Skadden

Latin America Dispute Resolution Update

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

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ICSID Tribunal Finds That Colombia Violated the Minimum Standard of Treatment but Did Not Indirectly Expropriate the Investment in *Eco Oro v. Colombia*

In September 2021, an International Centre for Settlement of Investment Disputes (ICSID) tribunal concluded in *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/02/6, Decision on Jurisdiction, Liability and Directions on Quantum (Sept. 9, 2021)) that Colombia violated the minimum standard of treatment under international law when it designated the Santurbán Páramo zone as a protected wetland zone in which mining activities could not be carried out, depriving Eco Oro of its vested rights under a concession agreement.

Eco Oro is a Canadian mining company with a history of investments in Colombia's mining sector. In 2007, Eco Oro and a Colombian state entity entered into a concession agreement with respect to land that Eco Oro intended to mine for gold, silver and other metals. In 2014, Colombia issued Resolution 2090, which created the boundaries of the Santurbán Páramo (the Páramo), a high-altitude wetland zone. The Páramo overlapped by over 50% with the area that Eco Oro had intended to mine. Although Resolution 2090 contained exceptions allowing mining rights to be granted in the Páramo, in 2016, Colombia's Constitutional Court issued a judgment that removed those exceptions, essentially preventing Eco Oro's use of over 50% of the Páramo.

In December 2016, Eco Oro commenced arbitration against Colombia under the Canada-Colombia Free Trade Agreement (FTA). Eco Oro claimed that Colombia's designation of the Páramo constituted an expropriation under the FTA and violated the minimum standard of treatment under international law.

On the issue of Colombia's liability, a majority of the ICSID tribunal determined that Colombia did not indirectly expropriate Eco Oro's investment. The FTA expressed Canada's and Colombia's "shared understanding" that nondiscriminatory measures designed to protect legitimate public welfare objectives, such as the environment, do not constitute indirect expropriation, "[e]xcept in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith." Accordingly, the tribunal analyzed "whether the Challenged Measures were a legitimate exercise of Colombia's police powers pursuant to Annex 811(2)(b)," *i.e.*, if they were "a nondiscriminatory measure or series of measures designed and applied to protect the environment."

US Supreme Court Will Address Whether Section 1782 Permits Discovery for Use in a Foreign Private Arbitration

As discussed in our March 2021 newsletter, the U.S. Supreme Court was poised to consider whether a U.S. statute known as 28 U.S.C. §1782 (Section 1782) permits U.S. federal district courts to order parties to produce documents for use in foreign private commercial arbitrations. Section 1782 generally allows litigants to obtain discovery from individuals and entities in the U.S. if the discovery is "for use in a proceeding in a foreign or international tribunal." However, several U.S. Courts of Appeals have reached opposite conclusions regarding whether a private commercial arbitration, as opposed to a foreign court proceeding, for example, constitutes a "foreign or international tribunal." In *Servotronics Inc. v. Rolls-Royce PLC* (No. 20-794 (U.S.)), the Supreme Court had agreed to decide that precise question. Oral argument was scheduled for October 5, 2021, but, in September 2021, the parties agreed to dismiss the case and it was removed from the Supreme Court's calendar.

This was not the end of the road for this important issue, however. On December 10, 2021, the Supreme Court granted *certiorari* in two cases that address the same question from different angles. One case, *ZF Automotive US, Inc. v. Luxshare, Ltd.* (No. 21-401 (U.S.)), involves a private commercial arbitration over a contract dispute with two private parties. The other, *AlixPartners LLP v. The Fund for Protection of Investor Rights in Foreign States* (No. 21-518 (U.S.)), involves an arbitration between a private party and a state under a bilateral investment treaty.

