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FEATURED Q&A

What Do New Rules for Arbitration Mean for Latin America?



The World Bank's Centre for Settlement of Investment Disputes, or ICSID, this month put into effect new rules that govern arbitration proceedings. // File Photo: publicdomainpictures.net.

Q The amended Regulations and Rules of the World Bank's Centre for Settlement of Investment Disputes, or ICSID, took effect on July 1. The long-anticipated changes relate to transparency, such as disclosure of third-party funding for the pursuit or defense of cases, as well as efficiency and timelines related to cases and entities' access to arbitration through ICSID. What are the most significant changes to the ICSID rules for Latin American countries and investors in the region? Who will benefit most from the rule changes, and do the changes have any drawbacks? What are the biggest trends to expect in Latin American and Caribbean dispute settlements in the years ahead?

A Marco Molina, partner at BakerHostetler: "It is no secret there are barriers to entry in investment arbitration in Latin America. Arbitrations take years to resolve. Submissions can run thousands of pages long. Parties submitting in Spanish may be required to translate their pleadings into English because of the lack of arbitrators fluent in Spanish. In the end, a claimant could rack up \$10 million to \$20 million prosecuting an investment arbitration claim, with no guarantee it will get back any of those costs should it prevail. The cost-prohibitive nature of investment arbitration forces would-be claimants in Latin America to walk away from meritorious claims or seek cheap stopgap remedies under local laws that do little, if anything, to make them whole. States also feel the financial crunch. Many Latin American states hire counsel under extremely restrictive budgets that make it difficult,

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TODAY'S NEWS

POLITICAL

Police Raid Leaves 18 People Dead in Rio Slum

A police raid in a Rio de Janeiro slum, or favela, left 18 people dead as officers pursued criminals. The operation lasted for 12 hours.

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POLITICAL

Nicaraguan Newspaper's Staff Flees Country

Nicaraguan newspaper La Prensa announced that its staff has fled Nicaragua and will continue working from outside the country. Authorities arrested two of its employees this month.

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ECONOMIC

López Obrador Denies Breach of USMCA

Mexican President Andrés Manuel López Obrador denied that his energy-sector policies amount to a breach of the USMCA trade deal. A day earlier, the United States and Canada announced they were seeking consultations over that complaint.

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López Obrador // File Photo: Mexican Government.

POLITICAL NEWS

Police Raid Leaves 18 People Dead in Rio de Janeiro Slum

A police raid in a Rio de Janeiro slum, or favela, left 18 people dead on Thursday, as 400 heavily armed officers pursued criminals and sprayed bullets from helicopters above, The Washington Post reported. The raid in the Complexo do Alemão neighborhood began early in the day and lasted for 12 hours, the newspaper reported. Among the dead were at least one bystander and one police officer. Police said in a statement that the operation targeted a criminal gang that is responsible for bank robberies and cargo thefts. Authorities in Rio de Janeiro said the other 16 people killed were suspected criminals, the Associated Press reported. Videos posted on social media showed shootouts in the neighborhood, and reporters saw residents carrying about 10 bodies, with residents shouting “We want peace!” the AP reported. “There are signs of major human rights violations, and the possibility of this being one of the operations with the highest number of deaths in Rio de Janeiro,” Rio de Janeiro state’s public defense office said in a statement, The Washington Post reported.

Staff of Nicaragua’s La Prensa Flees Following Arrests

The staff of Nicaraguan newspaper La Prensa has fled the country and will continue working from outside Nicaragua, the newspaper announced Thursday, the Associated Press reported. Authorities in the Central American country took control of the newspaper’s offices in August of last year and arrested two of its employees this month, the AP reported. The arrests happened after La Prensa reported on the Nicaraguan government’s expulsion of the Missionaries of Charity, which was established by Mother Teresa. “The persecution by the Daniel Ortega regime intensified this month against the personnel of La Prensa newspaper and forced the outlet’s personnel flee the country,” the newspaper said in a statement. “Reporters, editors, photographers and other personnel were obliged to flee Nicaragua in an irregular manner in the past two weeks for their safety and freedom,” it added. The arrests of the La Prensa employees came amid President Daniel Ortega’s crackdown on political opponents and civil society groups, more than 1,000 of which the government has shut down. [Editor’s note: See related [Q&A](#) in the Feb. 22 issue of the Advisor.]

