Skadden

Latin America Dispute Resolution Update

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

US Courts Will Decide Whether to Enforce US$2 Billion Award Against Petróleos de Venezuela

In April 2018, an International Chamber of Commerce (ICC) tribunal awarded US$2.04 billion in damages to two subsidiaries of U.S. company ConocoPhillips in their arbitration against Petróleos de Venezuela, S.A. (PDVSA), Venezuela's national oil and gas company, and two of its subsidiaries.[1] The ICC tribunal held that PDVSA and its two subsidiaries were contractually liable for the 2007 expropriation of ConocoPhillips's stake in two ventures for the development of the Hamaca and Petrozuata oil fields in the Orinoco belt, as well as for a prior income tax hike that targeted the oil industry and impacted the ventures' cash flows. This award adds to the increasing number of damages awards that have recently been issued against Venezuela and PDVSA against the backdrop of the overall debt crisis they face.

The claimants' investments, which were encouraged by the Venezuelan government in the mid-1990s, were governed by a set of association agreements providing that the private investors would be compensated for any "discriminatory actions" by the government that have a negative impact on the projects' cash flows. The tribunal found that both the expropriation of the investors' stake and the income tax hikes breached these provisions because they were unjust and discriminatory. All other claims — including in particular the claimants' claim that increased royalty rates constituted discriminatory actions, as well as willful breach claims and a claim that the respondents' actions constituted an illicit act under Venezuelan law — were dismissed.

The tribunal rejected Venezuela's contention that the claimants had failed to pursue alternative legal remedies, as required by the association agreements, finding that this requirement had been fulfilled through the 2007 commencement of parallel International Centre for Settlement of Investment Disputes (ICSID) proceedings against Venezuela.[2] The ICSID tribunal in that arbitration ruled in 2013 that Venezuela's expropriation violated international law, and proceedings to determine the amount of damages are ongoing.

[1] *Phillips Petroleum Company Venezuela Limited & ConocoPhillips Petrozuata B.V. v. Petróleos de Venezuela, S.A., Corpoguanipa, S.A. & PDVSA Petróleo, S.A.*, ICC Case No. 20549/ASM/JPA (C-20550/ASM), Final Award (April 24, 2018).

[2] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30.

US Supreme Court Decisions of Interest

Supreme Court Limits Deference to Foreign Government Interpretation of Its Laws

On June 14, 2018, the U.S. Supreme Court issued a unanimous decision in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*[1] regarding the amount of deference that U.S. courts must afford to a foreign sovereign's interpretation of its own laws and regulations.

The case, which was discussed at length in a January 25, 2018, client alert, involved claims of alleged price-fixing brought by U.S. parties against Chinese producers of Vitamin C. The Ministry of Commerce of the People's Republic of China (MOFCOM) made a submission at the trial court level stating that the defendants' allegedly anti-competitive conduct was required under Chinese laws regulating Vitamin C exports. The trial court, in ruling against the defendants, declined to defer to MOFCOM's interpretation of Chinese laws.

The defendants appealed to the U.S. Court of Appeals for the Second Circuit, which addressed the level of deference the trial court should have given to the statement by the Chinese government regarding its Vitamin C regulations. The Second Circuit came out in favor of a highly deferential standard, holding that where a foreign government "directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construc-

[1] 585 U.S. ___ (2018).

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On April 26, 2018, the ConocoPhillips subsidiaries filed a petition to enforce the US$2.04 billion award in the U.S. District Court for the Southern District of New York.[3] In May 2018, it was reported that the ConocoPhillips entities had ramped up their efforts to execute the ICC award by seizing oil products belonging to PDVSA on the Dutch Antilles islands of Curaçao, Aruba, Bonaire and St. Eustatius. These enforcement efforts have given rise to controversy, including a warning by Curaçao's prime minister that allowing ConocoPhillips to seize PDVSA assets could cause PDVSA to halt oil shipments to the island, creating a shortage. Although PDVSA opposed ConocoPhillips' enforcement efforts in the Caribbean and indeed suspended some shipments as a result, the Venezuelan Oil Ministry has reportedly commented that PDVSA is committed to honoring the arbitration tribunal's decision. It remains to be seen whether and how the Venezuelan government and PDVSA react to these and other debt challenges in the months ahead.

Securities Litigation Resolutions for Brazilian Companies

Several important securities class action litigations involving Brazilian companies recently were resolved in New York federal court.

