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Investment arbitration in Chile, Colombia, Mexico and Peru: Where are we and where are we going?

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On November 26, 2020, the #YoungITATalks session took place with the participation of representatives from government offices of different countries: Mairée Uran Bidegain (Chile), María Paula Arenas Quijano (Colombia), Cindy Rayo Zapata (Mexico) and Ricardo Ampuero Llerena (Peru). All panelists are or, at some point, were responsible for organizing and preparing the defense of States in investor-State disputes. The moderators were Sylvia Sámano Beristain and Andrés Talavera Cano.

Developments and novelties in the treaties entered into by Colombia, Mexico, Chile and Peru

The panel started with the intervention of Mrs. Arenas, who detailed how Colombia's approach to international investment agreements (IIA) has evolved. She explained that, when international investment agreements began to be signed, Colombia's aim was to enhance the country's visibility in the international arena. Currently, Colombia's policy of attracting foreign investment focuses on efficiency, namely, on making the local economy more proactive, in order to attract more productive investment that leverages better quality jobs. Within this framework, the Superior Council of Foreign Trade has instructed the Government to engage in the modernization of IIAs by making sure that the language of new agreements and their provisions seek a balance between the interests of the State and the attraction of foreign investment.

In the case of Mexico, Mrs. Rayo stated that the modernization and updating of IIAs began in 2012 with the Trans-Pacific Partnership Agreement (TPP), now CPTPP, and continued in 2017 with the United States-Mexico-Canada Agreement (T-MEC, its abbreviation in Spanish) which includes a modern investment chapter with provisions that reflect the experience of Mexico, Canada and the United States in investment arbitration; the disciplines contained in this chapter reflect the jurisprudence of NAFTA.

On the other hand, Mrs. Uran, analyzed the cooling off period from the point of view of the States. From her perspective, this is an important conflict prevention mechanism that has not had the expected results, among other reasons, because investors do not provide the State with the necessary inputs for it to evaluate and establish on a well-founded basis whether and why an amicable solution would be warranted. This manifests itself in two ways. The first is that investors

present claims under domestic law, as if investment arbitration were “an additional instance” of review of State decisions, rather than presenting their treaty claims under international law from the outset. The second is to refrain from submitting relevant background information to the State. Claimants generally fail to submit all the information that would support their claims and monetary claims – notwithstanding a confidentiality agreement – which dooms the negotiation process to failure.

Finally, in the case of Peru, Mr. Ampuero pointed out the steps necessary to enter and implement an agreement to solve a dispute (transaction) with the Peruvian Government. First, a viable solution formula must be determined in two senses: technical (having the favorable opinion of the entities involved in the dispute, which are part of an ad-hoc commission) and legal (not violating any legal provision within the transaction). Then, a Supreme Resolution is signed by the President and the Ministers of the sectors involved in the ad-hoc commission and the Minister whose sector must implement the transaction formula. Finally, the compromise formula is signed. This mechanism has worked well because it divides the evaluation of the transaction into a technical stage (which is carried out by the Special Commission) and a political evaluation stage (by the Council of Ministers, where the political impact, among others, is studied).

Relevant aspects in emblematic cases

The second topic addressed by the panelists was relevant defense aspects from emblematic cases. In the case of Chile, Mrs. Uran referred to Pey Casado, in which the State prevailed after 22 years of litigation in which all the remedies and procedural instances provided by the ICSID system were exhausted, making it the longest ICSID case. This case made it possible to point out that compliance with the principle of *res judicata* in a scenario of parallel proceedings is still a pending issue in the ICSID system and damages its credibility.

In the case of Mexico, Mrs. Rayo focused on best practices for the defense, during the notice of intent to arbitrate stage and the arbitration process. She explained that, when the notice of intent is received, the first thing to do is to establish contact with the agencies or entities to whom the claims are attributed, as well as to gather and preserve information to analyze the merits of the claim and prepare a good defense. Regarding parallel proceedings, Mrs. Rayo mentioned that this is a recurring phenomenon in ICSID and it usually involves the analysis of the very same measures but claimed by shareholders and/or subsidiaries of an original claimant, under different treaties. This results in increased defense costs, contradictory decisions, double damages, among others. In view of these situations, treaties should have clear rules that allow the parties, with prior consent, to consolidate multiple claims, even when they are brought under different treaties.

