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?2021 in Review: Latin America and Investment Arbitration?

Enrique Jaramillo (Locke Lord LLP) · Thursday, December 16th, 2021

In 2021, we witnessed a number of interesting developments in the field of investment arbitration in Latin America. From Mexico's actions potentially triggering numerous treaty claims, to Colombia's four consecutive victories, to Ecuador's return to the International Centre for Settlement of Investment Disputes (ICSID) Convention. Our authors did a tremendous job covering and sharing their insights on the most important developments affecting our field. In this post, we aim at giving you a quick look back to some of our most impactful publications in 2021.

Mexico: A Wave of Investment Claims on the Horizon?

As reported here, during the first months of 2021, the Mexican government adopted and proposed a number of legislative initiatives affecting the country's power and hydrocarbons (O&G) markets.

In the O&G realm, the Ministry of Energy (SENER) issued the new Hydrocarbon and Fuel Import and Export Rules (the "Import/Export Rules"). Among other things, the Import/Export Rules established a summary proceeding mechanism to revoke existing import/export permits and shorten the validity of new permits from 20 years to 5 years. In addition to the Import/Export Rules, Congress approved an amendment to the Hydrocarbons Act granting State-owned entities a greater role in the mid- and downstream sectors. Specifically, the amendment granted the Government the power to suspend or revoke permits on grounds such as "national and energy security" or the "security of the national economy."

In the power sector, Congress passed a bill amending Mexico's Electricity Industry Law (the "Electricity Bill"). The Electricity Bill removed some of the prerogatives granted to private investors when the market was liberalized in 2013. For example, it granted priority access to the grid to State-owned CFE (Comisión Federal de Electricidad), in detriment of private wind and solar energy generators, it eliminated CFE's obligation to purchase electricity from said generators and allowed CFE to issue Clean Energy Certificates (CEL) which – prior to the Bill – could only be done by private generators.

Given the relevance of these measures, thousands of companies filed "Amparos," legal action seeking to enjoin them on constitutional grounds. At the time, the courts suspended the application of said measures. However, as of December 2021, some of those courts have already lifted such injunctions. Furthermore, the Executive Branch has engaged in a number of action directed at circumventing the judicial blockage. These actions include the promotion of a constitutional

amendment, directed at modifying the electricity legal framework and giving the CFE greater regulatory and market power.

The endeavors of Mexico's government to modify the market liberalization of 2013 have been defined as the "Energy Counter Reform," and where the central topic of the Tenth Investment Arbitration Forum? that we covered here and here. During the event, several experts discussed the nature of this so-called counter reform and its potential to be considered a violation of some investment protections established in the various treaties to which Mexico is a signatory, including – at least – thirty-six bilateral investment treaties (BITs), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the United States-Mexico-Canada Agreement (USMCA).

Ecuador: New Government Wants to Get Back in the Saddle

In 2017, we summarized Ecuador's efforts to withdraw from ISDS. Some of the most decisive steps where denouncing all the country's BITs (2008, 2017), as well as the ICSID Convention (2009). Ecuador also passed a constitutional reform prohibiting the Government from submitting disputes to the jurisdiction of non-Latin American tribunals, whose jurisdiction did not stem from instruments among Latin American parties (2008).

In June 2021, Daniela Páez-Salgado reported Ecuador's return to ICSID with the signature of the Convention by Ecuador's Ambassador to the United States. Although under Ecuadorian law, the power to enter into and ratify international treaties lies with the President, a legal discussion arose regarding whether the ICSID Convention fell within one of the exceptions to this presidential power. Such exception is found in Article 419 of the Constitution that states:

> *Article 419: Prior approval by the National Assembly shall be required in order to ratify or denounce international treaties where:*
>
> *(. . .)*
>
> 6. ***They bind the country into integration and trade agreements.***
> 7. ***They confer competences inherent to the domestic legal system to an international or supranational body.***
>
> *(. . .)*

(Free translation) (Emphasis added).

The answer to the debate was left to the Constitutional Court (the "Court") which, under the Organic Act of Jurisdictional Protections and Constitutional Control?, must determine whether prior approval from the National Assembly is required pursuant to said article of the Constitution?.

A month following Ecuador's signature, Andrés Larrea reported that the Court ruled in favor of the government and decided that prior approval from the National Assembly was not required. The Court ruled that ratification of the ICSID Convention did not require prior legislative approval

because the ICSID Convention does not contain clauses creating obligations intended to regulate trade between its Member States, nor are there any provisions forcing States to enter into a process of economic integration. The Court also decided that the Convention does not confer competences inherent to the domestic legal system to an international or supranational ?body?. The Court reasoned that ICSID establishes the possibility, but not the obligation, to submit a dispute to its dispute resolution system. Being a party to the ICSID Convention does not translate to automatic consent to arbitrate. Ecuador would have to consent on a separate instrument such as a BIT, a bilateral investment contract, or an investment protection law to arbitrate a specific investment dispute in order to be bound by such agreement. The Court also clarified that the ICSID Convention does not confer competences of its internal legal order to international bodies, because "the resolution of disputes between States is not a competence of internal legal order".

Colombia: Wave of Victories for the South American Nation

The first half of 2021 saw a wave of investment arbitration case decided in favor of Colombia.