NEWS BRIEFS

Peru Launches New Probe of Castillo After Interior Minister’s Firing

Peruvian Attorney General Patricia Benavides opened a new probe of President Pedro Castillo following accusations from a former interior minister that Castillo has obstructed corruption investigations of close allies, prosecutors said Thursday, Reuters reported. Castillo on Tuesday fired the interior minister, Mariano González, who was in office for just two weeks, after he authorized the appointment of a special police unit that would find and arrest allies of Castillo who are under criminal investigation, the wire service reported.

U.S. Files New Labor Complaint Against Mexico

The U.S. Trade Representative’s Office, or USTR, on Thursday filed its fifth labor-related complaint under the U.S.-Mexico-Canada (USMCA) trade agreement against Mexico for alleged violations of union organizing rights, the Associated Press reported. The most recent USTR complaint is related to a union fight at car parts factory Manufacturas VU in the city of Piedras Negras in northern Mexico, the office said. There is “credible evidence” that two independent unions at the factory were being denied the right to freely represent workers, the complaint said.

Santander Drops Out of Bidding for Citi’s Retail Unit in Mexico

Spanish banking giant Santander announced today that it has dropped out of the process for potentially buying Citigroup’s retail unit in Mexico, Reuters reported. Santander had submitted a nonbinding offer for Citibanamex earlier this year. Santander’s executive chairman, Ana Botín, previously said that Santander did not need to buy the unit to keep generating “very attractive and very profitable growth.”

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if not impossible, to provide a comprehensive defense. The International Centre for Settlement of Investment Disputes (ICSID) attempted to address these issues with its revised arbitration rules, which took effect this month. Among other things, these revisions: allow for ‘Expedited Arbitration’ proceedings; encourage tribunals to issue awards promptly; and allow tribunals to streamline the scope of the disputes through intermittent ‘management conferences.’ While these revisions are promising, their application, in many cases, appears to be contingent on the tribunal’s discretion or the parties’ consent, neither of which can

be assured. We will know more once ICSID publishes its long-awaited guidance on these revisions in the coming weeks. But at least ICSID is addressing the elephant in the arbitration room.”

A **María Paz Lestido, associate, and Juan Pedro Pomés, senior associate, at Freshfields Bruckhaus Deringer:** “The 2022

ICSID rules introduce various innovations and significant changes to the ICSID arbitration process, mostly aimed at increasing efficiency and transparency. In terms of transparency, the rules now require ICSID to

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Brazil's Workers' Party Officially Taps Lula as Candidate

Former Brazilian President Luiz Inácio Lula da Silva was on Thursday confirmed as the leftist Workers' Party candidate ahead of the October presidential election, the Associated Press reported. Lula, who was Brazil's president from 2003 to 2010, did not attend the Workers' Party convention in São Paulo as he is currently on the campaign trail in Pernambuco, his home state. "He said that's enough of inside party talk; it's time to go to the streets and talk to voters," a Lula aide told Reuters about why the former president did not attend the convention. Lula, 76, is in his sixth presidential campaign, the most recent one being in 2018, when he was removed from the race following a corruption and money laundering conviction, the AP reported. He was released from prison after 580 days, when the convictions were annulled, Reuters reported. "I didn't need to be president again," Lula said at a rally in Recife, the AP reported. "But I saw this country being destroyed. I saw our education being led by a guy who doesn't like education. So I decided to come back," he added. Lula is currently leading polls against his primary opponent, current President Jair Bolsonaro.

