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A REPORT ON #YOUNGITATALKS "MÉXICO Y EL ARBITRAJE DE INVERSÍON"

by Juan Pablo Gómez-Moreno

I. INTRODUCTION

On December 9, 2021, Young ITA hosted the live webinar #YoungITATalks Mexico, a live debate on the Mexican experience with investment arbitration. The event was moderated by Rodrigo Barradas (Von Wobeser y Sierra, Mexico City), who discussed with panelists Alan Bonfiglio (Mexican Economy Secretariat, Mexico City), Laura Zielinski (Holland & Knight, Mexico City), and Juan Pablo Hugues (Foley Hoag LLP, Washington, D.C.).

The event was part of the #YoungITATalks Online series, several virtual events taking place across the world, with webinars, workshops, and interviews covering a wide array of arbitration-related topics. This time, panelists had a chance to discuss relevant cases and precedents that became milestones of international arbitration, as well as to consider current trends in the field and make a balance of the situation today.

II. CURRENT STATUS OF MEXICO'S INVESTMENT AGREEMENTS

Alan Bonfiglio explained that Mexico is one of the countries with the most free-trade agreements (FTAs) and investment agreements (BITs) in Latin America and the world. Currently, Mexico is a party to 30 BITs. Besides, it is noteworthy that Mexico's consent to existing investment arbitrations cases has not emerged from a domestic law or an arbitral clause in a contract but from treaties. The North American Free Trade Agreement (NAFTA) played a major role in this regard, influencing subsequent agreements signed by Mexico, mostly BITs. This tradition started in the 90s when Mexico decided to join a global trend of free-market economies and become part of the multilateral trading system. Since the early years of NAFTA, Mexico expected future investment disputes under the rules of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL).

III. MEXICO'S TRADITION OF INTERNATIONAL DISPUTES

Juan Pablo Hugues discussed the history of Mexico as a party to international treaties and its experience with investment arbitration. *Firstly*, he pointed out that Mexico has historically favored the settlement of disputes before international tribunals, subject to the rules of public international law and regardless of whether the other party is a state or a private entity. This is explained by the fact that, since its first days of independence, Mexico was already a party to the mixed claims commissions that operated from 1825 until the second part of the 19th century to settle disputes with nationals of other states. Additionally, Mexico was the only Latin American country that participated in the 1899 and 1907 Hague Conventions that led to the creation of the Permanent Court of Arbitration (PCA).

Secondly, while Mexico has a long-standing tradition of international disputes, its experience with cases of public international law has been rather negative. Accordingly, Mexico has faced adverse awards with high amounts in damages, as well as results that led to a significant loss of its sovereignty and territory. These experiences have left an effect that translates to Mexico's current relationship with international arbitration.

Notably, the *Clipperton* case[1] illustrates the Mexican experience with disputes under public international law. In this 1933 arbitration, Mexico lost to France an island located in the Pacific Ocean because it abandoned the territory after the 1910 Mexican Revolution. These two forces, Mexico's tradition of international dispute settlement and the negative results arising from such proceedings, leave a big question on why Mexico is still a party to such treaties. The reason, rather than a political one, could respond to economic interests aligned with the idea that Mexico has opted for using FTAs and BITs to attract foreign investments.

IV. CASES FILED AGAINST MEXICO

Laura Zielinski underscored that Mexico has been subject to 37 investment cases, which is a high number. Unlike claims brought against other countries, such as

[1] Republic of France v. United Mexican States, Award, 2 R.I.A.A. 1105 (January 28, 1931), https://legal.un.org/riaa/cases/vol_II/1105-1111.pdf.

Venezuela, Argentina, and Spain, these cases have not been a reaction to a specific situation or industry. This means that Mexico has faced investment cases frequently over the years, most of them before ICSID. Juan Pablo Hughes commented that, comparing Mexico's experience with that of other Latin American countries, it is hard to determine whether such experience has been positive or negative overall. However, observing the data of other countries with similar conditions, such as Argentina, Colombia, and Indonesia, the Mexican experience seems to be one of the best because the State has faced a reasonable amount of investment disputes considering its large number of BITs, as well as its developed economy and large population.

V. FIRST ARBITRATIONS AGAINST MEXICO

Alan Bonfiglio also went back in time to the mixed claims commissions established in the 19th century. Particularly, the one with the US under the Bucareli Treaty of 1923 was of special importance as, by signing these instruments, Mexico expected to gain some legitimacy after its independence. The milestone under this commission was the *Neer* case,[2] arising from the killing of US citizen Paul Neer by a group of bandits on Mexican soil, which is of fundamental importance today because it discussed the high standard of proof for claims under the minimum standard of treatment (MST) and fair and equitable treatment (FET) standards.