In *ZF Automotive*, Luxshare, Ltd., a Hong Kong limited liability company, is seeking discovery from an indirect U.S. subsidiary of a German corporation, ZF Automotive US, Inc. ZF Automotive's parent company is currently engaged in an arbitration in Germany with Luxshare in which Luxshare accuses ZF Automotive's parent of concealing information during the negotiation of a purchase agreement between the companies. Luxshare sought discovery from ZF Automotive under Section 1782 and the U.S. District Court for the Eastern District of Michigan granted the application. ZF Automotive then took the unusual step of seeking a stay of the discovery order from the U.S. Supreme Court, which the Court granted.

In its petition asking the Supreme Court to hear the case, ZF Automotive highlighted that the U.S. Courts of Appeals remain split on the issue of whether Section 1782 may be invoked to support private commercial arbitrations. The Fourth and Sixth Circuits have held that commercial arbitrations qualify for Section 1782 relief, while the Second, Fifth and Seventh Circuits have held that a private commercial arbitration is not "a foreign or international tribunal" for purposes of Section 1782.

In *AlixPartners*, the petitioner has asked the Supreme Court to decide whether Section 1782 may be used to seek discovery in aid of a foreign *ad hoc* arbitration, constituted pursuant to a bilateral investment treaty, involving a "commercial dispute." The underlying dispute involves a claim by a former shareholder of AB Bankas Snoras (Snoras), a failed Lithuanian bank, against the government of Lithuania. The claim was assigned to the Fund for Protection of Investor Rights in Foreign States, which commenced an *ad hoc* arbitration in accordance with the United Nations Commission on International Trade Law Rules pursuant to a bilateral investment treaty between the Russian Federation and the Republic of Lithuania. The fund then sought to obtain discovery in the United States from AlixPartners LLP and its former CEO, who had served as a temporary administrator of Snoras. The U.S. District Court for the Southern District of New York granted the application under Section 1782, and the Second Circuit Court of Appeals affirmed the order.

The Supreme Court will hear both cases in a consolidated oral argument and will likely issue a decision during this Supreme Court term, which ends in June.

The number of petitions filed in U.S. courts to seek discovery under Section 1782 has been rising. The Supreme Court's decision in these two cases will significantly impact that trend.

The majority found that Colombia was properly exercising its police powers when it designated the Páramo as a protected area. The tribunal held that, because it found Colombia's actions were adopted in good faith, nondiscriminatory and proportional to the state's goal — the protection of the Páramo, they did not constitute an indirect expropriation.

A different majority of the same ICSID tribunal applied a two-step analysis to evaluate whether Colombia had nonetheless breached the minimum standard treatment obligation: (i) whether Colombia, *inter alia*, violated Eco Oro's legitimate expectations; and (ii) whether Colombia's actions were unacceptable from an international law perspective. This majority found that Colombia's actions "comprise[d] conduct that failed to provide Eco Oro with a stable and predictable regulatory environment." Furthermore, the tribunal found that Colombia's actions had been grossly inconsistent and gave rise to considerable confusion and uncertainty as to what activities Eco Oro could undertake and what the final boundaries of the Páramo would be (and when those boundaries would be announced), thereby constituting a breach of the minimum standard of treatment.

The tribunal directed the parties to consider additional questions related to the quantum calculation of Eco Oro's loss.

New Rules in Brazil on Availability of Documents and Judicial Cooperation Between Courts and Arbitral Tribunals

Recent developments in Brazil have broadened the scope of two tools that may be used in local dispute resolution proceedings. New rules expand (i) the availability of document production in Brazilian litigation and (ii) the extent of cooperation between Brazilian courts and arbitration tribunals seated in Brazil. The impact of these developments on disputes subject to arbitration and on cooperation between the Brazilian courts and arbitration tribunals seated outside of Brazil remains to be seen.

