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Joshua Briones
Ana Tagvoryan

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IS INTERNATIONAL ARBITRATION IN LATIN AMERICA IN DANGER?

Joshua Briones* and Ana Tagvoryan**

I. INTRODUCTION

LITIGATION in national courts exposes multinational companies to unknown risks and great cost. Arbitration, therefore, is not an option for most multinational companies. International arbitration provides a uniform practice, a neutral forum, enforceable awards, and a final non-appealable solution. For any country wanting to attract foreign investment, firmly established and trusted arbitration mechanisms are a must.

Recent developments in Latin America, however, have transformed the region into a challenging forum for international arbitration and foreign investors. The last few years, even months, have seen radical changes in commercial arbitration in several Latin American countries. While some countries support arbitration and uphold the states’ international obligations under United Nations Commission on International Trade Law (UNCITRAL) and the New York Convention, others reject arbitration that they perceive as unfairly favorable to foreign investors.

II. HIGH PROFILE NEGATIVE DEVELOPMENTS

A. COUNTRY SPECIFIC DEVELOPMENTS

The situation in Ecuador is but one example. On September 28, 2008, sixty-four percent of Ecuadorians approved the adoption of a new consti-
The new constitution—Ecuador's twentieth—gives President Rafael Correa *de jure* authority to run for consecutive second and third terms, which could keep him in office until 2017. It also gives him sweeping authority over key government institutions, including the courts and the central bank.

While many of the articles focus on domestic reforms, others address international relations. Article 422 directly impacts foreign investment. It forbids Ecuador from entering into any agreement which would require Ecuador to subject itself to any international arbitral tribunal.

The new constitution and Article 422 are not unique to Ecuador. At least two other countries in Latin America have taken similar steps against international arbitration of investment disputes.

2. **Venezuela**

In Venezuela, President Hugo Chavez's increasing control over Venezuela's natural resources, in particular its crude oil reserves, has had an impact on that country's respect for international arbitration mechanisms. For instance, the Venezuelan government has taken a majority control over key oil projects located along the Orinoco river basin. The government has also taken other significant steps which further discourage international investment and participation in international arbitration mechanisms. Apart from increasing taxes, the Venezuelan government has also forced companies to void existing agreements with international arbitration clauses and replace them with contracts that do not contain these investment protection tools. Venezuela's official explanation for its protectionist measures is to rectify the imbalance created in the 1990's when Venezuela was in desperate need of foreign investment and hastily entered into one-sided contracts.

Recently, Venezuela took the unprecedented step of unilaterally transforming thirty-two oil contracts into joint ventures operated by the Venezuelan government. While the original contracts all contained arbitration clauses, the new joint venture agreements do not.

3. **Bolivia**

Seemingly following in Venezuela's footsteps, in 2007, Bolivia nationalized its natural gas and oil fields. In doing so, the Bolivian government

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2. Id.
3. Id.
4. Id.
6. Id.
7. Id.
8. Id.
9. Id.
gave itself oversight over production and demanded a majority of the revenue generated by the country’s natural gas and oil fields. This is a significant development because Bolivia has the second largest natural resource deposits in South America, and has therefore enjoyed billions of dollars of foreign investment.

B. Economic Crisis

Adding to the direct attacks on international arbitration by the above mentioned regimes, the worldwide financial crisis hangs over the region like a dark cloud. Some estimate that the global financial meltdown could increase poverty in Latin America by fifteen percent in 2009. More poverty could lead to more crime, further strapping dwindling government resources. Indeed, some Latin American countries have already seen an increase in drug trafficking and criminal activity. In Mexico, for example, the government has initiated a war involving the country’s military against violent and powerful drug cartels, which has propelled the entire nation toward increased lawlessness. The concern, therefore, is that these economic woes, along with increased lawlessness, could result in further protectionist policies that discourage international investment and, by extension, international arbitration, especially in those countries that have been retooling their political systems in recent years.

All of these problems may create a perception among CEOs and General Counsel outside the region that international arbitration in Latin America is generally a bad idea at the present time.

III. Significant Positive Developments

Even with a rocky landscape in some parts of Latin America, international arbitration continues to gain recognition. The shining examples of Mexico, Chile, and Peru, to name just three, demonstrate that international arbitration in Latin America is becoming more and more of an accepted and reliable institution in the region.

