Kluwer Arbitration Blog

2020 in Review: Latin America and Investment Arbitration

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In 2020, we witnessed a number of interesting developments in the field of investment arbitration in Latin America. From the entry into force of the United States – Mexico – Canada Agreement (USMCA) signed over a year ago, as well as numerous cases and actions still arising from the Odebrecht scandal that became public back in 2016, to the conclusion of treaties departing from the traditional approach to investor-State dispute settlement (ISDS). Our authors did a tremendous job 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 2020.

A new era for investment arbitration in Mexico

In 2020, Mexico gained positive attention by strengthening its commitment to ISDS. The United States – Mexico – Canada Agreement (USMCA) finally entered into force in July 2020. The USMCA succeeds the North American Free Trade Agreement (NAFTA) and covers a range of trade-related issues, and investment protection. As reported by Kiran Gore and Esmé Shirlow, the USMCA provides an ISDS mechanism that departs in many ways from the one established in NAFTA. Glaringly, Canada is not a party to the ISDS mechanism. ISDS survives only for the benefit of American and Mexican investors, and even then, with certain procedural and substantive restrictions.

Likewise, in April Mexico and the EU released a draft text of the upcoming EU-Mexico Free Trade Agreement, including its proposed Investment chapter (including ISDS provisions). There are various innovations in the agreement. For example, it removes the system of party-appointed arbitrators in favor of a pre-selected pool of arbitrators, appointed by States. It also includes a permanent appellate arbitration court also appointed by the States. As pointed out by our authors, Danny Davila II and Nicolas Borda, removing party-appointed arbitrators is a stark change from typical ISDS clauses and will test the debate between those in favor of maintaining the *status quo* and those proposing a centralized appointment mechanism. In regard to the appellate mechanism, the same authors note that this novelty has strengths, such as enhanced consistency, but also weaknesses, such as the replacement of parts of the traditional system, like the finality of awards.

The Odebrecht scandal: What's the burden of proof to prove corruption acts?

It's been almost four years since Odebrecht admitted to paying bribes to obtain infrastructure contracts throughout Latin America, and the consequences stemming from the scandal are still making the headlines.

In Colombia, a national arbitration tribunal in the *Ruta del Sol* case ruled in favor of the government, and declared an infrastructure contract null and void, concluding that it was obtained and awarded through corrupt practices. This case is peculiar, however, because it deviates from the current trend in regard to both gathering and assessing evidence of corruption. Regarding the gathering of evidence, the tribunal adopted an active – as opposed to a passive – role. The Tribunal decided to go beyond and didn't limit its determination on evidence obtained from the parties and other proceedings. It assumed an active role: it undertook its own investigation; it obtained additional evidence and made its own determination regarding the validity of the corruption allegations. In assessing the evidence, the Tribunal seemed to have deviated from the preponderance of the evidence standard, which is customary in civil cases. Specifically, the Tribunal established that, to prove acts of corruption, the evidence should prove them without any doubt. Therefore, implementing a burden of proof resembling the clear and convincing evidence standard.

Peru is probably one the countries most affected by the Odebrecht scandal. In the *Rutas de Lima* case, an arbitral tribunal – hearing a case between a consortium led by Odebrecht and a Municipality – decided that, in accordance with the current trend in international arbitration, it was bound to apply a preponderance of evidence standard. In other words, the Tribunal concluded that it had to decide whether it was more likely than not that the contract was obtained through corrupt means. Ultimately, the Tribunal rejected the corruption allegations holding that the casual link between the evidence and the contract was insufficient.

In yet another case arising from the corruption scandal, in February 2020, Odebrecht registered a request for arbitration before the International Centre for Settlement of Investment Disputes (ICSID) against Peru, in relation to a concession agreement for the improvement of a pipeline in Peru. As to this date, the case has not moved forward as the Tribunal is not constituted yet. Carlos Matheus opines that, once all the members of the Tribunal are appointed, Peru is likely to use the "clean hands doctrine" to allege lack of jurisdiction. In doing so, Peru will have to prove that the acts of corruption that it alleges actually took place, which in turn will depend on the standard of proof used by the Arbitral Tribunal. The ICSID Convention and the Arbitration Rules are silent on this matter, on which there is no consensus in Investor-State jurisprudence. However, as Pablo Mori Brigante noted, arbitral tribunals currently tend to apply a more flexible standard (preponderance of the evidence) to prove acts of corruption, like the *Ruta del Sol* Tribunal.

