

Latin America Dispute Resolution Update

The Latest Developments in Cross-Border Disputes Involving the US and Latin America

US-Mexico-Canada Agreement Is Signed

As detailed in an [October 2, 2018, Skadden client alert](#), the United States' efforts to revise the 25-year-old North American Free Trade Agreement (NAFTA) reached a milestone on September 30, 2018, when the U.S., Mexico and Canada announced they had formed an agreement on what will be called the United States-Mexico-Canada Agreement (USMCA). If ratified, the USMCA will significantly curtail the substantive investment protections available to investors.

Under Chapter XI of NAFTA (as it currently stands), investors from NAFTA countries enjoy a range of protections against adverse government action with respect to investments they make in other NAFTA countries. These protections include the right to bring international arbitration claims against NAFTA countries that violate those safeguards. Chapter XI arbitration has resulted in several significant damages awards against Canada and Mexico in claims brought by U.S. companies where treatment fell short of NAFTA standards. With respect to most investors in such situations, the USMCA rolls back the available protections. It amends the definition of expropriation so as to protect against direct expropriation only — reversing long-standing U.S. policy that previously sought to protect interests against indirect expropriation (*i.e.*, measures tantamount to expropriation). It also amends the definitions of “fair and equitable treatment” and “full protection and security” to state that they do not require treatment in addition to or beyond that which is required by the “minimum standard of treatment” accepted under customary international law.

USMCA Chapter 14 also drastically changes the scope of investor-state arbitration. Except for certain “legacy” arbitration claims (*i.e.*, claims concerning investments established or acquired between January 1, 1994, and the termination of the existing NAFTA), investor-state arbitration will cease to be available altogether with respect to either Canadian investments in the U.S. or Mexico, or for U.S. or Mexican investments made in Canada. This change (a concession to the Canadian government) means that those investors will have to resort to national courts, state-to-state arbitration or investor-state arbitration under a different treaty (if applicable).

Recent US Court Decisions of Interest

New York Court Addresses ‘Manifest Disregard of the Law’ as Basis to Vacate Arbitration Award

On September 27, 2018, a New York state appellate court issued an important ruling in *Daesang Corp. v. NutraSweet Co.* regarding the ability of New York courts to vacate an arbitration award on the basis that it was rendered in “manifest disregard of the law.”¹ Historically, in addition to the various grounds for *vacatur* based on errors of “procedure” recognized by the Federal Arbitration Act (FAA), U.S. courts also have recognized that a court may vacate an arbitration award if it was rendered in “manifest disregard of the law” — that is, where “the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether,” and the ignored governing law was “‘well defined, explicit, and clearly applicable’ to the case.”² This ground for *vacatur*, and its proper interpretation, has been the subject of much controversy and is rarely successful.

In 2008, the U.S. Supreme Court cast doubt on the continuing validity of the manifest disregard doctrine in *Hall Street Associates*,

¹ 167 A.D.3d 1 (N.Y. App. Div. 2018).

² *Roffler v. Spear, Leeds, & Kellogg*, 13 A.D.3d 308, 310 (N.Y. App. Div. 2004) (quoting *Folkways Music Publ'rs, Inc. v. Weiss*, 989 F.2d 108, 112 (2d Cir. 1993)).

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LLC v. Mattel, Inc.,³ in which it held that the FAA sets forth the “exclusive grounds” for vacating an arbitration award. Following this decision, some U.S. courts found that “manifest disregard of the law” was no longer a valid basis to vacate an arbitration award. Other courts, including New York state courts, continued to recognize manifest disregard as a possible basis to vacate an arbitration award.

In 2017, a lower court in New York vacated an international arbitration award on the basis that the tribunal had “manifestly disregarded the law” when it did not allow an equitable claim for fraud and failed to consider a breach of contract counterclaim for procedural reasons.⁴ In September 2018, a New York appellate court reversed this decision in *Daesang Corp.* and confirmed the very limited nature of manifest disregard as a basis for *vacatur*. The appellate court noted the concern that “[a]ny suggestion that New York courts will review the arbitrator’s factual and legal determinations, as if on appeal ... will discourage parties from choosing New York as the place of arbitration.”⁵ While the appellate court acknowledged that manifest disregard of the law remains a potential

basis for vacating an award in New York, it explained that this standard requires something “more than a simple error in law”⁶ and that it is reserved for “the rare occurrences of apparent ‘egregious impropriety’ on the part of the arbitrators.”⁷ Since the tribunal’s decision in the case was, “[a]t most ... nothing more than a mere error of law,” it held that the award should not have been set aside.⁸