ECONOMIC NEWS

López Obrador Denies Breach of USMCA Trade Deal

Mexican President Andrés Manuel López Obrador on Thursday denied that his administration's energy policies breach the U.S.-Mexico-Canada (USMCA) free trade agreement following the news that Canada had joined the United States in a consultation request under the regional trade agreement, Reuters reported. The president said that Mexico is planning to defend control of its power market

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<p>Anselm Hennis Director, Department of Noncommunicable Diseases and Mental Health, PAHO</p> <p>Cristian Herrera Senior Health Specialist in the Health, Nutrition and Population Global Practice, World Bank</p>	<p>Mariana Rico Regional Medical Director, Americas Health Foundation</p> <p>Moderated by:</p> <p>Alessandra Durstine CEO and Founder, Catalyst Consulting Group</p>
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Online Event
Tuesday, July 26
11 a.m. - 12 p.m. EDT

To RSVP, click [here](#).

and oil policies, saying there has been "no violation" of the pact. López Obrador added that his administration reached an agreement with a group of U.S. investors in the energy sector, the wire service reported. The United States requested dispute settlement consultations under the USMCA early on Wednesday, and Canada joined the request later that day. "We agree with the United States that these policies are inconsistent with Mexico's USMCA obligations," Mary Ng, Canada's international trade minister, said in a statement, Reuters reported. Canada has "consistently raised its concerns regarding Mexico's change in energy policy," she added. "This could be extremely damaging for Mexican exports," said Kenneth Smith Ramos, who was Mexico's chief USMCA technical negotiator in 2018, Bloomberg News reported. "Engaging with the U.S. in a major trade dispute would definitely be a negative for the Mexican economy," he added.

BUSINESS NEWS

Codelco, Unions to Hold Safety Talks Following Deaths

Chilean state-owned copper mining company Codelco and its employee unions agreed to safety talks through a new committee following two fatal work-related incidents at Codelco sites in less than a month, a union leader said Thursday, Reuters reported. "We've proposed to start a process, more than just an audit, and decided to create an ad-hoc committee," said Amador Pantoja, the president of the FTC Copper Workers Federation. "Codelco will implement urgent measures to ensure compliance and protocols in all its operations and projects," the company said Wednesday.

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publish all awards, orders and other decisions, and contain disclosure requirements regarding third-party funders (TPFs). The regulation of TPFs and, in particular, how to avoid conflicts of interest, was thoroughly discussed during the public consultations leading to the amendments to the ICSID rules. One notable innovation is an expedited arbitration process that, through shorter time limits, aims at resolving disputes in less time and at a lower cost. Disputing parties must expressly consent to apply the

“One notable innovation is an expedited arbitration process...”

— María Paz Lestido & Juan Pedro Pomés

expedited procedure. Whether states will accept, with any frequency, the resolution of investment disputes on an expedited timetable remains to be seen. ICSID also rolled out amendments to its ‘Additional Facility’ rules. These are ICSID-run arbitrations that are not governed by the ICSID Convention. Previously, at least one of the parties had to have the nationality of a state party to the ICSID Convention. This requirement has been removed, making it easier to use the Additional Facility in cases involving states that have not ratified the ICSID Convention, such as Brazil. This could significantly increase ICSID’s caseload in the future. In terms of future trends, post-pandemic economic recovery policies, as well as environmental measures, being adopted by Latin American governments are likely to have significant impacts on foreign investment, which may well give rise to new waves of disputes.”

A Carlos José Valderrama, independent practitioner and arbitrator: “Rule 14—Notice of Third-Party Funding—is a well-celebrated amendment to the arbitration rules. This is of key importance as it adds another layer to the assessment performed in order to clear potential conflicts in relation to members of the tribunal. A member may be a shareholder of the funding financial company. However, it may be troublesome if states incorporate such a rule into their defense by seeking to represent before the tribunal that the claimant actually represents interests different from its own, by representing the interests of the funder, and therefore bringing jurisdictional defenses based on that information. It is a mistake to allege that in order to secure a favorable award the funder may try to impose its interests over the claimant’s. The funding company may not have that leverage in the arbitration. The funding company makes an assessment of the risk of losing the case and, if it appears to be a winning case, it will fund the claimant’s case. In my experience, an attorney who is being paid if the arbitration comes to life is much better positioned to influence in the investor’s decision, regardless of whether it is a winning case or not. The lawyer makes a profit out of the mere existence of the case. I witnessed attorneys recommending that their clients not accept proposals made during the consultation period, because they ‘will have better chances with the arbitration,’ and then they lose the case.”

The Advisor welcomes comments on its Q&A section. Readers can write editor Gene Kuleta at gkuleta@thedialogue.org.

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