- A settlement was approved in the suit brought by purchasers of the 2013 and 2014 U.S. dollar-denominated bond offerings of Petróleo Brasileiro S.A. (Petrobras), relating to alleged misrepresentations in its financial and other public statements. Skadden represented the underwriters of Petrobras in these offerings. The allegations linked these misrepresentations to the corruption scheme revealed by Operation "Lava Jato." On June 22, 2018, the court approved the settlement, which calls for payments totaling $3 billion by Petrobras, two of its affiliates and PricewaterhouseCoopers Auditores Independentes, finding that the terms are "fair, reasonable, adequate, and comport with all requirements of law." Prior to the settlement, the defendants had secured the dismissal of a portion of the plaintiffs' claims and successfully vacated, at the U.S. Court of Appeals for the Second Circuit, the district court's certification of a class of investors.
- Brazilian aircraft manufacturer Embraer S.A., also represented by Skadden, successfully moved to dismiss with prejudice a securities fraud class action suit that was filed after the company announced a settlement with the U.S. government for violations of the Foreign Corrupt Practices Act. The court found that the company's disclosures of ongoing internal investigations and discussions with U.S. and Brazilian regulators were sufficient to meet its disclosure obligations.
- Gerdau S.A., a steel manufacturer, faced a class action from its American depositary receipt (ADR) purchasers, who claimed securities fraud violations stemming from alleged bribery of Brazil's administrative tax court judges in connection with a tax dispute. After the defendants filed their motion to dismiss but before the plaintiff filed its opposition, the parties agreed to mediate and ultimately settled the matter for $15 million. Skadden represented Gerdau in this matter.
- Braskem, S.A. reached a settlement in a class action over whether Braskem

[3] *Phillips Petroleum Company Venezuela Limited & ConocoPhillips Petrozuata B.V. v. Petróleos de Venezuela, S.A., Corpoguanipa, S.A. & PDVSA Petróleo, S.A.*, Case No. 18-cv-3716, Petition to Confirm, Recognize and Enforce an Arbitration Award (S.D.N.Y. filed April 26, 2018).

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tion and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements."[2] On this basis, it deferred to MOFCOM's submission regarding the proper interpretation of Chinese laws and reversed the trial court.

On appeal to the Supreme Court, both the U.S. and Chinese governments filed *amicus curiae* submissions. The U.S. government argued that although a federal court should give substantial weight to a foreign government's characterization of its own law, a foreign government's submission should not be treated as conclusive in all circumstances and courts should be permitted to consider other relevant evidence.

The Supreme Court found that the Second Circuit's "bound to defer" standard went a step too far. It held that a U.S. federal court must give "respectful consideration," but not conclusive deference, to a foreign sovereign's statement concerning its own domestic law. The Court explained that "the appropriate weight in each case will depend on the circumstances," which may include "the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions."

The Court concluded that the Second Circuit erred in failing to consider the "shortcomings" in MOFCOM's submissions and other evidence presented to the trial court concerning the relevant Chinese laws. Accordingly, the Court vacated the judgment of the Second Circuit and remanded the case for "renewed consideration."

The Supreme Court's decision regarding the level of deference that U.S. courts must give to a foreign government's characterization of its own laws may have far-reaching implications in cross-border and international disputes. Foreign laws, and the actions of

[2] *In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016).

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and certain of its executives made false and misleading statements to investors concerning, among other things, an alleged bribery scheme affecting the price at which Braskem purchased naphtha from Petrobras. The settlement was agreed after the court granted in part and denied in part the defendants' motion to dismiss.

- The Brazilian state-owned power company Centrais Eletricas Brasileiras SA (Eletrobras) reached a $14.75 million settlement with the plaintiffs in a securities class action filed against it. The settlement was reached after the court granted in part and denied in part the defendants' motion to dismiss the claims, concluding that the plaintiff had sufficiently alleged scienter and materially misleading statements concerning the company's code of ethics, financial condition and internal controls.

China Expands 'One Belt, One Road' Initiative to Latin America

In 2013, China launched the "One Belt, One Road" Initiative (OBOR), a policy encouraging Chinese infrastructure investment into countries situated along the ancient Silk Road and Maritime Silk Road. By 2018, 69 countries throughout Europe and Asia had signed on to the initiative, valued at approximately US$350 billion, typically by entering a partnership or cooperation agreement with China.

In January 2018, China announced that it plans to extend the initiative to Latin America. Panama has already signed a cooperation agreement with China and on May 14, 2018, Trinidad announced that it signed a memorandum of understanding and is now the first Caribbean country to join OBOR. Other Latin American countries such as Mexico, Chile, Bolivia and Argentina have expressed interest.

China is of course already heavily invested in Latin America. In the last decade, Chinese investment and transactions in Latin America have exceeded US$125 billion. (See a summary of our February 6, 2017, webinar "Minimizing Risks and Maximizing Opportunities in China-Latin America Investment.") Formal cooperation under OBOR would signal a commitment to more direct coordination and policy alignment with the Chinese government and is intended to provide a platform for policy coordination, capacity building, liberalization and facilitation of trade and investment, and financial cooperation.

