Skadden

Latin America Dispute Resolution Update

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

NAFTA's Future Looks Increasingly Uncertain

The United States, Mexico and Canada have now completed the fifth round of negotiations concerning the renegotiation of NAFTA, and the future of the treaty is looking increasingly uncertain.

In a previous memorandum on the NAFTA negotiations, Skadden noted that "reducing the U.S. merchandise trade deficit" was listed as the "first negotiating objective of the Trade Representative on July 17, 2017," an objective that arguably requires significant changes to the treaty. Mexico and Canada, on the other hand, have looked for the negotiations to focus on modernizing NAFTA, such as by addressing e-commerce and dealing with extant issues concerning rules of origin (among others).

The tension between these competing objectives became apparent during the fourth round of treaty negotiations, which were conducted from October 11, 2017, to October 17, 2017. In that round, the United States proposed a series of seemingly "protectionist" changes to NAFTA, including a requirement that 50 percent of the value of all NAFTA-produced cars, trucks and large engines come from the United States; an increase in NAFTA's regional automotive content requirements to 85 percent from 62.5 percent; a sunset clause that would require the renegotiation of the treaty in five years; the end to Chapter 19's anti-dumping dispute settlement provision; reduced protections for Canadian and Mexican firms seeking U.S. government procurement contracts;[1] and the ability to opt in and out of Chapter 11's investor-state dispute settlement provisions.[2] These U.S. positions may be highly unpalatable to the governments of Canada and Mexico. Some commentators went so far as to suggest that the U.S. had introduced "poison pills" to undermine the NAFTA negotiations and said that there remains a reasonable likelihood that President Donald Trump will choose to withdraw from the treaty altogether.[3]

[1] *See* Dave Graham & David Lawder, "Grim Reality of NAFTA Talk Sets in After Tough US Demands," Reuters.com (Oct. 14, 2017).

[2] *See* Katie Simpson, "US Wants Power Taken Away From Panel Handling NAFTA Disputes," CBCNews.com (Oct. 14, 2017).

[3] *See* Paul Wiseman, "NAFTA in Jeopardy as Fourth Round of Talks Gets Underway," PressHerald.com (Oct. 11, 2017).

US Court Decisions of Interest

US Supreme Court Addresses Foreign Sovereign Immunity

The U.S. Foreign Sovereign Immunities Act (FSIA) provides immunity from suit in the U.S. for foreign sovereigns and sovereign entities, unless a specific exception applies. On May 1, 2017, the U.S. Supreme Court issued a decision holding that a case against a sovereign should not proceed unless the plaintiff has shown more than a "nonfrivolous" basis that a specific exception to sovereign immunity applies. See *Venezuela v. Helmerich & Payne International Drilling Co.*, 136 S.Ct. 2539 (2017). In so holding, the Supreme Court emphasized the importance of ensuring at the beginning of a case that there is a firm basis for proceeding against the sovereign.

In *Helmerich*, the plaintiffs relied on an exception to sovereign immunity in the FSIA, which provides that a U.S. court will have jurisdiction in any case "in which *rights in property taken in violation of international law are in issue* and that property … is owned or operated by an agency or instrumentality of the foreign state … engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3) (emphasis added).

The Supreme Court held that courts can only proceed to the merits of a case if they make a preliminary determination that "the property in which the party claims to hold rights was indeed 'property taken in violation of international law.'" The Court noted the importance of making this determination at the outset of the case as a jurisdictional

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The three countries reportedly made little progress on these controversial provisions during the fifth round of negotiations, which closed on November 21, 2017.[4]

Although it remains unclear whether President Trump possesses sole and unilateral authority to withdraw from NAFTA (*i.e.*, without Congressional approval), the very uncertainty caused by a threatened presidential withdrawal may well precipitate adjustments to established supply chains in Mexico and Canada. Meanwhile, various trade and other groups have been lobbying to maintain the treaty's current status. The treaty's status is also likely to be complicated by the upcoming 2018 national elections in Mexico and the politics of the 2018 mid-term elections in the U.S. (as well as tax reform legislation).

Investment Arbitration: Peru Faces New ICSID Claims

In 2017, Peru has faced a number of new investment treaty claims, with several arising in the transportation sector. On February 1, 2017, Metro de Lima Línea 2 S.A., a Peruvian company owned by a consortium of Italian and Spanish companies, initiated a $260 million claim before the International Centre for the Settlement of Investment Disputes (ICSID), alleging Peru breached its concession contract by failing timely to provide the lands necessary to commence construction of metro lines in Lima.[5] On April 5, 2017, the Spanish company Lidercón, S.L. also filed an ICSID claim, claiming $100 million damages for alleged breach by Peru of its exclusivity obligations under Lidercón's contract to provide vehicle inspections in Lima.[6]

Two additional claims also are reportedly brewing against Peru. In July 2014, Peru entered into an agreement with the Argentine consortium Kuntur Wasi, pursuant to which Kuntur Wasi would design, finance, construct and operate the second airport in the city of Cusco, Peru — the International Airport of Chincheros. Following three years of uncertainty, Peru purported to terminate the contract in June 2017. Peru had been criticized in February 2017, when it assumed 80 percent of the project financing, citing Kuntur Wasi's alleged failure to meet its financing obligations. Peru also claims that it is investigating Kuntur Wasi for alleged illegal conduct.

