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TDM Special Issue *"The Future of Investment Law in Latin America; El Futuro del Derecho de las Inversiones en América Latina"*.

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LATIN AMERICA

From NAFTA to USMCA: Modifications to Investment Protections

Sophia Castillero
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Executive Summary

The following article discusses the changes in investment protections resulting from the 2018 adoption of the United States-Mexico-Canada Agreement (USMCA), a new treaty between the three neighboring countries, to replace the 1994 North American Free Trade Agreement (NAFTA).

It begins with an introduction to NAFTA, its contributions to the field of international investment law, and the emergence and rise of USMCA.

The article then follows with a comparative legal analysis of the modifications to investment protections from NAFTA to USMCA, with a focus on the following topics: (1) investment arbitration availability; (2) legacy and pending claims; (3) scope of available investment protections; (4) available investment protections; (5) procedural matters.

The article concludes that NAFTA did a good job of not only inducing investment in its three member nations. Additionally, NAFTA was indeed a pioneer in treaty law, as it has been appropriated by other bilateral and multilateral investment agreements. Although there are substantial investment provisions in the new treaty, USMCA contains less investment protections than its predecessor NAFTA. However, even though investment protections are considerably reduced, USMCA still offers substantial foreign investment protections to investors from Mexico and the United States. The article also offers relevant insight for investors on how to navigate these changes and mitigate the political risk intertwined with foreign investment in light of the new multilateral treaty at hand.

Full article here

La Participación Social en el Arbitraje de Inversión Latinoamericano: Nuevos Caminos en Materia Ambiental

Yuri Pedroza Leite

Victoria Mulville

Abstract

The article addresses the future of the social participation in investment arbitration proceedings with an environmental component in Latin America. It begins by presenting new regulations that promote social participation in environmental matters and in investment arbitrations in general: the Escazú Agreement, on the one hand, and the UNCITRAL Rules on Transparency and the Proposal for Amendments to the ICSID Rules, on the other. It then analyses relevant Investor-State Dispute Settlement ("ISDS") jurisprudence that demonstrate a growing, albeit timid, tendency to promote the participation of third parties in matters of environmental protection. It also studies how certain procedural and substantive aspects of ISDS can impact access to justice by third parties. It ends by offering a reflection on the direction that the environmental dispute resolution system is taking around social participation: a future that leans towards environmental democracy as the standard.

Resumen

El artículo aborda el futuro de la participación social en arbitrajes de inversión en Latinoamérica con componente medioambiental. Comienza por presentar nuevas normativas que promueven la inclusión social en materia ambiental y en arbitrajes de inversión en general: el Acuerdo de Escazú, por un lado, y el Reglamento CNUDMI sobre la Transparencia y la Propuesta de Enmiendas a las Reglas del CIADI, por el otro. Luego analiza jurisprudencia del sistema de Solución de Controversias Inversionista-Estado ("ISDS") que demuestran una creciente, aunque tímida, tendencia por promover la participación de terceros en materia de protección ambiental. También estudia cómo ciertos aspectos procesales y sustantivos del ISDS pueden impactar el acceso a la justicia de parte de terceros. Termina por ofrecer una reflexión sobre la dirección que está tomando el sistema de solución de controversias medioambientales en torno a la participación social: un futuro que se inclina hacia la democracia ambiental como estándar.

Full article here

Investment Law and Post-Pandemic in Latin America: Towards a New Approach to the Non-Intervention Principle

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Abstract

This paper proposes two strategies to address the potential conflict between International Investment Law and the non-intervention principle in Latin America during the pandemic. Regarding the International Investment Agreements in force, Latin American countries should consider that the standards of protection are based on principles similar to the general principles of the Latin American Administrative Law, as legitimate expectations, non-discrimination, transparency, good faith, arbitrariness prohibition, grossly unfairness, and violation of the due process. Rather than try to escape from International Law arguing the non-intervention principle, the region should move into an Administrative Law interpretation that reduces the risk of investment disputes. That interpretation also protects the right to regulate and the margin of deference -vague concepts that could have a more precise meaning through this interpretation methodology. In addition, Latin America should consider the advantage of an Inter-American BIT model that promotes a balance between the right to regulate and the investor's protection, considering two characteristics of the region: state fragility and pervasive inequality.

Full article here

Indirect Expropriations in International Investment Law and in Brazil: A Cross-Regime Approach

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Adriana Braghetta Advogados

José Marinho Séves Santos
Mattos Filho

Abstract

Brazilian law does not present any provision forbidding indirect expropriation. However, the Brazilian Federal Constitution offers property rights a high degree of protection. Scholars point out that indirect expropriation should, then, be considered unconstitutional. There is, however, no parameter available for practitioners to determine that a certain regulation had expropriatory effect. This paper proposes that parameters currently used in international investment law might be used by Brazilian courts.