Hoskins and Extraterritorial Reach of US FCPA

As discussed in further detail in a [September 4, 2018, Skadden client alert](#), the U.S. Court of Appeals for the Second Circuit issued a decision with implications for the extraterritorial reach of the Foreign Corrupt Practices Act (FCPA). The statute prohibits, *inter alia*, U.S. persons and businesses, issuers of U.S. securities, their officers, directors, employees or agents, or any other person while in the territory of the U.S. from making corrupt payments to obtain or retain business.⁹

The court held in *United States v. Hoskins* that a person may not “be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as principal.”¹⁰ In doing so, the court

rejected an avenue that the U.S. Department of Justice had previously used to assert jurisdiction over foreign nationals with no other connection to the United States. The government had charged Lawrence Hoskins, a non-U.S. citizen who worked for a U.K. subsidiary of the French company Alstom S.A., with conspiracy to violate the FCPA, and aiding and abetting others in doing so. Hoskins allegedly approved the selection of consultants retained by Alstom’s U.S. subsidiary and authorized payments to them with knowledge that portions of the payments were intended as bribes.

The Second Circuit agreed with Hoskins that Congress did not intend for the FCPA to apply to non-U.S. natural persons who did not act within the U.S. territory and are not officers, directors, employees or agents of a U.S. domestic concern or U.S. issuer. However, the court did not foreclose the argument that, provided Hoskins acted as an “agent” of the U.S. subsidiary, he could be liable of “conspiring with foreign nationals who conducted relevant acts while in the United States.”¹¹ Accordingly, the Second Circuit appears to have left open the possibility of this and certain other potential avenues of extending the FCPA’s reach to foreign individuals even if they never entered the U.S., which may diminish the practical implications of the *Hoskins* decision.

³ 552 U.S. 576, 583 (2008).

⁴ *Daesang Corp. v. Nutrasweet Co.*, 58 N.Y.S.3d 873, 2017 WL 2126684, at *5, *7 (N.Y. Sup. Ct. 2017) (unpublished table decision).

⁵ *Daesang Corp. v. NutraSweet Co.*, 167 A.D.3d at 4 n.1 (quoting the amicus curiae brief submitted by the International Commercial Disputes Committee of the Association of the Bar of the City of New York) (second alteration in original).

⁶ *Id.* at 16.

⁷ *Id.* (citation omitted).

⁸ *Id.* at 16-17.

⁹ 15 U.S.C. § 78dd-1 to -3.

¹⁰ 902 F.3d 69, 76 (2d Cir. 2018).

¹¹ *Id.* at 98.

For investments made by U.S. investors in Mexico or Mexican investors in the United States, investor-state arbitration will remain available pursuant to Annex 14-D of the USMCA, but its scope is substantially limited. For most investors, the USMCA significantly rewrites the basic guarantees so that investor-state arbitration would be permitted only in cases of denial of national treatment, “Most Favored Nation” violations or in the case of direct expropriation. Moreover, those investors would be required to seek recourse before a competent court or administrative tribunal of the respondent state for a minimum of 30 months before commencing

investor-state arbitration, thus significantly delaying access to international remedies.

Pursuant to Annex 14-E, access to broader investor-state protections will continue only for a limited group of U.S. and Mexican investments: those that qualify as “covered government contracts” in sectors such as oil and natural gas production, power generation, telecommunication, transportation, and certain infrastructure investment.

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Though the three states signed the agreement on November 30, 2018, it must still be ratified by the legislature of each country. In connection with the new pact, President Donald Trump announced on December 2, 2018, that he intends to formally terminate NAFTA, but Congress must still vote to approve the USMCA before it can enter into force. In the interim, investors who have relied on NAFTA to protect their cross-border investments can use this opportunity to reassess their existing investment protection structures and consider alternative ways to achieve protection under other bilateral or multilateral investment treaties.

International Court of Justice Rules on Border Dispute Between Bolivia and Chile

On October 1, 2018, the International Court of Justice (ICJ) issued a decision in a long-standing border dispute between Bolivia and Chile. In a win for Chile, it held that that coastal nation had no obligation under international law to negotiate regarding Bolivia's access to the Pacific Ocean.