In a separate dispute, in January 2017, Peru drew down on a $262 million financing bond and cancelled its contract with a consortium comprising the Peruvian company Graña y Montero, the Spanish company Enagas and the Brazilian company Odebrecht for the construction of a gas pipeline in southern Peru. The government pointed to Odebrecht's alleged failure to obtain sufficient financing after national and international banks apparently terminated their line of credit to Odebrecht (allegedly due to allegations against the company in Brazil). Although Odebrecht is currently in negotiations with the Peruvian state, it has stated that it will pursue ICSID arbitration (as provided for in the parties' contract) if those negotiations are unsuccessful.[7]

[4] *See* Ana Swanson and Elizabeth Mallon, "Nafta Round Closes With Talks Bogged Down by Conflict," *New York Times* (Nov. 21, 2017).

[5] *Metro de Lima Línea 2 S.A. v. Republic of Peru* (ICSID Case No. ARB/17/3).

[6] *Lidercón, S.L. v. Republic of Peru* (ICSID Case No. ARB/17/9).

[7] *See* "Odebrecht Podría Buscar Arbitraje Internacional Para Recuperar Inversión en GSP," *Gestión* (July 8, 2017).

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threshold, rather than later on in the case as part of a motion to dismiss, because denials of motions to dismiss do not give rise to the same rights of immediate appeal as denials of a jurisdictional defense. The Court acknowledged that a decision on some or all of the merits of the case may be required in order to decide the jurisdictional issue.

In another case to watch, the U.S. Supreme Court is considering whether to hear an appeal of a decision regarding the appropriate means by which to serve a foreign state under the FSIA in *Republic of Sudan v. Harrison*, Docket No. 16-1094. The petitioner (Sudan) seeks review of a decision by the U.S. Court of Appeals for the Second Circuit that held that plaintiffs suing a foreign state may serve it by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs "via" or in "care of" the foreign state's diplomatic mission in the United States, which Sudan argues is in contravention of U.S. obligations under the Vienna Convention on Diplomatic Relations.

Securities Litigation Against Latin American Companies

Several Latin American companies have been the targets of recent high profile class action lawsuits brought in the U.S. federal district court sitting in the Southern District of New York, alleging violations of the U.S. federal securities laws. These lawsuits have been filed after the companies' stock prices declined in response to news regarding bribery or corruption investigations implicating the companies. The shareholder plaintiffs have typically alleged that these companies failed to disclose ongoing corrupt practices and misrepresented the quality of their internal anti-corruption controls. In recent decisions, three district court judges have addressed whether the complaints in such lawsuits were sufficient to allege a claim for securities fraud. The courts each recognized that a company does not have a general duty to disclose that it has engaged in illegal conduct where it has not made any misleading statements.

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Venezuelan Sovereign Debt Crisis

On November 13, 2017, S&P declared Venezuela to be "technically in default" for failure to make $200 million in coupon payments on bonds due 2019 and 2024 (the 2019/24 bonds).[8] It is reported that a further $420 million of external indebtedness may be falling due (and/or be overdue) as of the date of this writing, and may be in default soon. Venezuela reportedly is engaged in negotiations with creditors to restructure its debt and thus avert what could be the second-largest sovereign default in history (second only to Greece's 2012 default), implicating up to some $150 billion in external sovereign debt.[9]

What next? The 2019/24 bonds contain what are now fairly typical "collective action clauses" (CACs), which permit holders of 75 percent of an outstanding bond series to alter the terms (such as principal, interest or payment date) for all holders, even those who do not expressly consent to such amendments. Depending on whether Venezuela is able to convince a super-majority to approve a restructuring, these CACs may allow Venezuela to avoid the type of "holdout" creditor litigation that Argentina faced in the wake of its 2001/02 sovereign bond default.

A default or acceleration of the bonds also may trigger events of default in other Venezuelan public external indebtedness. The bonds contain cross default clauses that make it an event of default for Venezuela to fail to perform under any other public external indebtedness, or in the event that other public external indebtedness has been accelerated for any reason.

An event of default also ensures that disputes will follow, including possible attempts to attach assets of Venezuela. The 2019/24 bonds are governed by New York law and contain a consent by Venezuela (on a non-exclusive basis) to be sued on the 2019/24 bonds in London and in Manhattan federal and state courts.

Although the bonds contain waivers of sovereign immunity from suit, which may allow creditors to obtain judgments against Venezuela in the English and New York courts — and although the 2019/24 Bonds also contain a purported waiver of sovereign immunity from attachment of state assets — any attempt to attach assets belonging to Venezuela will still present issues of sovereign immunity. In the United States, the Foreign Sovereign Immunities Act puts various restrictions on the ability to attach the assets of a foreign state, even when a waiver has been signed, including that the assets in question be "used for commercial activity" in the United States.