Full article here

Revelas o ¿anulación? Comentario a la decisión sobre anulación en Eiser v. España

Kiara Sofía Bazán Santillán
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Abstract

On June 11, 2020, an ICSID award was annulled for the first time on the grounds that the tribunal was not properly constituted, due to the lack of independence and impartiality of an arbitrator.

This decision raises a number of questions: What is the standard of disclosure of an arbitrator in an ICSID arbitration? What does being independent and impartial entail? What is the standard for challenging an arbitrator? The purpose of this article is to answer these questions.

We conclude that the case in question will have an impact on the practice of investment arbitration, as it will be a benchmark for decisions on the challenge or annulment of awards. Especially in Latin America, where the world of arbitrators and experts specialized in this type of arbitration is limited and the process of searching for and appointing arbitrators could become slow and costly if the standard set by the case in question is followed.

Article is in Spanish.

Full article here

Unitization of Shared Reservoirs in Mexico and Risks of Indirect Expropriation

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Abstract

Seven years after the publication of the Constitutional Energy Reform, Mexico counts with 111 Contracts in force with private companies and/or Petroleos Mexicanos (PEMEX), besides 399 Entitlements exclusive to the latter, to carry out the Exploration & Production of Oil & Gas in the country. Nevertheless, the government elected in 2018 has implemented a new energy policy that rejects several of the principles of the Energy Reform and aims to reinforce the role of the State, mainly through PEMEX, in order to achieve the objectives of energy security and sovereignty. Even though the Mexican State, through the Ministry of Energy (SENER), is responsible for defining that energy policy, there is a possibility that SENER materializes acts that violate the conditions agreed under the Contracts and several international treaties.

This paper focuses on the risks of the Unitization procedures (the union of Contractual and/or Entitlements' Areas that share an oil & gas reservoir) that unjustifiably benefit PEMEX in detriment of private companies and how this may materialize cases of indirect expropriation that would result pretty burdensome for the country.

Full article here

La Protección Ambiental en el Arbitraje de Inversiones: Tendencias Actuales y Posibles Ramificaciones

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Resumen

Las protecciones sustantivas contenidas en los Tratados Bilaterales de Inversión buscan proteger derechos económicos con el fin ulterior de fomentar el flujo de inversiones y mejorar las condiciones de infraestructura, bienestar social, y desarrollo de las naciones latinoamericanas. Por otro lado, un conjunto de normas que podrían considerarse de mayor envergadura busca proteger el medio ambiente y preservar los recursos naturales.

La interacción de estos preceptos puede desembocar en disputas-arbitrajes-de inversión, como consecuencia del ejercicio de potestades estatales en beneficio del medio ambiente que trastocan o afectan proyectos desarrollados con capital extranjero. Latinoamérica, siendo una región rica en recursos naturales y un destino predilecto de capital extranjero, se ha convertido en cuna de diversos arbitrajes de inversión con un componente ambiental, cuyo análisis resalta la difícil tarea de conciliar derechos de distinta naturaleza, pero con similar valor normativo. En adición a estas consideraciones, la prevalencia de comunidades indígenas en la región se traduce en que los arbitrajes de inversión en proyectos que podrían afectar al medio ambiente tengan un matiz particular y autóctono, que amerita análisis y estudio, con particular énfasis en su relación con la aplicación práctica de principios rectores en materia ambiental y, en específico, del principio de Evaluación de Impacto Ambiental.

Full article here

The State of Necessity in Public Health Emergency Measures: A Proposition from the Latin American Experience

Ruxandra Irina Esanu
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Dechert LLP

Abstract

In the past, necessity has been raised in international arbitration by Latin American respondent States, most notably Argentina, to defend measures adopted in the context of national emergencies (e.g., caused by severe economic crises). In 2020, a number of States declared national emergencies and adopted extraordinary measures to deal with the severe health and economic crisis caused by the COVID-19 pandemic. These measures, seldom confined to a specific economic sector, may be at the origin of new disputes with foreign investors. In this article, we review the historical application of the necessity defense, as understood by Latin American respondents and as decided by arbitral tribunals. On this basis, we consider whether the necessity defense may validly be raised against expropriation claims in the context of health and economic emergencies.

Full article here

Algunas consideraciones en torno a la protección efectiva de las inversiones del sector energético en México

Juan Carlos González Magallanes
PEMEX

Resumen

Los mecanismos de salvaguarda a las inversiones en México encuentran sustento en su vocación arbitral, en la jerarquía de los tratados internacionales como norma suprema, en las reformas constitucionales de 2008, 2011 y 2013 y en los precedentes judiciales.

Abstract

The mechanisms for safeguarding investments in Mexico find support in their arbitration vocation, in the hierarchy of international deals as a supreme norm, in the constitutional reforms of 2008, 2011 and 2013, and in judicial precedents.

