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Tendencies in Investment Arbitration in Latin America: Current Issues and Challenges

Benjamin Silva (Jana & Gil Dispute Resolution) · Sunday, January 14th, 2024 · Asociación Latinoamericana de Arbitraje (ALARB)

It was 8:45 am in Santiago de Chile on August 30, 2023, and the Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago's – CAM Santiago venue was full for the seminar "Tendencies in Investment Arbitration in Latin-America: Current Issues and Challenges." Among attendants were academics, practitioners, government officials, and arbitrators, who were later joined by over 50 virtual attendants via Zoom. The event was organized by the CAM Santiago and Jana & Gil Dispute Resolution, and sponsored by the International Centre for Settlement of Investment Disputes – ICSID and the Asociación Latinoamericana de Arbitraje – ALARB.

The cohort of panelists was comprised of top-notch speakers: Macarena Letelier (Executive Director of CAM Santiago), Gonzalo Flores (Deputy Secretary General of ICSID), Andrés Jana (Founding Partner of Jana & Gil Dispute Resolution), Dyalá Jimenez (former Minister of Foreign Trade of Costa Rica and Founding Partner of DJ Arbitraje), Dietmar Prager (Partner at Debevoise & Plimpton LLP), Daniela Rivera (Chilean diplomat and member of the government team for the Chilean's defense in international disputes) and Francisco Grob (former Senior Counsel at ICSID, and Partner at Jana & Gil Dispute Resolution).

We address below the most relevant discussions held on the seminar.

The Role of Latin American States in the Development of Investment Arbitration

The guest of honour and keynote speaker was Gonzalo Flores. He kicked off the event addressing the development of ICSID and the role of Latin American States. He showed the rise in Latin American cases since the early 2000s, a trend that he ascribed to the high number of BITs and MITs concluded in the last 20 years and the growing flows of Foreign Direct Investment to and from Latin American States.

Mr. Flores's speech was followed by a round table moderated by Andrés Jana. The first topic was the current tendencies in Investor-State dispute settlement (ISDS) in Latin America.

Dietmar Prager was the first to grapple the topic. Mr. Prager noted that the high number of BITs coupled with systemic institutional problems and weak governments has resulted in more cases being brought against states in the region. It seems that more BITs do not necessarily suppose more

cases as a respondent state. The real detonator seems to be political and institutional flaws within some states. He further noted that an interesting phenomenon was developing, which consisted in more and more Latin American investors acting as claimants in investor-state disputes. He illustrated this point by referring to the *Tethyan v. Pakistan* case, in which a Chilean investor launched proceedings against Pakistan.

On this same topic, Mrs. Dyalá Jiménez noted that ISDS has consolidated itself as part of the investor's toolbox when assessing risks at the time of making an investment. Investors are more aware of the possibility of recourse to international arbitration if they deem their substantive protections have been violated; and that such assessment is part of any treaty planning in advance of investing.

Mrs. Jiménez highlighted that Latin American States are far more engaged in their disputes than they used to be over the last years. For instance, Latin American States are more concerned with the consequences arising out of the language chosen for the underlying arbitral proceedings and the proficiency of their arbitrators. This, she noted, is relevant for matters such as treaty interpretation and document review. Persuasion is a key element in any dispute, and to be able to present the case in the same language of any relevant document and relevant domestic legislation is a key factor. Likewise, the possibility of an arbitrator to understand the documents in their native language effortlessly was highlighted.

The next topic put forward by Andrés Jana concerned the alleged evolution of Latin American States' defenses to investment treaty claims. Mr. Grob agreed that the States' defenses have evolved as investor's claims grow and become more complex. Today, we see many investors challenging the use of regulatory powers by States in sensitive domains such as environmental protection, natural resources and energy supply. The State's reaction has been to stress their "right to regulate", contending that legitimate measures adopted in the public interest cannot be deemed to breach any treaty obligation. States have also resorted to procedural devises that are increasingly common in newer treaties to have frivolous claims dismissed at an early stage of the proceedings, to consolidate related claims and the like.