It also is possible that the bondholders will seek to attach assets of Venezuelan state-owned entities (as has occurred already in the case of one creditor), in which case questions will arise as to whether they are legally separate entities or "alter egos" of the state itself.

[8] The original principal amount of these bonds issued in 2009 amounted to $5 billion.

[9] Our discussion focuses on bonds of the Republic of Venezuela, not on the securities of PDVSA, the Venezuelan government-owned oil producer.

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Where, however, the company made statements about the sources of its competitive advantage or successes but failed to disclose that corrupt practices played a substantial role, the courts have found that omission potentially actionable. The courts also found it actionable for a company to falsely deny wrongdoing or misleadingly comment on the merits of a government investigation. With respect to statements about internal controls, the courts found allegations insufficient where they solely concerned general statements about the company's maintenance of anti-corruption policies or codes of conduct. But they found actionable misstatements where the company had touted the effectiveness of its controls to reassure investors after news reports about potential corruption or where it made affirmative, false representations about employees' strict compliance with the anti-corruption policies.

See In re Banco Bradesco SA Securities Litigation, No. 1:16–cv–4155–GHW, 2017 WL 4381407, at *1 (S.D.N.Y. Sept. 29, 2017); *In re Braskem S.A. Securities Litigation*, 246 F. Supp. 3d 731 (S.D.N.Y. 2017); *In re Eletrobras Securities Litigation*, 245 F. Supp. 3d 450 (S.D.N.Y. 2017).

Latin American Countries Are Most Sanctioned by FIFA

Latin American countries received the greatest number of fines and sanctions by FIFA for disciplinary misconduct during the qualifying matches for the 2018 FIFA World Cup in Russia. Leading the way was Chile, which was fined by the international soccer federation on at least 12 occasions, followed by Mexico, Argentina and Honduras, with 10, nine and eight sanctions, respectively.

Under Article 67 of the FIFA Disciplinary Code, national associations are liable for the conduct of their fans. Thus, many of the fines levied by FIFA relate to misconduct by the national teams' fans and not the players themselves. For example, as a result of an alleged homophobic chant directed at the opposing goalkeeper during Mexico's World Cup qualifier matches, FIFA imposed disciplinary sanctions against the Federación Mexicana de Fútbol Asociación, A.C. (the Mexican national association, FMF) on several occasions. The FMF appealed some of those fines.

The FIFA Disciplinary Code provides for a confidential two-step appeal process: an internal appeal to the FIFA Appeal Committee and, if either side is dissatisfied with the decision of the Appeal Committee, an external appeal to the independent Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. On November 16, 2017, CAS announced that an arbitration panel had partially accepted two appeals filed by FMF. The panel ruled that the alleged homophobic chant at issue constituted "improper conduct" under Article 67 of the FIFA Disciplinary Code. However, the panel also recognized that, in light of a 2014 decision by the FIFA Disciplinary Committee that had previously concluded the same chant was not homophobic, FMF had a legitimate reason to believe that the chant in question did not violate the FIFA Disciplinary Code and thus had no reason to take action to prevent fans from shouting this chant during matches. The panel therefore replaced the fines with warnings, with the caveat that future breaches of the FIFA Disciplinary Code would result in harsher penalties.

It is unclear whether Latin American countries other than Mexico have appealed the recent FIFA disciplinary sanctions.

US Imposes New Sanctions on the Government of Venezuela, Tightens Sanctions on Cuba

In August 2017, the U.S. government dramatically increased sanctions on the government of Venezuela. The new measures are aimed at restricting the government of Venezuela's access to U.S. debt and equity markets. They include restrictions on three categories of Venezuelan debt: (i) any new debt or financings by Venezuela's state-owned oil company, Petróleos de Venezuela, S.A. (PdVSA) with a maturity of greater than 90 days (debt of less than 90 days is not restricted); (ii) other new debt of the government of Venezuela other than new debt of PdVSA with a maturity of greater than 30 days (debt of less than 30 days is not restricted); and (iii) certain existing bonds issued by the government of Venezuela prior to August 25, 2017. In addition, the new measures impose certain restrictions on equity of the government of Venezuela, including that of PdVSA and other state-owned or controlled entities, restrictions on the payment of dividends to the government of Venezuela, and restrictions on the purchase of securities from the government of Venezuela. Skadden issued a client alert on the new sanctions on August 30, 2017.

On November 9, 2017, the U.S. government took steps to implement portions of a June 16, 2017, National Security Presidential Memorandum regarding U.S. policy toward Cuba. These regulatory changes mark a break from the past two years of limited easing of U.S. sanctions on Cuba initiated by the Obama Administration. The amended regulations include (i) amendments to the Office of Foreign Asset Control's (OFAC) Cuban Assets Control regulations to prohibit certain financial transactions with specified entities associated with the Cuban military, intelligence or security services; (ii) an expanded definition of prohibited officials of the government of Cuba; (iii) changes to the Department of Commerce's regulations and licensing policy to restrict exports and re-exports consistent with OFAC's amendments and to broaden license exceptions available for private sector economic activities; and (iv) changes to certain requirements for travel to Cuba. Skadden issued a client alert on the new regulations on November 29, 2017.

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