The case arose from a long-standing grievance with roots in the 1879-83 "War of the Pacific" between Bolivia and Chile, which resulted in Bolivia losing its coastline territory on the Pacific Ocean. Ever since then, Bolivian politicians have sought to undo this result. Despite vigorous diplomatic efforts — all aimed at restoring Bolivia's access to the sea — the border has remained unchanged.

In 2013, Bolivia asked the ICJ to rule that "Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean" and that Chile breached this obligation.¹ The stated basis for the application (as framed by Bolivia) was that, in various diplomatic communications throughout the 20th century, Chilean diplomats had committed to discuss the matter, and that those commitments were sufficiently definite so as to engage an obligation to negotiate an agreement with Bolivia to allow it access to the Pacific. In an interim ruling in 2015, the ICJ made clear that this claim did not seek sovereign access to the Pacific Ocean outright, but rather a direction that Chile negotiate in good faith.²

The ICJ's October 2018 decision thus focused on whether international law recognized such an obligation. It held that states "may agree to be bound by an obligation to negotiate" and, in that case, "are under an obligation so to conduct themselves that the nego-

tiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification."³ Nonetheless, the court found no such obligation for Chile in the instant case, despite Bolivia's claims that Chile was required to negotiate based on several sources, including existing agreements entered into by Chile, Chile's unilateral acts with respect to Bolivia and the United Nations Charter, as well as pursuant to what it characterized as internationally recognized doctrines of acquiescence, estoppel and legitimate expectations, among others. The court rejected each of these arguments, saying that it was "unable to conclude" that Chile had an obligation to negotiate under any of these sources or theories.⁴

Although the court did not find that Chile had an obligation to negotiate with Bolivia, it encouraged the parties to continue negotiation voluntarily, remarking that its decision "should not be understood as precluding the Parties from continuing their dialogue and exchanges, in a spirit of good neighbourliness."⁵

The ICJ's decision has notable parallels to the law of contract, which typically does not subject parties to obligations to which they have not clearly consented. It is also notable that the court expressly distinguished the one prior occasion when it did subject a party to legal obligation based on a unilateral statement: France's pledge in 1974 to cease atmospheric nuclear testing in the South Pacific.

ICSID Roundup: New Claims Against Latin American Countries

In Latin America, various countries reportedly face significant new investment treaty arbitration claims. We highlight new cases against Bolivia and Guatemala below.

Bolivia. The Spanish banking group Banco Bilbao Vizcaya Argentaria SA (BBVA) has sought arbitration against Bolivia under ICSID's Additional Facility in a dispute regarding the valuation of BBVA Previsión AFP, an entity incorporated in 1997 to administer pension funds in Bolivia. In 2010, Bolivia passed a law restoring a national pension system to replace BBVA's business. Although BBVA states that it has cooperated in connection with the transfer of the administration of the pension system to a public entity, it disputes the valuation of the compensation owed to BBVA by the Bolivian government.

Bolivia purported to withdraw from the ICSID Convention in 2007 and further purported to denounce the 2001 Spain-Bolivia BIT in 2012. However, the Spain-Bolivia BIT has a "tail" provision allowing 10 years of coverage for investments made before

¹ Obligation to Negotiate Access to the Pacific Ocean (*Bolivia v. Chile*), Judgment, 2018 I.C.J. Rep. 153, ¶ 13.

² Obligation to Negotiate Access to the Pacific Ocean (*Bolivia v. Chile*), Preliminary Objection, Judgment, 2015 I.C.J. Rep. 592, ¶ 34.

³ *Bolivia v. Chile*, Judgment, 2018 I.C.J. Rep. 153, ¶ 86 (quoting *North Sea Continental Shelf* cases, 1969 I.C.J. Rep. 1 ¶ 85).

⁴ *Id.* ¶ 175.

⁵ *Id.* ¶ 176.

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the denunciation of that treaty. Moreover, the BIT provides that ICSID's Additional Facility is available even if one of the parties is not a contracting state to the ICSID Convention.

Guatemala. There has been a rise in the number of investment treaty arbitrations against Guatemala. In addition to two already pending arbitrations (*Teco Guatemala Holdings LLC*, ICSID No. ARB/10/23, and *Iberdrola Energía S.A.*, PCA No. 2017-4), Guatemala now faces three new pending or potential claims.

In February 2018, IC Power Asia Development filed an UNCITRAL arbitration seeking more than US\$74 million for claims arising under the Israel-Guatemala BIT. The claims involve back taxes sought by Guatemala following IC Power's investment in two Guatemalan electricity distribution companies, DEOCSA and DEORSA.