We understand from Brazilian counsel that a new law has amended the Civil Procedure Code to permit broader document production in Brazilian court proceedings. The law began as a provisional executive order, known as the Improvement of the Business Environment Act, issued by President Jair Bolsonaro. On August 26, 2021, the Brazilian Congress converted that executive order into law (Federal Law No. 14,195). This new legislation amended an array of federal statutes to implement some of the current Brazilian administration's core policies, such as facilitating the incorporation of new companies, fostering international trade and decreasing the bureaucratic steps required for a variety of corporate and judicial acts.

Historically in Brazil, the ability to obtain documents from the opposing party in a litigation has been limited. A litigant seeking document production is required to (i) identify the individual document sought as completely as possible, (ii) demonstrate the evidentiary purpose of the document, including the facts associated with it, and (iii) explain the circumstances upon which the litigant relied to assert that the document exists and is in the opposing party's custody. The party from whom a document is sought is entitled to object to the request, and the judge may compel production if the document, by its content, relates to the relationship between the parties, or if the counterparty has a legal obligation to produce the document or has previously referred to the document as evidence in the proceedings. The new legislation allows litigants to seek production of "categories of documents" in addition to individual specific documents, which potentially expands the scope of permissible document requests and could have the practical effect of increasing the level of document disclosure in court proceedings.

In addition, the ability to obtain broader document disclosure may have the effect of prompting more litigants to avail themselves of existing mechanisms under the Civil Procedure Code that permit pre-dispute requests for evidence. Whether and under which circumstances these pre-dispute mechanisms are available when a dispute is subject to arbitration remains in question and has not yet been settled by Brazilian courts.

We also understand that a second development concerns the arbitral letter (*carta arbitral*), a mechanism by which an arbitral tribunal may seek direct cooperation from national courts. Newly approved Resolution 421/2021 of Brazil's National Council of Justice[1] regulates practical aspects of the arbitral letter procedure, which is provided for under both the Civil Procedure Code and the 2015 Reform of the Brazilian Arbitration Act.[2] Arbitral letters are, among other things, commonly used to enforce provisional measures granted by an arbitral tribunal (*e.g.*, seizures, attachments and freezing of bank accounts) or to enforce arbitrators' orders compelling the production of documents or witness testimony, which require coercive powers that arbitrators lack. The new resolution is intended to provide uniform rules for the use of the arbitral letter throughout the country and to strengthen the pro-arbitration approach of Brazilian courts.

The resolution specifies that proceedings relating to arbitral letters shall be held under seal, provided that the arbitration itself is also confidential. The new rule also outlines the formal requirements of an arbitral letter, which must: (i) identify the arbitral tribunal, arbitral institution and number of the proceeding; (ii) specify the act that requires judicial cooperation; (iii) include evidence of the constitution of the arbitral tribunal; and (iv) include copies of the arbitration agreement, relevant briefs, arbitration decision and powers of attorney for the lawyers involved, where applicable. In addition, the resolution introduces the possibility that the arbitral letter may be used in reverse, *i.e.*, a court may use an arbitral letter to seek cooperation from an arbitral tribunal.

Finally, the resolution contains an express provision limiting its applicability to arbitral letters relating to domestic proceedings. The issue of whether arbitral tribunals seated outside of Brazil may seek direct cooperation from Brazilian courts by way of an arbitral letter is not addressed by the legislation and has yet to be tested before Brazilian courts.

[1] Resolution 421/2021 of September 29, 2021, which amended Resolution 350/2020 of October 27, 2020. The National Council of Justice is the body responsible for the strategic planning and administrative regulation of the judiciary branch in Brazil.

[2] Federal Law No. 9,307 of September 23, 1996, as amended by Federal Law No. 13.129 of May 26, 2015, Article 22-C.

Creditors' Efforts To Enforce Judgments Against Venezuela and PDVSA Face Continuing Challenges, Including From US Sanctions

The collective efforts of Venezuela's award creditors, particularly those of Crystallex, Inc., the former owner of an expropriated gold mine, to recover compensation for the expropriations of the Chavez-Maduro eras have encountered further complications in the form of U.S. sanctions laws and competing claims by bondholders of Petróleos de Venezuela, S.A. (PDVSA).