The first decision came in March from the case of Naturgy v. Colombia, initiated under the Spain-Colombia BIT (the "BIT"). Naturgy claimed that its investment in Electrocaribe (power utility) was expropriated following a takeover by the national authority regulating public utility services. Pursuant to Law 142 of 1994, the State can take temporary control of public utilities as a "preventive" measure in certain cases. Some of the situations include (1) when the company can no longer provide services with the quality and continuity required if such service is indispensable to preserve public or economic order; (2) to avoid serious damage to users or third parties, and (3) if the company has suspended or might suspend payment of its obligations. Colombia argued that intervention in the company was a valid exercise of its police powers, that the requirements for takeover under domestic law were met, and that the intervention was justified. The award concluded that Colombia legitimately exercised its police powers because the requirements for takeover under Law 142 of 1994 were met. The takeover was justified by Electricaribe's financial distress, the danger of the disruption of service, and a 'systemic risk' that the company could no longer comply with its financial duties to purchase energy in the national market (¶ 468). Hence, the Tribunal decided that Colombia's takeover was not an expropriation and Colombia accordingly did not owe compensatory damages to the claimant.

In May, a tribunal issued another decision in favor of the State in América Móvil v. Colombia, a case initiated under the Colombia-Mexico Free Trade Agreement (the "FTA"). América Móvil claimed that Colombia breached the FTA by expropriating its "Right to Non-Reversion" and certain assets affected to concession contracts granted in 1994 (the "Assets"). América Móvil's concession contract incorporated a reversion clause providing that at the end of the concession term, all the elements and assets affected to the concession would become property of the Nation, without any compensation from the latter. On July 30, 2009, Congress enacted Law 1341. Article 68.4 of such law provided that in telecommunication concessions in effect at the time of its entry into force, operators would only be obliged to revert the radio frequencies assigned to the Concessions – not the Assets. Joining the new regime entailed the anticipated termination of the concession, thus the operator had to request a new title for operating (the "Transition Regime"). In 2013, América Móvil requested to join the Transition Regime. Prior to acceptance of the claimant's request, the Court published Judgment C-555 in which it analyzed whether Article 68.4 should be understood as to derogate the reversion clauses incorporated in public contracts executed

before the entry into force of Law 1341 or whether those clauses should remain in force. The Court concluded that the law did not derogate the Reversion Clauses and therefore these continued to be binding for the parties. The majority of the Tribunal concluded that the alleged "Right to Non-Reversion" did not exist under Colombian domestic law or international law and therefore there was no right subject to expropriation. The Tribunal therefore found no breach of the FTA and denied Claimant's request of compensation of US$ 1,286,517,675.

Finally, Colombia prevailed in two arbitrations under the Colombia-US Trade Promotion Agreement ("TPA"). The claims were filed by the Carrizosa family under the UNCITRAL Arbitration Rules, and under the ICSID Convention. In both arbitrations the Carrizosa family alleged that Colombia breached the fair and equitable treatment and national treatment standards, the affecting their investment in Granahorrar, a financial institution in which the claimants were shareholders. In the late 1990s Colombia suffered an economic crisis, which caused Granahorrar's financial standing to deteriorate. In consequence, the Superintendency of Finance ordered Granahorrar to raise approximately US$ 99.8 million in new capital to offset its insolvency. Granahorrar could not raise the additional capital. In consequence, the Superintendency issued a report to Fogafín (a Government entity created to protect savings) concluding that Granahorrar was insolvent and illiquid. Fogafín's board decided that the Government would take over Granahorrar, and ordered the company to reduce the nominal value of its shares to COP 0.01. The financial situation of Granahorrar improved and Fogafín sold Granahorrar in 2005. Following these events, the Carrizosa family initiated a number of domestic legal actions seeking compensations, which ended with the Constitutional Court dismissing their request. In their international disputes, the Carrizosa family also failed as, in April and May 2021, both tribunals found that they did not have *ratione temporis* jurisdiction over their claims.

Conclusion

We expect to see as many interesting developments in 2022 concerning arbitration in Latin America. It will be interesting to see whether the Mexican Executive succeeds in the advancement of the so-called Energy Counter Reform and the response from the industry in turn. From this, we will be able to analyze different legal strategies as well as decisions, based on the plethora of investment treaties to which Mexico is a signatory. Likewise, we expect to see how Ecuador's return to ISDS develops. As mentioned before, although the country is again a signatory of the ICSID Convention, it still needs to provide its consent to international arbitration through other means such as BITs. It will be interesting to see whether and how the country will be able to overcome the government's constitutional prohibition to submitting itself to the jurisdiction of non-Latin American tribunals. We also expect to keep hearing from Colombia, especially in view of a couple of claims arising from the mining industry lately, as well as from Peru which was one of the most frequent respondents in 2021. Finally, although we did not get as many reports from Brazil as in previous years, we anticipate the continuance and strengthening of the country's unique approach to arbitration.[1)] Specially, in light of the nation's adoption of the Government Procurement Act ("GPA") in April, which contains a chapter exclusively dedicated to dispute resolution (ss. 151 to 154), which reinforces Brazil's arbitration-friendly framework.

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References

?1 As many readers may know, Brazil has not yet signed the ICSID Convention, the CPTPP or BITs with investor-state dispute settlement mechanisms. Unlike the vast majority of countries, Brazil believes that it does not need to sign any investment treaties to attract foreign investment

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