

2022 in Review: Latin America and Investment Arbitration

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2022 was a year of change and action with important developments in investment arbitration in Latin America. The region continues to top the ICSID investment arbitration caseload, accounting for 28% of the total of registered cases by June 2022. In 2022, states and arbitral institutions sought to modernize investment protections and their institutional frameworks. In addition, we also reported on decisions regarding important issues that spanned defeated claims on grounds of successful jurisdictional objections to significant interpretations of substantive standards.

Early in the year, Luis Paradell and Santiago Gatica predicted important developments in the ISDS Landscape in Latin America, which included the increase of energy-sector, ESG, and COVID related disputes. Tech and Telecom disputes were also in the radar for 2022.

We discuss these major developments below.

Modernization and Cooperation

On July 1, 2022, ICSID issued its 2022 Arbitration Rules with important changes that included an expedited proceeding to improve efficiency in ISDS and rules to increase transparency and accountability of ISDS actors. These changes are especially important for Latin America, as it represents a large portion of the cases registered with ICSID in 2022

In October 2022, Guatemala enacted a new investment law to promote and attract foreign investments. As reported by Paulina Rodriguez, the implementation is still undefined as a regulation must be issued that details the list of benefits investors will receive as part of the special treatment offered by Guatemala under the new law.

On its side, Ecuador also saw important changes in cooperation and institutional modernization. As discussed by Alvaro Galindo, Julián Bordachar, and Carla Cepeda, Ecuador recently signed a cooperation agreement with the PCA to increase collaboration between the arbitration center and the local authorities. This agreement seeks to raise Ecuador's international profile as an arbitral forum and to attract disputes that otherwise would be heard in other parts in Latin America. As of today, the PCA has Host Country Agreements in force with Argentina, Chile, and Costa Rica in the region.

On another note, this year's ITA-ALARB Americas Workshop focused on the intersection between domestic environmental protections and investment law, especially in Latin America. The workshop aimed to address the states' interest in environmental protection and its interaction with investors' legitimate expectations and the extent to which states can be held

accountable if their environmental regulations breach investment protections.

Substantive and Procedural Developments

Besides modernization and cooperation, Latin America saw important developments in substantive and procedural issues in investment arbitration, and, in some instances, potential constitutional reforms that could impact arbitration frameworks.

- **Mexico: Member States trigger newly entered into in force USMCA provisions**

Mexico also saw some important developments. On January 11, 2022, a tribunal found that its jurisdiction under the Mexico-Singapore BIT could not extend over measures that did not affect the claimant (PACC Offshore Services), but, instead, affected only its local partner with whom the Claimant had a contractual relationship (Posh v. Mexico).

In addition, later in the year, the United States requested consultations under the United States Mexico Canada Agreement (USMCA) over Mexico's Energy Policies on behalf of U.S. stakeholders, but the consultations did not lead to a settlement. According to Guillermo Garcia Sanchez, who reported on this development, the exhaustion of the consultation period triggers the first step in the dispute resolution mechanism, which could then lead to the establishment of a panel.

- **Central America: Overall success from international claims**

In 2022, Guatemala was hit with three new investment claims registered with ICSID (Energia y Renovacion v. Guatemala, GEB and Transportadora v. Guatemala (1), and GEB and Transportadora v. Guatemala (2)), two of which were recently consolidated into a single proceeding by a tribunal. However, Guatemala prevailed in an earlier claim brought by Israeli company IC Power. The award in IC Power v. Guatemala recently resurfaced as Guatemala sought to enforce a costs award that the investor failed to pay in US courts, having obtained a default judgment in its favor last month. Finally, Guatemala recently agreed to settle the prolonged dispute with Teco Guatemala Holdings agreeing to pay the investor \$ 46 million.

As to Costa Rica, the tribunal in Alejandro Diaz Gaspar v. Costa Rica put FET under the spotlight after finding that Costa Rica was liable for the breach of the standard but declining to award any damages to the Claimant. The dispute concerned the closure of a poultry processing plant.

Panama also succeeded on a \$ 81.5 million claim brought by Omega Engineering and Oscar Rivera under the Panama-US Trade Promotion Agreement and the Panama-US bilateral investment treaty. The award is yet

to be published, and we look forward to reporting on it this year.

- **South America**

As reported by Nicolas Wayar, on July 12, 2022, a tribunal held that Bolivia breached its obligations under the Bolivia-Spain BIT after finding that an investor was essentially held hostage by a lengthy nationalization process, and as a result, ordered Bolivia to pay damages for a breach of the FET standard under the treaty.

On August 5, 2022, the tribunal in *Bacilio Amorrotu v. Peru* issued its partial award on jurisdiction. The tribunal upheld Peru's objection that the investor did not provide a valid waiver pursuant to the "No U-Turn" clause included in the US-Peru Trade Promotion Agreement. A second claim was filed on August 16, 2022, allegedly bringing the claim again on similar legal grounds.

In *Autopista del Norte v. Peru*, a tribunal found Peru liable for breaches of an underlying concession agreement. According to the Government of Peru, the tribunal awarded only around US\$ 8.6 million (compared to the US\$ 150 million that was originally claimed by the investor). This claim was brought as a result of a breach of the 25-year concession agreement against the investor. The concession was granted for the construction and operation of the highway Pativilca-Trujillo on the Peruvian coast.

In an important victory, the Agencia Nacional de Defensa Juridica (Colombia's State Agency in charge of its legal Defense -ANDJE-) defeated a claim brought by Spanish investor AFC. The arbitral tribunal dismissed AFC's claim under ICSID Rule 41(5) (which provides for early dismissal of claims) and, as reported by Juan Felipe Merizalde and Juan Pablo Gomez "the Tribunal swiftly resolved a dispute without forcing the Parties to submit a full case on the merits of the case."

At the end of the year, Agencia Nacional de Defensa Juridica issued a report on costs in investor-state arbitration in Latin America, that provides insightful information about costs in the region. The report builds on statistical analysis to establish current trends in the allocation of costs and estimates the average costs of an investment arbitration.

Conclusion

The developments discussed reflect the trends originally predicted at the beginning of 2022: (i) an increase of energy related disputes which is echoed in the consultations started by the US under USMCA as a result of Mexico's energy policy changes; (ii) ICSID finalized a process of reforms with its 2022 ICSID Rules which would bring interesting developments in transparency and efficiency to arbitration proceedings; (iii) states such as Colombia and Ecuador would continue looking for ways to strengthen and make more efficient their local defense teams; and (iv) while the world seemed to have adapted to the 'new normal', COVID related disputes were still on the radar.

We expect that 2023 will not be an exception and that the trend of increased

investor state disputes will continue in Latin America. We look forward to receiving many more contributions from our network in the region and to keeping our community updated in 2023.

******This article was written by our Dispute Resolution Lawyer, Aécio Filipe Oliveira, Daniela Pérez-Salgado and Fabian Zetina. The text was published on the Kluwer Arbitration Blog on January 21, 2023. [Click here to check.](#)

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