On a related note, Daniela Rivera explained that governments, and Chile is no exception, have become increasingly sophisticated in the defense of the state's interests and compliance with international obligations. Mrs. Rivera emphasised the relevant role of coordinating different State entities and increasing awareness of potential conflicts in order to prevent future disputes within local agencies.

The third topic discussed by the panelists was the role of mediation in ISDS. Mr. Jana introduced the matter, noting that arbitration numbers are consistently increasing, but it seems that mediation is not as appealing to stakeholders.

There were competing views on this matter. Mrs. Jiménez first intervened, expressing that mediation has an inherent flexibility that puts it ahead of arbitration for resolving a dispute amicably. Mediators have different tools available to assist the parties in reaching an agreement, such as, *ex parte* meetings, amongst others. Mr. Pager shared a more sceptical view on the efficiency of mediation for investor-states disputes. In his words, the two necessary elements for a mediation to be potentially successful were: (i) a clearly authorized government official who has the capacity to conduct the negotiations, and (ii) the State's will to reach an agreement. However, governments officials usually lack the authority and interest to mediate.

Mrs. Rivera, as a government official, shared Chile's experience with mediation and argued that robust institutions and a coordinated approach are key elements. She explained that Chile has a committee with permanent and non-permanent members. This committee discusses and agrees on any sensitive issue concerning foreign investments, including any potential settlement.

New ICSID Arbitration Rules and Code of Conduct for Arbitrators in International Investment Dispute Resolution

The last topic discussed was the recent amendments to the ICSID arbitration rules. Mr. Jana introduced the subject pointing out that the ICSID made public consultations on its new rules, allowing all stakeholders to comment on the amendments. He also praised the balance achieved by the rules taking into consideration both states and investors' interests.

Francisco Grob intervened, acknowledging the comprehensive work conducted by ICSID. He stated that the Centre developed an inclusive framework on the discussion of the rules, not only opening them for comments, but by holding several seminars on the amendment process. He then delved into the involvement of Latin American States in the amendment process. Mr. Grob noted that Latin American states showed a keen and coordinated interest that resulted in several joint proposals adopted in the final text of the rules.

The concluding remarks of the event concerned the recent Andrés Jana noted the relevance of the code of conduct to increase ISDS transparency and legitimacy by, i.e., reinforcing the duty of independence and impartiality of arbitrators, regulating double-hatting, and listing specific disclosure requirements, amongst others. He added that the code of conduct entailed a comprehensive and collaborative work with ICSID´s Secretariat, and the relevant input received by State delegates and interested stakeholders. The code is based on an extensive and thorough comparative review of standards found in codes of conduct in investment treaties and arbitration rules applicable to ISDS, among others; contributing to the transparency and legitimacy of the code itself.

Mrs. Dyalá Jiménez highlighted the difference between the code of conduct and the IBA Rules on Conflict of Interest regarding the expected duty of arbitrators to disclose and remain vigilant concerning any conflict of interest. The code of conduct sets a standard of proactiveness whereas the IBA Rules balance the interests and relies on the parties' interest for further disclosure; the former puts a higher burden on the arbitrators concerning disclosure *vis a vis* the later that is more in connection with the dispositive principle.

Conclusion

The event came amidst interesting times for the Latin American Region. Latin American states represent nearly 22% of ICSID cases, and in recent times, Latin American States have become respondents in a series of recent disputes. For instance, Peru and more recently Honduras have been hit with several new cases. Political changes in the region may increase notice of disputes and potential arbitrations. Therefore, the evolution of State defenses and the interplay of new applicable BITs will be an interesting topic to follow. Maybe, some of the future disputes will also be subject to mediation, given the recent rules enacted by ICSID. We ought to wait and see.

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