In September 2018, APM Terminals, a Spanish subsidiary of Denmark's Maersk Group, submitted a notice of its intention to file an ICSID claim under the Spain-Guatemala BIT, seeking compensation following a local court ruling that voided its concession contract to operate a port terminal. APM acquired the terminal from Spanish port operator Grup Maritim TCB, which is alleged to have obtained the concession by way of bribes, resulting in the termination of the concession.

In December 2018, a U.S. businessman and his Nevada-based company, Kappes, Cassidy and Associates, filed a request for arbitration before the ICSID under Chapter 10 of the Dominican Republic-Central America Free Trade Agreement. According to a previous notice of intention to arbitrate the dispute, the claim is based on the alleged deprivation of the use and enjoyment of an investment related to a mining project that was suspended indefinitely by the Guatemalan Supreme Court for alleged environmental concerns. It seeks damages of more than US\$150 million.

Ecuador, Argentina and Uruguay Pass New Investment and Arbitration Laws

Three Latin American countries have recently introduced significant arbitration reforms, which may increase the use of international arbitration across the region.

In Ecuador, the government of President Lenín Moreno, in a stated initiative to attract foreign investment, has announced it will negotiate new bilateral investment treaties (BITs) with approximately 30 different countries. This is a notable shift from the policy of former President Rafael Correa, whose administration denounced and withdrew from 16 BITs as well as the ICSID Convention (from which Ecuador withdrew in 2009). In August 2018, Ecuador's National Assembly passed a new investment protection

act, "Ley de Fomento de la Producción, Atracción de Inversiones, Generación de Empleo y Estabilidad y Equilibrio Fiscal," that enables investors to arbitrate disputes arising from investment contracts of more than US\$10 million under the auspices of the Inter-American Commercial Arbitration Commission (IACAC), the International Chamber of Commerce (ICC) or the UNCITRAL Arbitration Rules. This apparently reverses the previous regime's posture of antagonism toward investor-state dispute settlement.

Notably, however, Ecuador has thus far not evinced any intention to rejoin the ICSID Convention.

In Argentina, in July 2018 the Argentine Congress enacted a new law on international commercial arbitration, "Ley de Arbitraje Comercial Internacional." The law is based largely on the UNCITRAL Model Law on International Commercial Arbitration and applies to all international commercial arbitrations venued in Argentina. The law apparently does not apply to domestic arbitrations venued in Argentina.

The new law aims to provide more predictability for international commercial arbitration in Argentina, modernizing the Argentine law to conform to internationally accepted standards. It modifies certain aspects of the UNCITRAL Model Law to fit local conditions. For instance, it departs from the Model Law's Article 1(3) by excluding the possibility that the will of the parties alone can determine whether the arbitration should be deemed "international" in nature.

In Uruguay, the Uruguayan House of Senators passed a bill on international commercial arbitration in July 2018 that is also based largely on the UNCITRAL Model Law. The new act reportedly will apply to all international commercial arbitrations venued in Uruguay in the absence of a multilateral or bilateral international treaty stipulating otherwise. Like the Argentine law, it contains several departures from the UNCITRAL Model Law, including a similar stipulation excluding the ability of the parties to designate the "international" nature of the arbitration, among others.

Developments Regarding Service of Process in Brazil

Two recent developments may assist parties engaged in litigation outside of Brazil to serve process on defendants located in Brazil.

First, Brazil recently acceded to the Hague Service Convention (Convention). The treaty will enter into force for Brazil on June 1, 2019, subject to the enactment of a presidential decree. Previously, parties needing to serve process on a party located in Brazil in connection with a U.S. litigation had to comply with the Inter-American Convention on Letters Rogatory, which required parties to obtain letters rogatory in order to serve a party in

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Brazil and took up to a year to complete. In contrast, the Hague Service Convention provides a streamlined method for service of process for contracting parties.

Significantly for U.S. parties, Brazil made several reservations in connection with the methods of service permitted under the Hague Service Convention. It stated that it is opposed to (1) the use of the methods of transmission of judicial and extrajudicial documents provided for in Article 8 of the Convention, which permit transmission through diplomatic and consular channels, and (2) the methods of transmission of judicial and extrajudicial documents provided for in Article 10 of the Convention, which permits service through mail or through judicial officers or officials of the country of destination.

