

Kluwer Arbitration Blog

2023 Year in Review: Latin America and Investment Arbitration

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Another year ends with set records for investment arbitration in Latin America. [ICSID reported](#) that, out of the new forty-five registered cases, twenty-one were brought against Latin American and Caribbean states (the annual report covers the fiscal year from July 1, 2022 to June 30, 2023). In other words, almost fifty percent of the new cases registered arose out of disputes in Latin America and the Caribbean.

Predictions that Latin America would be at the top of the statistics were not unfounded. Earlier in the year, [Maria Jose Monroy reported](#) that, in the past few years, Latin America has welcomed left-leaning political regimes that could potentially have repercussions on foreign investment. In light of these political changes, investors should be cautious of a potential wave of direct or indirect expropriations, regulatory overreaches, resource nationalism, contract revisions, and the implementation of taxes and tariffs in the coming years.

But not everything was bad news for Latin American states. Argentina and Ecuador announced in December of 2023 that they defeated investment claims brought by [Worley Parsons](#) (*Worley International Services Inc. v. Ecuador*) and [Orazul](#) (*Orazul International Espana Holdings SL v. Argentina*), respectively. We will report on these end-of-the year developments in early 2024.

One Step Forward, Two Steps Backwards

2023 saw interesting developments regarding Latin American and Caribbean states' approach to foreign investment, especially with respect to those countries that had at some point denounced the ICSID Convention. For instance, on February 3, 2023, Colombia and Venezuela entered into an [Agreement for the Reciprocal Promotion and Protection of Investments](#) with the objective of “incrementing the flow of transborder direct investment.” [Diego P. Fernandez Arroyo reported](#) that this was an interesting development considering Venezuela's denunciation of the ICSID Convention in 2012 and its concerns regarding the investment protection system. While the treaty certainly is aimed at sending a positive message to potential investors, it also contains limitations and exceptions, which, as concluded by Diego P. Fernandez Arroyo, made it appear to be “one of the most restrictive” instruments. Further, the easement on US sanctions on Venezuela in 2023 might also impact the foreign investment the country receives.

On the other hand, on July 28, 2023, the Constitutional Court of Ecuador declared unconstitutional a [Trade Association Agreement](#) concluded between Ecuador and Costa Rica in March 2022. The Constitutional Court held that the Agreement was unconstitutional because it provided for ICSID arbitration, noting that if Ecuador were condemned by international tribunals, that would be equivalent to Ecuador's yielding of its "sovereign jurisdiction" ([reported by David Toscano, Gabriela Ortega, Sebastian Arrieta, Valentina Paladines](#)). As our readers may recall, Ecuador denounced the ICSID Convention in 2009, and later [rejoined ICSID](#) in 2021 under President Lasso's right-wing administration.

Adding to the list of countries threatening to withdraw from ICSID, in July 2023, Honduras [threatened](#) to withdraw from the investment dispute tribunal following a claim of US\$ 11 billion by a US investor. As of the date of this post, Honduras has not formally denounced the treaty, but became one of the countries with most cases registered by ICSID in Latin America in 2023.

Contributions of Latin America to the Development of Investment Arbitration Case Law in 2023

This year, we also reported on a number of awards that discussed key concepts in international investment law.

Venezuela

The dual nationals saga continued in Venezuela. Back in 2020, we had [reported](#) on the *Heemsen v. Venezuela* case, in which the tribunal declined jurisdiction because the treaty did not allow claims brought by nationals of both states. On July 26, 2023, the tribunal in *Santamarta v. Venezuela* issued its final award on jurisdiction and dismissed the claim. The dispute involved a claim by a dual national of Venezuela and Spain against Venezuela on the basis of the Bilateral Investment Treaty between Spain and Venezuela (the "BIT"). The tribunal declined jurisdiction over the dispute by adopting the doctrine of the dominant and effective nationality. The tribunal concluded that, although the claimant held the Spanish nationality, the claimant's effective nationality was the Venezuelan nationality and, therefore, the claimant did not qualify as an investor under the BIT. [Jose Gregorio Torrealba and Alejandro Gallotti](#) reported the details [here](#).

Peru

The Republic of Peru has become one of the countries with the highest number of arbitration claims filed against it. As [reported by Maria del Carmen Tovar](#), as of end of May 2023, nineteen cases involving Peru had concluded, and twenty-three cases remained pending resolution.

