment to a particular country; and (iv) the center of the person's economic, social and family life.

On account of Article 25(2)(a) of the ICSID Convention, the Ballentines decision will have no effect on ICSID cases. It is, however, relevant precedent for cases arising under treaties allowing dual-national claims, and – potentially – those silent on the matter. According to our author, Pablo Mori Bregante, this is so because the Ballantines award reinforced the concept that in absence of a provision in a treaty, customary international law cases are instructive, and because in at least one ongoing case without a similar provision (*Serafin García Armas v. Venezuela*), French courts have upheld the need to determine the effective nationality.

**Colombia's Constitutional Court conditions FTA ratification to issuance of joint interpretative notes by signatories**

Colombia's reputation as an investor-friendly country is irrefutable. In 2019, however, the nation's Constitutional Court (the "Court") issued a number of decisions in hinderance of both commercial and investment arbitration. In regard to the latter – for the very first time – the Court conditioned the ratification of investment agreements – with France (France BIT) and Israel (Israel FTA) – to

the issuance of joint interpretative notes for certain provisions, including those regarding fair and equitable treatment ("FET"), national treatment, most favored nation ("MFN"), and expropriation. The Court's decisions basically required the signatories to define terms such as "international law," "legitimate/reasonable expectations," "similar circumstances," and others, in line with the Court's own understanding of what those terms encompass.

As reported here and here, the relevance of these cases does not rest so much on the terms the Court required the parties to interpret but on the nature of the rulings itself. Specifically, on whether the Court exceeded its powers, first, by imposing its own views on the content of international investment agreements ("IIAs") on Colombia's Executive Branch; and, second, by asserting jurisdiction over foreign nations by requesting them to issue interpretative notes.

These decisions have dramatically changed the Court's longstanding position regarding IIAs and may have several effects. First, if the Parties wish to pursue the ratification of the treaties, the representatives of Colombia, France, and Israel – respectively – will have to negotiate again either a joint interpretative declaration or the language of the agreements. Second, the interpretations of the Court may become evidence of state practice on how Colombia interprets provisions such as "international law," "legitimate expectations," or "similar circumstances". This may have an impact on on-going and future investment arbitrations against Colombia.

**After a decade-long arbitration, an international tribunal issued award on quantum in *Perenco v. Ecuador* saga**

As reported by Daniela Páez-Salgado and Natalia Zuleta, after more than a decade, last year saw the end of the *Perenco v. Ecuador* saga. This dispute arose years ago from (i) Ecuador's amendment of its Hydrocarbons Law in order to increase windfall profit tax rate for oil and gas operations up to 99%; and (ii) from Petroecuador's decision to unilaterally terminate (declare *caducidad)* Perenco's exploration and production contracts (PSAs). In response to Ecuador's action, in 2008, Perenco brought a claim before ICSID arguing that the South American nation had breached FET standard under the France-Ecuador BIT and that it had unlawfully expropriated its investment. On the other hand, Ecuador also brought counterclaims, under Rule 40 of the ICSID Arbitration Rules, for environmental damages arising out of Perenco's operations.

In 2014, the Tribunal found that (i) Ecuador had breached its contractual obligations to Perenco; (ii) Ecuador had acted in violation of FET, and (iii) that Ecuador's decision to terminate the contract by declaring *Caducidad* amounted to an expropriation. In 2015, the Tribunal also found that Perenco was liable to Ecuador for environmental damage.

Finally, in 2019 the Tribunal issued an award on quantum. This award addressed the damages claimed by both parties; specifically, US$ 1.5 billion for the principal claim, and US$ 2.5 billion for the counterclaims. In the end, the Tribunal awarded Perenco US$ 449 million as compensation for Ecuador's violation of the PSAs and the BIT; and awarded Ecuador US$ 54 million for its environmental counterclaim. Interestingly, the Tribunal appointed an independent expert to award the damages for the environmental counterclaim. Tribunal-appointed experts are not a novelty in international arbitration. However, it has not been very common for investor-state tribunals to appoint independent experts. From 2005 onward, tribunal-appointed damages experts have been engaged in only eight publicly available cases.

**Modernized Canada-Chile FTA entered into force**

In July 2019, Chip Rosenberg and Eduardo Bruera reported the coming into force of the Amending Agreements to the Canada-Chile Free Trade Agreement ("CCFTA"). The amendment updates several key provisions of the CCFTA, for example, it added a section on corporate social responsibility ("CSR") reaffirming the parties' commitment to globally endorsed CSR standards. It also includes procedural enhancements to the investor-state dispute settlement mechanism with respect to a number of modern considerations, including preliminary objections, awarding of costs, ethical considerations, third-partying funding, and transparency.

The amendment of the CCFTA was in line with Chile's IIA agenda in recent years, *i.e*. to concentrate on comprehensive free trade agreements (FTAs) with investment chapters, instead of on BITs.

**Conclusion**

The intervention of Colombia's Constitutional Court aside, 2019 was arguably a good year for investment arbitration in Latin America. The Perenco-Ecuador arbitration seems to be finally coming to an end, and Chile continues to move forward with the modernization of its IIA program. Granted, the year went by without the USMCA coming into effect, but the AMLO administration has dispelled investors' concerns and, instead of reneging of treaty terms negotiated by the previous administration, it reasserted Mexico's commitment to ISDS and international trade.

We expect to see as many interesting developments in 2020 as we did in 2019, *e.g*., the ratification of USMCA and the resulting termination of NAFTA; the development of annulment proceedings initiated by Ecuador following issuance of the Perenco quantum award; and, hopefully, news on the ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in Chile and Perú. We look forward to receiving our readers and contributors' insights on these and other matters.

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This entry was posted on Friday, January 17th, 2020 at 4:00 am and is filed under 2019 In Review, Chile, Colombia, Constitutional Court, Damages, Dominican Republic, Dual Nationals, Ecuador, Free Trade Agreements, Investment Arbitration, Latin America, Mexico, USMCA
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