Kluwer Arbitration Blog

First Mexico Arbitration Week: Current State of Affairs of Investment Arbitration in Latin America

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From 29 May to 1 June 2023, Mexico Arbitration Center ("CAM"), the Mediation and Arbitration Commission of the Chamber of Commerce of Mexico City ("CANACO"), and the CAM/CANACO Young Arbitrators Forum came together to organize the inaugural edition of Mexico Arbitration Week. This event aimed to connect professionals from the international community, foster debates, and promote Mexico as a prominent hub for international arbitration.

The first edition featured seven panels, two fireside chats, and an impressive lineup of over sixty distinguished speakers. The event welcomed more than 120 attendees. In this post, we focus on one of the fireside chats titled "Current State of Affairs of Investment Arbitration in Latin America." The session commenced with an insightful presentation by Nigel Blackaby KC (Partner, Freshfields). Then, moderated by Juan Pablo Moyano (Senior Counsel, Holland & Knight), the conversation unfolded between Richard C. Lorenzo (Partner, Hogan Lovells) and Silvia Marchili (Partner, White & Case).

Latin America has played a pivotal role in shaping the field of international investment law. Mr. Blackaby noted that the region was once relatively isolated from the world of international arbitration. In the past, less than 5% of ICSID cases originated from the region. Times have changed, however, and the region now tops the ICSID arbitration caseload. Mr. Moyano later noted that in 2023, Latin America-related cases account for almost 30% of the caseload. Latin America has undeniably emerged as one of the most active regions in investment arbitration.

Contribution of Latin America to the Development of Investment Protection

Mr. Blackaby delved into the factors that contributed to this shift in Latin America. A series of privatization programs in Latin America led to an influx of investments in sectors such as natural resources, telecommunications, oil and gas, and mining. Long-term concessions were implemented to ensure investment security and attracted foreign capital. Nevertheless, changes in political leadership often resulted in alterations to the rights granted by previous administrations. The Argentine economic crisis and subsequent measures against foreign entities, as well as expropriation and nationalization campaigns in Venezuela and Bolivia, significantly influenced the investment landscape.

The Argentine crisis, triggered by the country's abandonment of the peso-dollar peg, marked the onset of a wave of investment cases at ICSID. Mr. Blackaby highlighted several landmark cases against Argentina which set important precedents. In *CMS v. Argentina*, an extensive interpretation of the fair and equitable treatment (FET) standard was reached. The tribunal reasoned that Argentina had profoundly altered the stability and predictability of the investment environment, while there could be no doubt that a stable legal and business environment was an essential element of FET.

The *CMS* case also established the right of a minority shareholder to bring a direct action against a host state asserted independently from the rights of the company itself, provided that the relevant treaty's definition of "investment" includes equity, stock, or shares in an enterprise.

Mr. Blackaby also cited *Suez v. Argentina*, which marked the first case where a tribunal exercised its discretion to allow non-governmental organizations to submit *amicus curiae* briefs. The Argentine cases also contributed to landmark decisions on issues such as the Most-Favored-Nation MFN clause's application to seek more favorable dispute settlement provisions (*e.g., BG Group v. Argentina*) and methods for calculating damages using Discounted Cash Flow (DCF) method.

Subsequently, investment cases against Venezuela and Bolivia were discussed, each setting its own important precedents. The tribunal in *Garcia Armas v. Venezuela* examined the issue of dual nationality and affirmed its jurisdiction. In *Aguas del Tunari v. Bolivia*, the tribunal analyzed claimant's corporate structure and ultimately recognized the legitimacy of organizing investments through third countries to secure protection under Bilateral Investment Treaties (BITs).

The increase in investment disputes has fostered some resistance towards investment arbitration. Latin American leaders have started negotiating more limited treaties. Some countries like Bolivia and Venezuela completely withdrew from the ICSID Convention, signaling a change in attitude. Similarly, Ecuador's courts ruled that several BITs were unconstitutional. The rejection of investment treaties has gained favor in North America as well, with the new USMCA having more limited investment protection compared to NAFTA.