Today, these issues have extended to modern NAFTA claims and other investment disputes. Mr. Bonfiglio then identified certain sagas of investment disputes. The first saga was on the management of wastes and included the cases of *Metalclad*[3] and *Waste Management*.[4] The second dealt with measures to impose taxes on fructose syrup. Then, a third saga is one of the diversified cases, including several industries such as energy, telecommunications, real estate, and gambling.

[2] L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, 4 R.I.A.A. 60, 60-66 (October 15, 1926), https://legal.un.org/riaa/cases/vol_IV/60-66.pdf.

[3] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, https://www.italaw.com/cases/671.

[4] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, https://www.italaw.com/cases/1155.

VI. HIGH-PROFILE MEXICAN CASES

Laura Zielinski pointed out that, while the case of *Neer* is not commonly associated with Mexico, it is indeed an important precedent for public international law. In contrast, the most notorious Mexican disputes are *Metalclad* and *Tecmed*,[5] mostly because they elaborate the FET standard and propose a very broad interpretation of the concept of 'legitimate expectations' of the investor. Additionally, there are recent cases such as *Lion v. Mexico*[6] decided in 2021, in which the tribunal found that failures of the Mexican judiciary were so significant that, even if there was no corruption or bad faith, they met the challenging burden of proof of a denial of justice.

Juan Pablo Hugues focused on the saga of NAFTA cases concerning corn syrup at the beginning of the 21st century, particularly on the 'countermeasures' defense argued by Mexico in three of these proceedings, which was innovative. These disputes, in particular, *Cargill*[7] and Corn Products,[8] are key because the tribunals (i) clarified the standard of countermeasures under public international law; (ii) determined whether they could have jurisdiction over measures adopted by a state that was not a party to the dispute; and (iii) concluded that investors, not just states, had rights under these treaties according to public international law.

Alan Bonfiglio highlighted that the syrup cases were also very political and notorious, to the point they were preceded by an antidumping investigation within the World Trade Organization (WTO). Further, he focused on the case of *Robert Azinian et. al.*[9] This was a key dispute that tends to be overlooked when compared with its twin and more prominent dispute, the *Metalclad* case. Notably, this was the

[5] Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, https://www.italaw.com/cases/1087

[6] Lion Mexico Consolidated L.P. v. United Mexican States, ICSID Case No. ARB(AF)/15/2, https://www.italaw.com/cases/3828.

[7] Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, https://www.italaw.com/cases/223.

[8] Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/1, https://www.italaw.com/cases/345.

[9] Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States, ICSID Case No. ARB (AF)/97/2, https://www.italaw.com/cases/114.

first NAFTA case, which dealt with the cancellation of a concession for the collection of garbage and referred to important issues such as the difference between treaty and contract claims, as well as the standard of denial of justice.

VII. BIG PICTURE OF THE MEXICAN EXPERIENCE

Laura Zielinski said that Mexico is represented by a professional team with a lot of experience. Notably, it has an in-house team to manage its cases and does not rely much on external counsels. The State is not antagonistic to investment arbitration. Contrary to other countries like Argentina, the State has complied with all the awards against it, which is something that inspires trust in foreign investors and gives an overview of the Mexican experience as a good one.

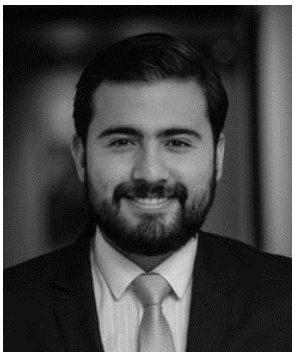
VIII. CURRENT TRENDS AND CHANGES

Alan Bonfiglio noted the current debates for a reform of the investment protection regime. Referring specifically to the discussions in ICSID and Group III of UNCITRAL, he pointed out that these trends reflect the concerns of several states, including Mexico. Mostly, those related to the 'megaclaims' for millions of dollars but additional concerns include parallel proceedings, actions brought by minority shareholders, as well as claims of the state.

Laura Zielinski said that she has not identified an opposition of Mexico to investment disputes, as did the EU recently. However, it is necessary to put clear limits on the guarantees offered to foreign investors. While there is no Model Mexican BIT as in other countries, probably the treaties that best reflect the position of the state are the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the BIT with Hong Kong.

IX. MEXICANS AS FOREIGN INVESTORS

Juan Pablo Hugues mentioned that Mexico's attitude towards BITs not only attracted investment claims but also gave Mexicans an opportunity to bring claims themselves against other states. For instance, the first NAFTA Chapter 11 dispute was a claim by a Mexican pharmaceutical investor in 1996 against the US.



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The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

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