As is often the case with intensive infrastructure projects, a handful of projects under OBOR in Europe are beginning to encounter disputes. These range from financing issues, corruption, noncompliance with contractual terms, project delays and, in some cases, sovereignty and control issues. In anticipation of such disputes, major international arbitral institutions in China, including the ICC and the Hong Kong International Arbitration Centre (HKIAC), are promoting their dispute resolution services for contracts signed in connection with OBOR. In early 2018, the Chinese Supreme People's Court also announced that it intends to establish a set of commercial courts dedicated to OBOR disputes.

China is a signatory to the New York Convention (otherwise known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards), as are all existing OBOR countries and most Latin American countries. Parties to the Hague Choice of Court Convention have agreed to similar enforcement for court judgments.

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foreign countries with respect to those laws, are potentially relevant in such disparate areas as securities litigation, contractual disputes involving sovereign states, human rights claims, intellectual property disputes and (as in this instance) antitrust disputes, as well as cases involving the Foreign Sovereign Immunities Act and act of state doctrine.

Supreme Court Holds That Non-US Corporations May Not Be Sued Under Alien Tort Statute

On April 24, 2018, in *Jesner v. Arab Bank PLC*, a divided U.S. Supreme Court issued a 5-4 decision holding that foreign corporations may not be sued under the Alien Tort Statute (ATS).[3] The ATS gives U.S. federal courts jurisdiction to decide civil cases seeking redress for injuries arising out of violations of international law or a U.S. treaty.

The ATS was rarely invoked until the 1980s, when foreign plaintiffs began to use it to seek redress in U.S. courts for alleged human rights violations committed outside the United States. In 2004, in the first case in which the Supreme Court considered this statute,[4] the Court interpreted the ATS to authorize federal courts to recognize causes of action under federal common law for violations of the law of nations in limited circumstances.

In 2013, the Supreme Court held in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), that where a corporation's alleged misconduct occurred entirely outside the United States, the plaintiffs could not invoke the ATS to seek redress in U.S. courts. The Court left open the question of whether a foreign (*i.e.*, non-U.S.) corporation could be sued under the ATS.

The Court recently answered that question in *Jesner*. In that case, a group of foreign plaintiffs sued Arab Bank, PLC, a Jordanian bank, in the U.S. District Court for the Eastern District of New York, alleging that it had facilitated terrorist acts that were

[3] 138 S.Ct. 1386 (2018).

[4] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

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Although China acceded to the Hague Convention in 2017, Mexico is the only Latin American country that is a signatory to date.

Doing Business in China: Why Arbitration Matters

On June 5, 2018, Skadden and the HKIAC jointly hosted a seminar titled "Doing Business With China: Why Arbitration Matters?" Skadden partner Timothy G. Nelson moderated a discussion with HKIAC Secretary-General Sarah Grimmer and Jinlin Nan, a partner at Zhong Lun, a leading mainland Chinese law firm. Topics included considerations in contracting with Chinese parties, effective dispute resolution mechanisms, recent trends at the HKIAC in resolving international disputes, and China's One Belt, One Road Initiative, which was recently expanded to Latin America.

Ms. Grimmer commented that Hong Kong continues to remain a popular arbitral seat for disputes involving Chinese state-owned enterprises, due to strong judicial support from Hong Kong courts and the special arrangement with mainland China for the enforcement of awards as between Hong Kong and China. Under that arrangement, awards are enforceable without separately requiring that they be "recognized," in contrast with foreign arbitral awards enforced under the New York Convention. Ms. Grimmer stated that the HKIAC experienced its highest caseload in 2017, and that there was a 66 percent increase in administered cases compared to 2016. Ms. Grimmer anticipates that OBOR will have a significant impact in both the near future and long term, and noted that the HKIAC has long been administering disputes involving Chinese parties, including state-owned enterprises, investing in Belt and Road jurisdictions. She noted that at the end of 2016, over US$220 billion had been invested as part of OBOR, compared to US$27 billion invested by the Asian Development Bank.

Mr. Nan provided an overview of the initiative. He noted that the countries involved are encountering lack of equity investment, limited borrowing and underdeveloped infrastructure sectors (particularly in the energy and transportation sectors). As a result, those markets present significant investment opportunities. However, investors will also encounter risks due to underdeveloped cross-border connectivity and infrastructure, weak institutional coordination, sovereign risk, political turbulence and immature legal systems. Both Ms. Grimmer and Mr. Nan agreed that arbitration is likely to be favored as the means of resolving future disputes connected with OBOR due to the large infrastructure projects, complex financing arrangements and multinational parties involved.

Mexico Joins ICSID Convention

On January 11, 2018, Mexico became the 162nd country to sign the ICSID Convention.