Corruption allegations in arbitration proceedings relating to Peru remain very common. Following the decision [reported](#) last year in *Bacilio v. Peru* (where the claimant argued that the tender of the project, which was the subject of the dispute, had been rigged as part of a corruption scheme involving high ranking officials in the government), this year, [Julio Olortegui and Nennele Rivadeneira](#) reported on the decision in *Panamericana Television S.A v. Peru*, where the tribunal

dismissed Peru's *ratrionae materiae* objection based on corruption allegations. The tribunal was unable to link the acts of corruption to the investment made, and therefore the case moved forward to adjudication on the merits. Subsequently, the tribunal held that the expropriation claim could not be attributed to the state and thus dismissed the case on the merits.

Uruguay

On August 6, 2020, an arbitral tribunal constituted under the [agreement between the United Kingdom and Uruguay](#) for the promotion and protection of investments issued an award in *Agarwal and Mehta v. Uruguay* declining jurisdiction to hear the case because the Claimants' interests were not considered assets for the purposes of the treaty and therefore they lacked standing. [Santiago Gatica reported](#) on a second phase of the case following a decision by the *Cour d'Appel* of Paris that annulled the award on the basis that the tribunal had wrongly declined jurisdiction. The appeals court decision is pending a final decision in the *Cour de Cassation*. As reported by Santiago Gatica, the awaited decision will be "one more pearl in the necklace of decisions" to be considered when considering Paris as a seat in investment arbitrations.

Central America

Central America saw a notable rise in investment arbitration cases in 2023. Honduras topped the list with nine cases registered by ICSID. The disputes span across different industries such as electric power, construction, and transportation. At least half of the cases arose as a result of changes in regulations in the energy sector.

[Alejandro Chevalier also reported](#) on a recently released award in *Leopoldo Castillo Bozo v. Panama*. The award confirmed the reasoning for a series of critical issues on jurisdiction and merits such as the standing of trusts' beneficiaries, issues on dual nationality, and state responsibility arising from a liquidation proceeding or administrative intervention. Of particular importance, the tribunal found that if the beneficiary of a corporate vehicle suffers the consequences of state actions, and if the beneficiary has economic interests and control powers over the corporate vehicle, then the beneficiary could be granted protection under the APRI and any treaty with similar language.

Panama has also been recently featured in the news for the cancellation of First Quantum Minerals' mining contract, which has led a Canadian investor to announce international actions against Panama.

What is going on in the Caribbean?

[Rodrigo Macin and Liliana Pérez reported](#) on the award in *Michael Anthony Lee-Chin v. the Dominican Republic*, where the tribunal ruled on violations claimed by the investor arising out of a concession agreement for the management and operation of the Duquesa Landfill. The tribunal found that the Dominican Republic had violated its obligations regarding expropriation, fair and equitable treatment, and the umbrella clause. The award also contains discussions about national

and environmental interests *vis a vis* the rights of foreign investors, an area which continues to gain relevance as part of the interaction between ESG and international arbitration.

Trinidad and Tobago faced its first investment claim registered by ICSID in the last two decades. As reported by Hon. Barry Leon, Calvin Hamilton, and Theominique Nottage, the Caribbean region is a net importer of foreign investment. The prominent economic sectors in the region include oil and gas, tourism, minerals, agriculture, fishing, offshore banking, financial and insurance services, and maritime.

Grenada reached an agreement with the True Blue Development Limited, the developers of a hotel project, to end an investment dispute filed with ICSID. ICSID registered an order taking note of the discontinuance of the proceeding on September 6, 2023.

Relevant to investment arbitration, some of the objectives of the Final Report of Caribbean Task Force by the Institute for Transnational Arbitration Americas Initiative issued in 2023 include supporting ongoing conversations in the Caribbean about the evolution of cutting-edge arbitration relation issues, such as third-party funding, transparency, open court versus confidentiality issues, immunity of arbitrators, corruption, and so forth.

Conclusion

As foreign investment increases in Latin America, we expect to see even more investment cases in 2024. Large-scale projects in sectors such as energy, infrastructure, and mining require foreign investment and governmental incentives to be viable. Breaches to such incentives could trigger a wave of new investment cases. As we saw with Honduras, the implementation of new regulatory policies for specific sectors such as energy could also impact investors and trigger new claims. This was one of the topics of discussion in the first Mexico Arbitration Week that took place in 2023, where the panelists concluded that the region is likely to witness future investment disputes related to climate change, finance, technology, large energy projects, and telecommunications (as reported by Sofia Vargas and Eduardo Lobaton).

Additionally, we expect to see more political shifts that affect foreign investment in 2024. Notably, 2024 is an election year for various countries in Latin America such as Mexico, Panama, El Salvador, Uruguay, and Venezuela. In countries like Argentina, new administrations have taken office in late 2023. And in other countries such as Guatemala, new administrations are set to take office early in 2024.

As usual, we look forward to keeping our readers updated in 2024 on new developments in the region.

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