In 2008, the Venezuelan government, led by Hugo Chavez, seized the Las Cristinas gold mine, which reportedly held the largest gold deposits in the country. In 2011, the former owner, Crystallex, commenced an arbitration before the Additional Facility to the World Bank's ICSID, claiming that the seizure violated the Canada-Venezuela bilateral investment treaty. In 2016, an ICSID Additional Facility arbitral tribunal upheld Crystallex's claim and awarded the company over $1.3 billion in damages. In 2017, the U.S. District Court for the District of Columbia confirmed the award, after which Crystallex brought enforcement proceedings in the U.S. District Court for the District of Delaware seeking to execute the award against assets of PDVSA, Venezuela's state-owned oil company. Specifically, Crystallex sought to attach shares of PDV Holding, Inc. (PDVH), a Delaware company belonging to PDVSA. PDVH is the holding company for CITGO Holding, Inc., which in turn wholly owns CITGO Petroleum Corp., a U.S. petroleum distributor.

In a 2018 ruling, Judge Stark of the Delaware district court found that PDVSA was an alter ego of the Venezuelan government, allowing Crystallex to levy execution against PDVH (and thus its interests in CITGO). Among other things, Judge Stark found that PDVSA was under the pervasive political control of the Maduro administration and therefore that PDVSA's separate corporate existence should be disregarded. The U.S. Court of Appeals for the Third Circuit later affirmed his ruling, with the U.S. Supreme Court denying *certiorari* on May 18, 2020.

These developments occurred alongside some important political developments. Starting in 2019, the U.S. government and most Western countries withdrew political recognition of the Maduro administration and instead recognized National Assembly President Juan Guaidó as the legitimate interim president of Venezuela. The Guaidó administration, however, consists of officials who are reportedly based outside of Venezuela. By contrast, the Maduro administration, while no longer internationally recognized as legitimate, remains *de facto* in control of the workings of government in Caracas. Although the mandate of Venezuela's National Assembly (and by implication the Guaidó administration's mandate) was set to end in January 2022, in early January 2022, a subset of Venezuela's opposition parties approved a one-year extension of the assembly's mandate. On January 4, 2022, the U.S. government announced that it "continues to recognize the authority of the democratically elected 2015 National Assembly as the last remaining democratic institution and Juan Guaidó as Venezuela's interim president" and that it "welcome[d] the agreement reached to extend the authority of the National Assembly elected in 2015 and of interim President Guaidó as its president."

Meanwhile, in 2021, the district court in Delaware issued preliminary directions concerning a potential sale of PDVH. The court also appointed a "special master" to assist it with the sale process. Over the course of the year, the court received further briefing on these issues, including whether pending U.S. government sanctions against Venezuela required issuance of a specific license from the U.S. Office of Foreign Asset Control (OFAC) in order for the court to conduct a judicial sale of PDVH. The court also received briefings from stakeholders affected by the proposed auction of PDVH, including:

- the Guaidó administration, which on behalf of the government of Venezuela (i) has informed the district court that it has appointed an "ad hoc" board to PDVSA, and (ii) has urged that no auction of PDVSA assets occur because, it claims, this would be deleterious to its efforts to effect a transition to democracy in Venezuela;
- the U.S. government, which has stated that it supports the Guaidó administration generally and, specifically, has asserted that CITGO's "loss through a forced sale in a U.S. court would be a great political victory for the Maduro regime"; and
- other award creditors of Venezuela, which are also seeking to participate in the auction of PDVH and to obtain a share of the proceeds.

The result of this litigation was that, as of 2021, the Delaware district court was poised to conduct a judicial sale of the company that controlled CITGO to satisfy Crystallex's award rights, and potentially those of other creditors. But other complications ensued.