The ICSID Convention, which entered into force in 1966, is a multilateral treaty formed under the auspices of the World Bank designed to facilitate investments among countries by providing an independent, nonpolitical forum for the resolution of disputes arising out of those investments.

Mexico has long been proactive in seeking to attract foreign investment, notably through the ratification of 29 bilateral investment treaties and 15 other international agreements containing investment provisions, including the investment chapter of the North American Free Trade Agreement (NAFTA). A majority of these treaties already contain an arbitration clause designating arbitration under the ICSID Conven-

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committed abroad. The plaintiffs argued that Arab Bank's conduct occurred within the United States because it used its New York branch to clear transactions that benefited the terrorists. The Supreme Court held that foreign corporations cannot be sued under the ATS and noted that the ATS was intended to give jurisdiction over a "relatively modest set of actions involving violations of the law of nations." It further noted that potential concerns relating to the separation of powers between the judiciary and the political branches of the government (*i.e.*, the executive and legislative branches) might arise in cases brought under the ATS, in particular where sensitive foreign relations issues are raised. In this context, the Court noted that the United States and Jordan had filed briefs as *amicus curiae* discussing the diplomatic tensions caused by this lawsuit.

The four Supreme Court justices who dissented argued that the ATS "does not categorically foreclose corporate liability" for foreign corporations. Those justices would have remanded the case for further proceedings on whether the allegations sufficiently concerned the United States, among other questions.

The *Jesner* decision further narrows the ability of plaintiffs to bring claims for violations of international law under the ATS in U.S. courts. The decision is consistent with the trend of decisions by the Supreme Court limiting the extraterritorial application of U.S. statutes (as discussed in this June 21, 2016, client alert).

tion or, alternatively, other systems such as the ICSID Additional Facility or United Nations Commission on International Trade Law (UNCITRAL) Arbitration rules. Mexico's accession to the ICSID Convention will not affect the substantive investment protection standards that already apply in Mexico by virtue of the bilateral and multilateral treaties currently in force — rather, it will only provide an additional pathway for investors to seek redress for any breaches of these standards.

The Mexican Senate ratified the ICSID Convention before its closing session on April 30, 2018. The ICSID Convention will come into force vis-à-vis Mexico 30 days after the deposit of its instrument of ratification, acceptance or approval.

Mexico's signing of the ICSID Convention may be driven in part by the renegotiations of NAFTA, which have created uncertainty as to NAFTA's future. Mexico's accession to the ICSID Convention will open another avenue for investors to settle their investment disputes with Mexico — and for Mexican investors to exercise their own investment rights — under the distinctive legal and procedural framework of the ICSID Convention and the ICSID Arbitration Rules. For more information, see our January 16, 2018, client alert on the topic.

Working Group Publishes Cybersecurity Protocol

Stating that "[i]nternational arbitration in the digital landscape warrants consideration of what constitutes reasonable cybersecurity measures to protect the information exchanged during the process," the Working Group on Cybersecurity, consisting of representatives of the International Council for Commercial Arbitration (ICCA) and the International Institute for Conflict Prevention and Resolution (CPR), has released the Draft Cybersecurity Protocol for International Arbitration.

While international arbitration is not uniquely vulnerable to cyber breaches, the need for cybersecurity measures in international arbitration is heightened by the contentious backdrop, the high-value and high-stakes nature of the disputes and the information exchanged, the use of international transmissions and the involvement of multiple actors. The draft protocol reflects the emerging consensus that cybersecurity is an important consideration that should be addressed early in the international arbitration process and that reasonable cybersecurity measures should be adopted. "International arbitration has the benefit over other types of dispute resolution of allowing parties to maintain confidentiality in high stakes matters if they wish to do so. Reasonable cybersecurity will enable international arbitration to maintain that advantage," explained Lea Haber Kuck, a partner at Skadden and a member of the working group.

The draft protocol does not advocate for a one-size-fits-all approach to cybersecurity, but rather provides a framework for parties and arbitrators to determine appropriate cybersecurity measures in the context of each case. It recognizes that cybersecurity measures will necessarily need to evolve with changing technology, new cyber threats and changes in laws, regulations and rules of arbitral institutions. At the same time, it also recognizes that cybersecurity is a shared responsibility of all participants in the arbitration process who are digitally interdependent, and that "security of information ultimately depends on the responsible conduct and vigilance of individuals." Accordingly, the draft protocol includes a schedule of General Cybersecurity Practices that highlights steps that participants should consider taking to make sure that information in their possession remains secure.

The working group has set a consultative period from now until the end of 2018, during which it will hold a number of public workshops around the world to obtain feedback on the draft from a broad segment of the international arbitration community. Interested parties are also invited to email comments and recommendations to cybersecurity@arbitration-icca.org. Eva Chan, an associate at Skadden, serves as secretary of the working group.

The draft protocol is available here.

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