As reported here, Odebrecht's corruption was not limited to bribes to get contracts from government agencies. It also including bribing arbitrators to obtain favorable awards, in order to increase the value of certain contracts and, hence, increase the company's profits. In response to this ploy, public and private entities in Peru have endeavored to develop a means to prevent this from occurring yet again, or at least to minimize the risk of recurrence. For example, our authors reported that the National and International Arbitration Center of the Lima Chamber of Commerce (LCC Arbitration Center) launched a digital platform named "Faro de Transparencia" ("Transparency Lighthouse"), aimed at providing public access to key pieces of information with regard to arbitrations administered by the institution as well as the arbitrators acting in them since 2012. The digital platform publishes the full texts of the awards that have been issued in proceedings involving the Peruvian State as a party, and special anonymized summaries of arbitral

awards that have been issued in commercial cases. In the same vein, Rafael Boza reported that, in January 2020, Peru amended its arbitration law to increase transparency to any arbitration in which the Peruvian Government is involved. The amendment, for example, bans *ad hoc* arbitration in almost all cases involving the State, and establishes that the drafting of an arbitration clause is a multi-department process resting on both the contracting agency and the attorney general's office.

Interpretation of treaty provisions – or lack thereof – in investment arbitration

In the passing year, we also reported more than a few issues relating to treaty interpretation and the interplay between arbitration tribunals and courts. In regard to Latin America specifically, Inaê Siqueira de Oliveira noted the development of two cases arising under the Spain–Venezuela BIT, in which the corresponding tribunals and courts diverged in the interpretation of the same term: the applicability of the treaty to "any kind of assets, invested by investors . . . ."

In *García Armas v. Venezuela*, Venezuela objected to the jurisdiction of the Tribunal, alleging that the claimants were not nationals of Spain when they made investments in Venezuela; they obtained Spanish citizenship only a few years later. Hence, the respondent argued, the treaty protections did not apply to them because they were not "investors," when the investments were made. The Tribunal issued a jurisdictional award in favor of the claimants, holding that the claimants' nationality when making the investment was not relevant. The relevant dates were those pertaining to (a) the alleged treaty breach and (b) the commencement of the arbitration. A French Court of Appeals partially set aside the jurisdictional award concluding that nationality at the time of the investment was relevant. This decision was eventually overturned by the French Supreme Court. In June 2020, however, the Court of Appeals rendered a new decision in the annulment proceedings to fix the previous error, reaffirming its prior interpretation and setting aside the jurisdictional award in its entirety.

In *Clorox Spain v. Venezuela*, the South American nation argued that the tribunal lacked jurisdiction because the claimant – Clorox Spain – had not "invested" in Venezuela, it had merely received shares in Clorox Venezuela, the local investment vehicle, from its parent corporation – US-based, Clorox International. In the award, the tribunal sided with Venezuela's interpretation, and held that Clorox Spain *prima facie* had an investment, but that treaty protection was limited to assets "invested by investors", so an action of investing was also required. In March 2020, Switzerland's highest court set aside the *Clorox* award. Unpersuaded by what it called a "particular importance" given to the term "invested by investors," the Swiss Federal Tribunal held that Article 1(2) is an ordinary asset-based definition of investment – known for its openness.

In a somewhat similar case – *Michael Lee-Chin v. the Dominican Republic* – the respondent challenged the jurisdiction of the tribunal not based on what the treaty said, but on what it omitted. Particularly, the Dominican Republic argued that, unlike the language used in other treaties it signed, the treaty in question (the Free Trade Agreement between the Caribbean Community and the Dominican Republic -"CARICOM-DR FTA") provides for three different disputes resolution mechanisms, but does not expressly allow the investor to unilaterally choose one of them. Hence, investors cannot resort to any of those mechanisms without the State's agreement. The majority was not persuaded and held that a difference in wording between treaties could hardly prove which interpretation should be preferred, or be evidence a "special meaning" for a term under Article 31 (4) of the Vienna Convention on the Law of Treaties (VCLT). Hence, the tribunal concluded that

even if the ISDS clause of the CARICOM-DR FTA does not specify the investor's right to choose among the dispute resolution mechanisms, that did not entail that such right was not conferred by the Treaty.

Conclusion

We expect to see as many interesting developments in 2021 concerning arbitration in the Latin American region, just as we did in 2020. Once the EU-Mexico FTA is in force, it will certainly be interesting to see how such stark deviations from the traditional system – lack of party-appointed arbitrators and existence of an appellate mechanism – play out. Likewise, we expect to keep reading about cases related to the Odebrecht scandal, expanding existing case law on the role of arbitral tribunals in gathering evidence and the standard used to prove acts of corruption. Last but not least, we expect to see a number of cases and post discussing ways in which COVID-19 has impacted international investments and, hence, investment arbitration.

We look forward to receiving our readers and contributors' insights on these and other matters at **kluwerarbitrationblog@outlook.com**.

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