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Inaugural World Arbitration Update: A New Era for ISDS in the Americas and the Caribbean – Transitioning to the USMCA, Looming Disputes in Mexico and Novel Quantum Approaches

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The World Arbitration Update conference, held on 11 to 15 October 2021, aimed to update the international arbitration community on the latest North American continental trends and developments. This blog post addresses two of the WAU's panel discussions regarding (1) the outlook on the trends and developments in the Americas and (2) Caribbean-related arbitrations involving renewable energy and climate change. The discussions were timely and important, especially in light of the COP26, which was held on 31 October to 12 November 2021.

Ian A. Laird (Crowell & Moring) moderated the panel on the ***Outlook on the Americas***, which consisted of Dr. Todd Weiler (Independent International Arbitrator), Adrian Magallanes (Von Wobeser & Sierra), Marinn Carlson (Sidley Austin) and Lauren Mandell (WilmerHale). The panel analyzed NAFTA's legacy and discussed what the future holds for the new United States-Mexico-Canada Agreement (USMCA).

Christina Beharry (Foley Hoag) moderated the panel on ***Arbitration in the Caribbean on Renewable Energy and Climate Change,*** which discussed disputes in renewable energy in the Caribbean community and whether litigation risks may discourage states from taking climate policy action and developing renewable energies. The panel consisted of government representatives Senator Sherene Golding Campbell (Jamaica) and Dia C. Forrester (Attorney General of Grenada), as well as Seabron Adamson (Charles River Associates), who provided a counsel perspective, and Daniel Flores (Quadrant Economics), who focused on the quantum aspects.

The USMCA: A Post-NAFTA Iteration?

Mr. Laird started the session with introductory remarks on the transition from NAFTA to the USMCA. In particular, he noted that NAFTA's three-year "sunset" period would play an important role in future disputes, as parties could bring legacy claims up till the beginning of July 2023. Dr. Weiler noted that such legacy claims can only be brought pursuant to investments that existed after NAFTA came into effect on 1 January 1994 but before the USMCA came into effect on 1 July

2020. He also flagged that the 90-day time limit (the "cool-off" period) for giving notice of potential NAFTA claims would apply, which is a mechanism aimed to encourage parties to settle. Therefore, while the USMCA signifies a shift from NAFTA policy, NAFTA may still be relevant for some time, due to legacy investments.

Looking at the USMCA and the future

While NAFTA was valuable for introducing key procedural innovations in ISDS, including for example enhanced transparency and a provision for amicus participation, USMCA is the framework for present day developments. In relation to Mexico, Mr. Magallanes observed that the energy sector in Mexico may now be in flux. In particular, the Mexican government implemented a change in policy, which involved the cancellation of long-term public biddings and clean energy certificates and the implementation of a new electricity act. However, the Mexican government suspended these changes following constitutional challenges by investors. Mr. Magallanes noted other proposed energy reforms which, if passed, could trigger protections under Annex 14-E of the USMCA which deals with "covered government contracts". Although there appears to be no "investor" damages to date as a result of the reforms that were halted, Dr. Weiler raised the interesting possibility that investors could claim damages based on the "amparo" constitutional appeal process that was unveiled as part of Mexico's 2013 energy reforms (a topic discussed in more detail in a prior post).

Comparing the USMCA and NAFTA, Ms. Carlson considered how investors may "vote with their feet", for example, by investors scrambling to file NAFTA legacy claims within the sunset period deadline. She also queried whether investors would, moving forward, restructure their new investments through other countries to secure protection under other treaties.

The panelists then discussed the future of ISDS and whether the USMCA signals any change in government policy. The general sense was that the approaches taken by the United States, Canada, and Mexico would not necessarily be determinative of what they would do in the future. For example, Dr. Weiler noted that Canada appeared to have other specific priorities ahead of ISDS, such as trade and environmental issues for the USMCA negotiations, and that it would be difficult to predict what Canada may do about ISDS in other treaties. Ms. Carlson, noting that the 2012 US model BIT provides for ISDS, concurred that the US-Canada approach of jettisoning ISDS in the USMCA would appear to be one-off.

Renewable Energy Policy Action in the Caribbean: The Right to Regulate in The Context of ISDS

The WAU continued its update endeavors with the panel on renewable energy in the Caribbean. Ms. Beharry highlighted the energy concerns in Caribbean states, including the lack of reliable electricity and its high cost, and their vulnerability to the effects of global warming. Indeed, several countries in the Caribbean have turned to renewable energy (i.e. Jamaica). Countries in this region are well placed to become renewable energy producers due to their high annual solar irradiation, high average wind and geothermal energy on volcanic islands, and the potential for biomass on islands with large agricultural sectors. Senator Campbell of Jamaica explained that although Jamaica has relied on fossil fuels for a long time, it is diversifying its energy matrix and

transitioning to renewables. Ms. Beharry reminded the audience that with these developments comes the potential threat of high-profile renewable energy disputes.

In this regard, as arbitration in the Caribbean increases, dispute resolution institutions, such as the BVI International Arbitration Centre, Jamaica International Arbitration Centre, Arbitration and Mediation Court of the Caribbean in Barbados, and the Dispute Resolution Centre of Trinidad and Tobago, may be used, offering a pool of experienced professionals in the region.

The panelists identified a few notable cases in the renewable energy sector in the Caribbean, including *FW-Oil Interest Inc v. Republic of Trinidad and Tobago*, which was dismissed as the claimant did not hold an investment, and *Grenada Private Power Limited and WRB Enterprises Inc v. Grenada*, which stemmed from the privatization of GRENLEC in 1994, whereby the tribunal noted that "[t]he grant of a monopoly [to GRENLEC in 1994] was important to profitability", and "affected the price that investors [] were prepared to offer for shares in GRENLEC". The speakers noted that the complexities of the Caribbean energy market, which were highlighted in these cases, may resurface in future disputes, following Caribbean states gaining independence and the prevalence of privatizations and monopolies in small island states.

The Reasonable Rate of Return: A Novel Quantum Approach to Consider for Renewable Disputes in the Caribbean

Damages valuation has also been of utmost importance at the outset of potential renewable energy claims in the Caribbean. Mr. Flores mentioned a shift over the last ten years, as arbitrations involving renewable energy have been brought on the basis of energy regulatory changes (cases involving Spain, Italy, Czech Republic, Romania, Canada and Ukraine) rather than pure breaches of contract.

Mr. Flores explained that a balanced approach to the expectations of investors may be best encompassed in the Reasonable Rate of Return (RRR) metric, most notably argued in the Spanish Energy Charter Treaty (ECT) cases. Mr. Flores further noted that the RRR entailed the expectation of the investor to receive acceptable levels of profitability; whilst investors should not aim at expecting a freezing of the legal framework, regulators should take stock of past disputes and act reasonably. He concluded that renewable energy investments should not be expected to create windfall profits, especially not on the scale of those seen in the last six years.

Conclusion

The World Arbitration Update (WAU) panels focused on North America and the Caribbean did not disappoint, updating attendees on the latest ISDS developments in the region, including potential disputes that could arise under the USMCA, and novel quantum approaches that may be used in future energy disputes. Capitalizing on lessons learned from NAFTA and energy disputes, North America and the Caribbean are well positioned to witness future developments, introducing a new era in regional ISDS.

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