First, the Guaidó administration attempted to appeal the Delaware district court's 2021 orders concerning the judicial sale. In early 2021, it filed an interlocutory appeal to the U.S. Court of Appeals for the Third Circuit, claiming that any auction would be improper and a violation of sovereign immunity. In January 2022, the Third Circuit dismissed the appeal for lack of jurisdiction as premature, given that no final auction order has yet been ordered. However, court's decision left open the prospect of a further appeal once the Delaware district court issues a final sale order.

US Government Announces Formal Strategy To Counter Corruption

On December 6, 2021, the White House released the "United States Strategy on Countering Corruption," which outlines the Biden administration's focus on fighting corruption as a core national security interest of the United States. The paper describes an interagency, cross-border approach, including:

– additional resourcing for and coordination among federal agencies charged with addressing corruption issues;

– increased scrutiny of bribe recipients (in addition to payors) and gatekeepers who facilitate corruption;

– leveraging existing anti-money laundering and asset recovery regimes as enforcement tools to discourage corruption; and

– more coordination with international partners.

Companies, including those doing business in or with Latin America, should expect increased Foreign Corrupt Practices Act enforcement efforts from the U.S. Department of Justice and U.S. Securities and Exchange Commission, and that other government agencies will increasingly share data and resources to support those efforts. Companies operating internationally should be aware of the Biden administration's increased focus on anticorruption efforts and should revisit their risk assessments and compliance programs to ensure those assessments and programs identify and address corruption-related risk in company operations. Please refer to our December 20, 2021, client alert "US Announces Formal Strategy To Counter Corruption" for a detailed discussion of the strategy paper.

Second, another group of creditors, namely the holder of bonds in PDVSA, is conducting competing efforts. Several year ago, PDVSA pledged a substantial block of CITGO Holdings shares as collateral for bonds it issued. PDVSA later defaulted on those bonds. In 2020, a group of bondholders of PDVSA — specifically, the holders of approximately 60% of the bonds issued by PDVSA with face value in excess of $1.5 billion — obtained a judgment from the U.S. District Court for the Southern District of New York allowing the holders to enforce their security rights and liquidate the pledged shares in CITGO Holdings. That order is now under appeal to the U.S. Court of Appeals for the Second Circuit, which heard arguments in January 2022. In that appeal, the Guaidó administration argued that the pledge of CITGO shares violated Venezuela's internal law. If, however, the bondholders' efforts to sell the stock go forward, that may impact Crystallex's position.

Third, as we have previously discussed (see our August 30, 2017, client alert "New Sanctions Target the Government of Venezuela's Access to US Capital Markets" and our November 8, 2018, client alert "New Executive Order Authorizes the Imposition of Sanctions To Counter Corruption in Venezuela"), the U.S. government has imposed extensive sanctions on Venezuela aimed at restricting access to U.S. debt and equity markets and targeting corrupt practices in Venezuela that are impeding the efforts of creditors. On September 10, 2021, OFAC issued a decision in which it refused to grant Crystallex a special license to conduct a judicial sale of shares in PDVH. In its decision, OFAC stated that it had consulted with the U.S. Department of State, which had considered the current situation in Venezuela. The State Department concluded that "denying the license at present and continuing the blocking of these shares is particularly important at this time." OFAC further noted that the political climate in Venezuela had substantially changed in January 2019 when Nicolas Maduro attempted to take the role of president for a second term after fraudulent elections, and the United States instead recognized Juan Guaidó as Venezuela's interim president. OFAC emphasized that its ability to issue or withhold licenses was critical for the U.S. government to "tailor sanctions to evolving foreign policy and national security needs."

The U.S. government's position has also impacted the PDVSA bondholders' efforts to enforce their rights against CITGO Holdings stock. On January 20, 2022, OFAC issued General License 5I and a related OFAC FAQ, in which it stated that "transactions related to the sale or transfer of" the CITGO Holding, Inc. shares serving as collateral for the holders of the PDVSA bonds "are prohibited" under the sanctions until at least January 20, 2023, "unless specifically authorized by OFAC."