A. Mexico

Mexico was the first country in the region to adopt the Model Law on

10. Id.
11. Id.
arbitration published by UNCITRAL.\textsuperscript{15} With this competitive advantage, Mexico continues to host the greatest number of international arbitrations in Latin America.\textsuperscript{16} Moreover, since joining NAFTA, foreign investment into the country has increased to US$60 billion. To improve the local judiciary's level of knowledge, the International Chamber of Commerce (ICC) has organized a six month arbitration training course for Mexico's judges.\textsuperscript{17} Perhaps most significantly, the Mexican Supreme Court recently rendered a decision, which provides a strong indication of that country's commitment to international arbitration. On June 13, 2007, the Mexican Supreme Court held that no decision rendered in an arbitration-related enforcement proceeding may be appealed.\textsuperscript{18} It is fair to say therefore that Mexico continues to show that paying out arbitral awards is good for business.

\section*{B. Chile}

Chile also recently passed a new arbitration law, which is closely based on the Model Law, thereby overriding its outdated nineteenth century arbitration legislation.\textsuperscript{19} Chile's version also broadens the term "commercial" arbitration to include investment arbitration, and gives the Court of Appeals specific jurisdiction to provide assistance in arbitrations.\textsuperscript{20} Since the passage of this legislation, there have been a number of encouraging signs indicating that Chilean courts are generally amenable to referring cases to arbitration when an arbitration clause exists and one of the parties seeks enforcement.\textsuperscript{21} Moreover, in Chile, enforcement of awards are subject to \textit{exequatur} by the Chilean Supreme Court, which may only be denied under the limited exceptions provided in Article V of the New York Convention, to which Chile is a party.\textsuperscript{22} All in all, therefore, international arbitration in Chile is currently "the most popular method of settling major commercial disputes thanks to the advantages it offers compared with state courts."\textsuperscript{23}

\begin{footnotesize}
\begin{enumerate}
\item Global Legal Group (GLG), \textit{The International Comparative Legal Guide to International Arbitration} 2007 378 (2007), \textit{available at} \url{http://www.iclg.co.uk/khadmin/Publications/pdf/1461.pdf}.
\item This body of law allows recognition and enforcement of awards, and establishes an arbitral procedure for the countries. GLG, \textit{supra} note 15.
\item GLG, \textit{supra} note 15, at 3.
\item James Graham, \textit{Mexico: Supreme Court Encourages International Arbitration}, Int'l Bar Ass'n (2008), \textit{available at} \url{http://www.lobo-graham.com/arbitration/iba-journal.pdf}.
\item GLG, \textit{supra} note 15, at 3.
\item \textit{Id.} Like Mexico, a course is available for judges to familiarize themselves with the new law.
\item \textit{Id.}
\item Global Legal Group, \textit{The International Comparative Legal Guide to International Arbitration} 2007 378 (2007), \textit{available at} \url{http://www.iclg.co.uk/khadmin/Publications/pdf/1461.pdf}.
\item \textit{Id.} at 379.
\end{enumerate}
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C. Peru

Peru also adopted new arbitration laws in 1996 based on the Model Law by UNCITRAL, called the General Law of Arbitration. What is unique about Peru’s version is that the parties can agree to exclude the opportunity to set aside an award, and the law permits arbitrators to award interim measures with direct enforcement by state courts. Peru is also a party to a significant number of BITs and Multilateral Investment Treaties, which allow recourse to International Centre for Settlement of Investment Disputes (ICSID) arbitration.

Significantly, in the legal and judicial system of Peru, courts do not have much discretion in what they can do. A Peruvian court’s authority is strictly derived from statutes. The recognition and enforcement procedure for arbitration awards by the courts is generally similar to the standard procedure used in arbitration-friendly countries across the world when it comes to recognition and enforcement of arbitration awards. The last decade has seen an impressive increase both in the number and the scope of subjects in cases submitted to arbitration.

IV. CONCLUDING REMARKS

International Arbitration in Latin America has come a long way. There have been undeniable setbacks in some jurisdictions in the region, but those setbacks should not and are not representative of the entire region.

As a result, it is important to distinguish between the approaches taken by different countries. The state of arbitration varies markedly from country to country. Mexico, for example, has continued to make huge strides by enforcing awards, even when doing so has been against its own interests. A CEO or multinational considering increasing investment in Latin America still has reason to be confident that quite a number of jurisdictions in the region continue to demonstrate high regard for trustworthy international arbitration mechanisms as a means of attracting foreign investment.

24. GLG, supra note 15, at 3.
25. Id.
26. Id.
27. Id.