Second, we understand from local counsel that Brazil's Superior Court of Justice has issued two decisions regarding the ability of a party to serve process in the manner agreed in the parties' commercial contract. In one case,⁶ the Brazilian court considered whether a foreign judgment issued in Florida should be recognized in Brazil where the defendant had been served through the courier delivery service Federal Express rather than through letters rogatory. Service through a mechanism such as Fed Ex had been expressly mentioned in the parties' contract. The court found that the service of process was accomplished in the manner agreed to in the parties' contract and, therefore, rejected the argument that the foreign judgment should not be recognized on the basis that the defendants had not been served through letters rogatory.

In a second decision,⁷ the same court again rejected the argument that the foreign judgment should not be recognized on the basis of failure to serve process through letters rogatory where the service of process was accomplished in accordance with both the applicable local law in the foreign jurisdiction in which the judgment was issued (New York) and the local law referenced in the parties' contract (here, also New York). In their contract, the parties had agreed that service in any litigations related to the contract could be accomplished through registered or certified mail, and that "no provision of this agreement prevents the ability to serve process in any other form allowed by law." The court found that process had been served in accordance with the laws of New York as well as the parties' contract and, accordingly, rejected the defense to enforcement of the judgment.

⁶ Superior Court of Justice, Recognition of Foreign Decision No. 896, Docket (2017/0212022-8), *Sanafarma International LLC Inc and Medecell do Brasil Comercio e Importação Ltda.*, Decision by Minister Maria Thereza de Assis Moura, Special Court, Published on DJe 05/23/2018.

⁷ Superior Court of Justice, Recognition of Foreign Decision No. 89, Docket (2016/0305869-7), *Shutterstock Inc and Latin Stock Brasil Produções Ltda.*, Decision by Minister Maria Thereza de Assis Moura, Special Court, Published on DJe 10/31/2017.

Litigation Involving Attempts to Recover the Proceeds of Corruption

Over the past several years, allegations of corruption in certain Latin American countries have resulted in significant commercial litigation in Latin America and the United States. Notably, in some of these litigations, an entity whose employees or agents are alleged to have been engaged in corruption attempts to recover the proceeds of that corruption from the party that benefited from making illegal payments.

For example, *Petróleo Brasileiro S.A. (Petrobras)*, Brazil's state-owned oil and gas company, has argued in defense to breach of contract claims that its contract counterparties should not be able to reap benefits from contracts obtained through bribery. In June 2018, an arbitral tribunal seated in Houston rejected this argument, finding that because Petrobras had accepted novations and amendments to its contract with *Vantage Drilling International*, a Cayman offshore drilling company, it was estopped from claiming that the contract was void on the basis of corruption. Petrobras is now seeking to vacate that award in a proceeding in the U.S. District Court for the Southern District of Texas.⁸

In another example, a litigation trust was formed in the United States to sue on behalf of *Petróleos de Venezuela S.A. (PDVSA)*, Venezuela's national oil and gas company. (Litigation trusts are occasionally used to pursue legal claims to repay potential creditors.) In March 2018, the PDVSA litigation trust filed a lawsuit alleging a long-running conspiracy by oil traders, banks and individuals to bribe officials, rig bids and obtain below-market contracts from PDVSA, and seeking to recover the illegally obtained proceeds.⁹ In November 2018, a magistrate judge in Florida concluded that the litigation trust did not have standing to pursue the claims, citing PDVSA's failure to make signatories to the trust agreement available for deposition as part of the court-ordered discovery into the validity of the litigation trust agreement. The judge also found that the PDVSA trust failed to carry its burden of demonstrating the evidentiary admissibility of the trust agreement, and that PDVSA's assignment of its claims violated champerty law of New York, which was the governing law of the trust agreement.¹⁰

Although claimants in both cases failed on procedural grounds, it is likely that the trend of pursuing such claims will continue.

⁸ *Vantage Deepwater Co. v. Petrobras Am. Inc.*, No. 4:18-cv-2246 (S.D. Tex. filed July 2, 2018).

⁹ *PDVSA Litig. Trust v. Lukoil Pan Ams. LLC*, No. 1:18-cv-20818 (S.D. Fla. filed Mar. 3, 2018).

¹⁰ Report & Recommendation at 20, *PDVSA Litig. Trust*, No. 1:18-cv-20818 (S.D. Fla. Nov. 5, 2018), ECF No. 636.

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