Sumario

I. Introducción. II. De la vocación arbitral y convencional de México. III. De los derechos de los tratados internacionales como norma suprema. IV De las reformas constitucionales de 2008 y 2011. V. Del relevante precedente de la Primera Sala de la Suprema Corte de Justicia de la Nación del 16 de mayo de 2016. VI. De la reforma constitucional de 2013. De la coyuntura actual en los sectores eléctrico y de hidrocarburos y; de las reflexiones finales

Article is in Spanish.

Full article here

El Clima para la Inversión Extranjera en México. El Caso de Energía en 2021 y a mediano plazo; The Climate for Foreign Investment in Mexico. Energy Case in 2021 and to Medium-term

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Abstract

This article addresses some of the recent policies that the Mexican government has adopted in the electricity sector, especially regarding the reform of the Electric Industry Act. Reference will be made to the motives behind the changes: the purported rescue of energetic sovereignty by the State. This paper addresses how these decisions will have several undesired consequences, both in the electricity and the hydrocarbons sectors, which could result in a systematic impact on investments made in the sector.

This paper will address the bill to reform the Hydrocarbons Act that was submitted a couple of days prior to this work being completed, so its analysis was not exhaustive. However, it is likely that this initiative will follow the same path as that of the reform to the Electric Industry Act.At the time this article was submitted for review, various events related to legal reforms and their challenges in the national courts of Mexico were underway, so the reader should consider reviewing both the results of the legal amendments, as well as the lawsuits.

Resumen

Este artículo aborda algunas de las políticas recientes que ha adoptado el gobierno mexicano en el sector eléctrico, especialmente sobre la reforma a la Ley de la Industria Eléctrica. Se hará referencia a la motivación de una supuesta recuperación por parte del Estado de la soberanía energética. Este trabajo se discute como estas decisiones causarán varios efectos no deseables tanto en la industria eléctrica como en el sector de hidrocarburos, mismos que podrían redundar en una afectación sistemática en las inversiones realizadas en el sector.

Este artículo mencionará la iniciativa de reforma de la Ley de Hidrocarburos que fue presentada un par de días antes de que este trabajo fuese terminado, por lo que su análisis no fue exhaustivo. Sin embargo, es probable que esta iniciativa siga el mismo camino que el que ha tomado la reforma a

la Ley de la Industria Eléctrica.Al momento de someter a revisión este artículo diversos eventos relacionados con reformas legales y sus impugnaciones en los tribunales nacionales de México se encontraban en curso, por lo que el lector debería considerar la revisión de los resultados de las modificaciones legales, así como de los juicios mencionados.

Article is in Spanish.

Full article here

The Non-Precluded Measures Defence. A View from Latin America

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Abstract

This Article will analyse the possible defences that host States are likely to raise, with a particular focus on non-precluded measures (NPM) in International Investment Agreements (IIAs) signed by Latin-American and Caribbean (LAC) countries. While this Article focuses on the identification, interpretation, and application of NPM provisions in IIAs, the Article will explore the relationship between NPM clauses and background defences in customary international law, such as force majeure, distress, and state of necessity.

The interpretation of both NPM clauses and customary defences is key to determining States' freedom to respond to exceptional circumstances, like the COVID-19 pandemic. In this context, LAC experience in the interpretation and application of such defences could be valuable for current and future ISDS.

Full article here

Counterclaims and Latin America: Proposals Aimed at Combatting Corruption Through ISDS While Vindicatingthe System's Legitimacy Within the Region

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Bufete Asali, S.C.

Roberto Cuchí
Bufete Asali, S.C.

Introduction

In this article, we argue that State counterclaims could be implemented in corruption-related disputes in order to vindicate ISDS as an effective means to combat this systemic problem within the region.

In the following sections, we will first analyze Latin America's historically complex relationship with ISDS considering the looming legitimacy crisis that the system is currently experiencing, highlighting the need to renew ISDS by exploiting its potential as an effective mechanism to fight one of the region's most pressing issues: corruption (Section I). A

fterwards, we will discuss how investment arbitration tribunals have dealt with corruption (Section II). Then, we will also provide an overview of the developments which counterclaims have undergone in the region to become a useful procedural tool to address host States' concerns (Section III). Finally, we will examine the possibility of implementing counterclaims in ISDS to deal with corruption-related disputes in Latin America (Section IV).

Full article here

What Investor-State Arbitrations Involving Latin American States Indicate about the Increasingly Relevant Dominant and Effective Nationality Principle

Michael Rodríguez Martínez
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Executive Summary

With the number of Latin American individuals acquiring a second or third nationality growing, and with an increase in the flow of investment to Latin America, the authors explore how the issue of a person's dominant and effective nationality will likely become increasingly relevant to investor-State arbitrations involving Latin American nationals and States.