Mr. Blackaby concluded by emphasizing the region's unique position and recognizing the emergence of highly skilled investment arbitration practitioners as a consequence of these waves of investment cases.

Following Mr. Blackaby's presentation, the discussion between Mr. Lorenzo and Ms. Marchili began. Both speakers acknowledged the numerous positive aspects of investment arbitration and expressed regret over the unfounded criticisms it often faces.

Mr. Lorenzo observed that the surge in investment cases is relatively recent, both in Latin America and globally. The attractiveness of investment arbitration stems from situations where many states act foolishly and lack coordination. When foreign investors suffer losses due to state actions, with no viable commercial remedies available, investment arbitration serves as a last resort to seek compensation.

Additionally, Mr. Lorenzo noted that Latin America has experienced significant political changes and fluctuations in public policy in recent years. These variations have contributed to the increase of investment cases and have shaped the investment arbitration landscape in the region.

Settlement Chill

The speakers then engaged in a dialogue on the reluctance of Latin American states to settle investment disputes. Ms. Marchili highlighted a phenomenon she termed the "settlement chill." While a popular topic in investment protection discussions is the regulatory chill that states face, she sees a "settlement chill" more clearly. States usually are disinclined to enter into settlement agreements and instead prefer to exhaust the entire arbitration and, in its case, pay compensation when a final award has been rendered.

Both speakers emphasized the need for more proactive discussions and agreements between investors and states to avoid lengthy and expensive arbitration proceedings. Except for Bolivia during Evo Morales' administration, most Latin American countries decline to engage in these discussions.

Back to Old Ways

On the proposed reforms to the Investor-State Dispute Settlement (ISDS) system, Ms. Marchili raised concerns about proposed reforms to the ISDS system. She warned that the hostile attitude against investment arbitration and the attempts to restrict the substantive protection standards may bring unintended consequences. One possible outcome is a return to contractual mechanisms. Historically, many government contracts contained an ICSID arbitration clause. If current trends persist, those foreign investors with leverage may negotiate agreements that not only incorporate ICSID arbitration clauses, but also explicitly include investment protections currently outlined in BITs. The privatization of these principles would hardly be the optimal solution.

Both speakers, however, agreed that the system is far from perfect, and underscored the importance of disrupting and improving the arbitration process to address the criticisms and challenges faced.

Future Disputes in the Region

Turning to future disputes in the region, Mr. Moyano steered the discussion towards potential areas where investment disputes may arise. Mr. Lorenzo mentioned that large-scale energy projects often require foreign investment and substantial governmental incentives to be financially viable. Breaches of these incentives could potentially trigger a wave of energy-related investment cases.

Ms. Marchili added that such cases have already started in Central America (*e.g.*, *Energía y Renovación v. Guatemala* or *Enel v. Costa Rica*). She also mentioned the possibility of similar disputes arising in Mexico, depending on the outcome of the country's renewable energy regulatory changes.

While the speakers did not discuss other possible triggers for investment claims, these may include disputes related to climate change, COVID-19 disputes (*e.g.*, *ADP International v. Chile*), financial disputes (*e.g.*, *HSBC v. El Salvador*), technology-related disputes (*e.g.*, *Espiritu Santo v. Mexico*), and telecommunications disputes (*e.g.*, *Telefónica v. Peru*).

Conclusion

Latin America has witnessed a notable transformation in international arbitration, transitioning from relative isolation to becoming one of the most active regions in investment cases. Landmark cases against Argentina, Venezuela, and Bolivia have set important precedents for the investment arbitration community at large.

Despite the increasing resistance towards investment arbitration in the region, it remains a crucial recourse for foreign investors. While reforms to the ISDS system are being proposed, caution is advised to prevent unintended consequences and a potential regression to older mechanisms that could undermine the optimal solution.

Looking ahead, the region is likely to witness future investment disputes in areas such as large energy projects, climate change, COVID-19, finance, technology, and telecommunications.

This entry was posted on Saturday, July 29th, 2023 at 8:52 am and is filed under Investment law, ISDS, Latin America, Mexico, Mexico Arbitration Week
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