The various creditors of Venezuela and PDVSA thus face a series of continuing challenges as they attempt to enforce their judgments against Venezuelan government assets located in the United States. Moreover, for as long as the U.S. government remains opposed to a sale of PDVH and/or CITGO Holdings, OFAC may continue to deny permission to conduct the sale.

All of these events, and possibly further claims, are likely to play out in the first half of 2022.

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New York Arbitration Week 2021 Features Panel on Latin American Enforcement Issues

The third annual New York Arbitration Week (NYAW) took place on November 15-19, 2021. Jointly led by the New York International Arbitration Center and the New York branch of the Chartered Institute of Arbitrators, NYAW 2021 provided a week of programming showcasing New York as a global seat for international arbitration and a generator of thought leadership on cutting-edge topics in the field. A different arbitral institution or organization sponsored each event in the week's calendar, and the NYAW 2021 Organizing Committee, which was co-chaired by Skadden partner Lea Haber Kuck, coordinated the overall programming. Skadden associates Alexander Haden and Jesse Peters served as committee secretaries.

Of particular note was the "Dispelling Myths: Enforcement of Latin American Arbitration Awards in the United States and U.S. Arbitration Awards in Latin America" program sponsored by the New York City Bar Association (find the recording available here). Columbia University Law School Professor Alejandro Garro moderated a panel in which leading practitioners from several jurisdictions across North and South America discussed the unique features and perceived challenges in enforcing international arbitral awards in their respective jurisdictions. Panelists included Skadden partner Jennifer Permesly (United States), Maria Ines Corra (Argentina), Marcela Levy (Brazil), Eduardo Zuleta (Colombia) and Elsa Ortega (Mexico).

The panelists agreed that although each jurisdiction has unique features, courts throughout the Americas have generally favored enforcement of international arbitral awards. Ms. Permesly discussed the commonly held view that U.S. courts do not honor competence-competence determinations. She noted, however, that U.S. jurisprudence recognized an exception that nearly swallows the rule: If there is clear and unmistakable evidence that the parties intended to refer the question to the arbitrators, then courts will not review the jurisdiction of the arbitrators *de novo* at the enforcement stage. Significantly, many courts have found that the incorporation of arbitral institution rules that delegate questions of arbitrability to the arbitrators can constitute such clear and unmistakable evidence.

Ms. Inés Corrá noted that Argentine law provides limited grounds for denying enforcement of foreign arbitral awards, following the spirit of the New York Convention. She highlighted three cases demonstrating the inclination of the Argentine Supreme Court of Justice to enforce awards and leave undisturbed the arbitral tribunal's decisions on the merits of the dispute.

Ms. Levy reported that Brazilian courts are very arbitration-friendly, but she flagged several cases showing the bounds of the Brazilian courts' willingness to enforce foreign awards. For example, she discussed a case in which the court denied enforcement of a foreign award, finding that the arbitrator was not impartial under the Brazilian Civil Procedure Code and holding that the award therefore violated Brazilian public policy.

Mr. Zuleta described Colombia as a country that "exports arbitrators and imports awards" because its jurisprudence favors enforcement of awards. However, he noted that some aspects of arbitration enforcement actions in Colombia are still uncertain, such as the number of rounds of pleadings each party may submit and the position of the Council of State (the body with jurisdiction over recognition of awards against state entities) on international public policy in certain circumstances.

Finally, with respect to Mexico, Ms. Ortega explained that enforcement of an arbitral award in Mexico is not an appeal, and the judge may not examine the merits of the underlying dispute. She discussed the use of the *amparo* constitutionality proceeding in the context of the enforcement of arbitration awards. She noted that parties may not bring an *amparo* proceeding against arbitral tribunals to challenge decisions, as tribunals are not state actors. However, parties can bring such challenges against a judge who decides to enforce or annul an arbitral award.

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