With reference to recent investor-State arbitrations involving Latin American nationals and States, the authors discuss two main issues related to the principle of dominant and effective nationality that arise in investor-State arbitration: first, when the dominant and effective principle applies; second, how a claimant's dominant and effective nationality is determined. For each question, the authors provide guidance to practitioners who seek to persuade a tribunal on their positions.

Full article here

Protecting the Environment in Latin America: Does Arbitration Have A Say?

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Abstract

This article analyses the potential role to be played by the international arbitration system when protecting the environment. For this purpose, it outlines the tendencies in treaty-drafting and the approach taken by arbitral tribunals in disputes involving Latin American parties, to understand how these issues have been tackled in practice. It concludes that arbitration could be an important resolution tool to address environmental challenges and balance related interests fairly, given that the applicable IIAs and their interpretation by the adjudicators provide the mechanisms to do so. It is proposed that this would not have a negative impact on arbitration as the dispute resolution mechanism of choice. To the contrary, it would align the interests of investors and States while adapting to the new challenging scenario. Contributing to protecting the environment in a fair manner is vital to ensure that the arbitral system stay relevant in this evolving market.

Full article here

Is There a Latin American Approach to the International Investment Law? From the Legal Doctrines and Pan American Conferences in the XIX and XX Centuries to a Contemporary Approach in the XXI Century

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Abstract

Latin America was one of the first regions to conquer its political independence at the beginning of the 19th century. Since then, these countries have been struggling for their economic sovereignty against colonialism and had developed their own legal doctrines of international law and their relation with foreign investors. The Bello, Calvo, and Drago doctrines, later the Pan American conferences, which developed a fruitful set of international norms in public and private international law, the Mexican Revolution as a symbol for nationalization and promotion for development, and the resolutions of the United Nations General Assembly Resolutions of the 1960s and 1970s, recognizing the permanent sovereignty of natural resources, describe a historical path for the defense of autonomy, equality between States, self-determination, equal treatment between foreign and national investors, and the prevalence of the application of domestic jurisdiction in investment dispute settlements. Among Latin American countries, only Brazil remained linked to the regional approach, standing away from the traditional framework of international protection (Bilateral Investment Treaties) and Investor-State Dispute Settlement (ISDS). Plus, this work analysis the 1980s and 1990s, when the region entered a period of internationalization of investment policies. Only after the Argentina crisis in 2001 and the financial crisis in 2008, along with the criticism of the international investment law and the negative effects of arbitration cases, Latin America is returning to its historical approach for the prevalence of domestic jurisprudence and equality between nationals and foreigners. The paper concludes that, in the 21st century, there is a returning to the historical Latin American approach, recognizing the colonialism process, the relevance of economic independence, and the awareness of a critical development of international law.

Full article here

Investment Protection and the Global Commons: The Human Right to Water and Concurrent Responsibilities in International Law

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Abstract

The human right to water is established not only by Resolution 64/292 of the UN General Assembly sanctioned in 2010, but also by other norms of positive international law and by customary law. The Committee on Economic, Social and Cultural Rights (CESCR) has also considered that compliance with the human right to water is essential for the fulfilment of other human rights guaranteed in international treaties. However, international law has not developed homogeneously, but has done so in a fragmented way and at multiple speeds.

We can see an example in how investors' rights are protected in international investment arbitrations such as ICSID tribunals and how investment claims are based on bilateral investment treaties (BITs). Those claims are initiated when concessionaires feel indirectly expropriated bay a government or violate the fair and equitable treatment, full protection and security of investment by measures taken by the State in order to guarantee human access to water in sufficient quantity and quality, for example. In those situations the State either supports its measure and risks a claim by the company, or retracts in order to negotiate a withdrawal of the company's claim, risking a possible violation of the human right to water.

This is called the "chilling effect": a situation self-inhibition to regulate by the State and satisfy the interests of investors instead. This puts in crisis a series of bases of the international legal structure, such as considering the priority in the fulfillment of human rights as obligations with an erga omnes effect in international law vis á vis obligations of a

purely dispositive nature, such as those emanated of the BITs.

These are cases of international responsibility of the State, especially in matters of human rights. However, the State is not the only responsible actor possible. The concurrent responsibility is that by which two legal entities are jointly responsible for different legal causes in case of violation of a rule. But is it impossible to attribute responsibility to a multinational corporation for violation of the human right to water or only the State can be responsible for that?

In international law, as well as in domestic law, it is possible to use the figure of complicity to attribute responsibility to the company for violations committed in their own right. Human rights treaties essentially attribute responsibility to States, but private legal entities are not excluded in these situations as they may assume a large number of functions that until a few decades ago were completely reserved for the State. In the present work we will develop the international responsibility of the companies as attributable entities of violations to the human right to water.

Full article here

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