With regard to Colombia, Mrs. Arenas commented that, in recent years, Colombia has been one of the most sued States in investment arbitration. Out of a total of 141 countries, Colombia ranks 19th as a respondent country. She also emphasized the importance of the Constitutional Court’s review, in the last stage before the ratification of the Colombia-Israel FTA, in which investment protection, the most favored nation clause and reasonable expectations were reviewed (this issue was analyzed in a previous post here). By the same token, for the Agreement for the promotion and protection of investments concluded with France, the provisions on equal treatment of investments, fair and equitable treatment and most favored nation had to be reviewed as well (this issue was analyzed in a previous post here).

Finally, to close the panel, Mr. Ampuero referred to the possibility of counterclaims by States in investment arbitration, an option that is quite debatable since, in principle, most tribunals have considered that treaties provide for obligations for States and rights for investors. The case of Peru is particular because it decided to include ICSID clauses in investment contracts, a situation that has generated two major effects: (i) an increase in the number of cases that the Peruvian State has to face on the basis of such contracts (Peru currently has 17 arbitrations), and (ii) the possibility of filing counterclaims by the Peruvian State. Moreover, a few years ago, Peru was the first Latin American country to act as claimant in Republic of Peru v. Caravelí case before ICSID a process that was concluded by agreement between the parties.

"Coordination Instance" implemented by the Pacific Alliance.

Finally, the panelists highlighted the importance of the creation and adoption of the Coordination Instance implemented within the framework of the Pacific Alliance (PA). From what was explained by the panelists, this Instance is a forum created to constantly share information and experiences between the PA States, in order to implement better decision making in relation to IIA and its controversies.

Mrs. Uran commented on its genesis. In this regard, she indicated that it was born out of 4 observations: (i) the PA States have faced more than 70 arbitrations and have collectively participated in the great changes and developments that the system has undergone since its inception, (ii) the four States face similar realities and have established a great technical capacity in the area of investment disputes, and therefore it is beneficial to share the experience of the four States, (iii) there is an interest in joining positions with respect to the proposals for reform of the ISDS system, in order to increase the degree of influence of each State in international forums and to strengthen the PA, and (iv) the States share the objective of preventing international liability and favoring investment, while safeguarding the regulatory capacity of the States.

To this, Mrs. Rayo referred that as part of several actions being carried out by the Coordination Instance, the dispute prevention project proposes the preparation of a prevention manual that should contain informative material in simple language on the disciplines related to these investment arbitration matters, including examples of the type of measures that, if implemented by the authorities, could result in a violation of the investment agreements. It is not ruled out that training and workshops for officials could be held in the future.

Mr. Ampuero indicated that the reason behind the creation of the Instance is to have more information for better decision making. There are some problems that are inherent to the States and others that are the result of their management, which is why sharing experiences in this regard is important and valuable.

Finally, Mrs. Arenas emphasized the importance of the Pacific Alliance Investment Subcommittee in the creation of the Coordination Instance and its role in the negotiations on investment defense, generating very productive interactions for the analysis of these matters.

In conclusion, Latin American States like Chile, Colombia, Mexico, and Peru have gained important experience in investor-state disputes; this is reflected in their policies to attract foreign investment, the language used in the provisions of new international investment agreements, and the efforts made to implement mechanisms related to the prevention of investor-state disputes that

save costs for both parties such as the cooling-off period or agreements; however, these do not always have the expected results. Last but not least, coordination between States facing similar realities never have been more important, the Coordination Instance implemented by the Pacific Alliance is an example of it, in order to increase the influence of States in the investor dispute system.

This entry was posted on Wednesday, April 14th, 2021 at 8:27 am and is filed under Arbitration, Chile, Colombia, ICSID, Investment, Investor, Mexico, Peru, State
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