

INTERNATIONAL DEVELOPMENTS

Defending Mexico and Its State-Owned Entities in International Commercial and Investor-State Arbitration:

Why Mexico Should Place this Defense in an Independent Legal Unit

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This article raises the issue of whether Mexico should create a specialized legal unit to represent and defend Mexico and its State-owned entities in international

commercial arbitration, investor-State arbitration, and litigation. The benefits of creating such a unit are discussed below.

Mexico has long favored arbitration as a means of resolving disputes. Since 1994, when the North American Free Trade Agreement (NAFTA) came into force, and for almost 20 years after that, Mexico has been at the forefront of Latin-American arbitration practice. It is often referred to as the Latino version of Switzerland, and is recognized for having a modern legal framework based on the UNCITRAL Model Law on International Commercial Arbitration, an arbitration-friendly judiciary, and high-quality, sophisticated practitioners.

Early visionaries are in part responsible for Mexico's leadership in Latin American arbitration. Over 20 years ago, they helped create the Diploma in International Commercial Arbitration under the auspices of the prestigious Escuela Libre de Derecho, in collaboration with the Mexican Chapter of the International Chamber of Commerce (ICC). Since the founding of this prestigious program, the Diploma has been awarded to 850 professionals, including lawyers, government officials, accountants, engineers, architects, and others. The contribution of the Diploma in International Commercial Arbitration to the development of arbitration in Latin America is widely recognized.

Involvement of Mexico and Its Entities in Arbitration

Mexico has been, and is currently, involved in investor-State arbitration proceedings. There are two pending

cases against the United Mexican States filed with the International Centre for Settlement of Investment Disputes (ICSID). In addition, Mexico is listed on the U.S. Department of State Web site as having been a respondent in 13 NAFTA arbitrations.

It may surprise some people that Mexico has been one of the two Latin American countries (the other is Brazil) most often involved in ICC commercial arbitration based on the nationality of the parties and the arbitrators, and the place of arbitration. For example, ICC statistics for 2010 showed the following: (1) 64 Mexican parties (both entities and individuals) participated in 23 ICC arbitrations; (2) Mexico City was the place of arbitration in 13 cases; and (3) 24 Mexican arbitrators were confirmed or appointed by the ICC Court.

More surprising, perhaps, is that between 2008 and 2011, the power giant CFE (Comisión Federal de Electricidad), and the State-owned Mexican oil and gas company PEMEX (Petróleos Mexicanos), were parties to 12 ICC commercial arbitrations. These government-owned entities are permitted by the "organic" laws that created them to enter into contracts with private parties that provide for arbitration of disputes.

Soon there could be other Mexican-owned entities involved in arbitration. The 2009 reforms to the Mexican Public Works Law (Ley de Obras Públicas) and the Public Procurement Law (Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público), and the January 2012 enactment of the Public-Private Partnerships Law, expressly allow all public-works and long-term service contracts with the federal government to provide for arbitration of disputes. We are already seeing arbitration clauses in these kinds of contracts. The question is whether Mexico and its



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State-owned entities will be prepared to competently face arbitration proceedings filed under these agreements. It is worth looking at the way CFE and PEMEX have dealt with arbitration cases.

CFE and PEMEX average about four arbitrations per year. The disputes generally involve complex construction and engineering issues that almost always raise questions of Mexican law. They are exceedingly complex and require a high level of specialization and sophistication from the lawyers taking the lead in their defense.

CFE's legal department has an arbitration team that works on these cases. The department has had little turnover during the past 10 years or so. Thus, the team has been able to provide continuous representation and a consistent strategy in the arbitration proceedings. As a result, CFE rarely employs outside counsel to assist in arbitration cases.

PEMEX has at least three subsidiaries that are frequently involved in arbitration. (One carries out oil and

legal unit, as well as common issues of fact and law present in many disputes involving assets of the government and government entities—compel the conclusion that Mexico should consider establishing a separate legal unit to represent the government's interests in investor-State and commercial arbitration, as well as in litigation. There is a real need for a new approach, given the lack of a coordinated defense strategy and the problem of legal department turnover.

True, Mexico has been remarkably represented in investor-State arbitration by a superb team of lawyers in the Ministry of Economy. So it may not seem obvious to everyone that change is needed. However, that highly successful team of lawyers has recently disbanded. Thus, there is even more reason to move in the direction proposed here.

Argentina's Procuración provides a model that Mexico could follow. Argentina has put together a highly specialized team of lawyers dedicated to representing the country and its State-owned entities in high-profile ICSID and ICC

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natural gas exploration and exploitation; another processes, transports, and commercializes natural gas; the third processes, transports and markets products derived from crude oil.) Each subsidiary has its own legal department, which represents the company in arbitration proceedings, so outside counsel is generally not used. The lawyers who work on these cases specialize in public procurement, energy, oil and gas, construction, and administrative law. The turnover in the legal teams at the PEMEX subsidiaries is high and the team leaders change more often than not. Whether due to turnover or something else, it appears that these teams may not have coordinated their legal strategies with each other.

An idiosyncrasy of Mexican politics that can lead to employee turnover is the frequent replacement of the heads of government offices and entities owned by the State. Turnover can lead to the loss of information about a dispute, the strategy used in a prior case, or the arbitration, if already commenced. It can also make it impossible to have a coordinated strategy. These problems can adversely affect the quality of legal representation and the presentation of the case to the arbitral tribunal.

The issues and developments discussed here—the number of arbitration cases filed, the pro-arbitration legislation involving public contracts, the example of several legal departments working independently of one another in representing State-owned entities, the importance of a stable

arbitrations. If Mexico were to create a Procuración to represent the interests of the government and its State-owned entities in both investment and commercial arbitration, unquestionable benefits would result, including greater efficiency, consistent positions, and cost savings. In addition, it might be possible to achieve a higher success rate. This would undoubtedly also lead to significant savings.

Ideally, the legal unit formed to represent Mexico and its State-owned entities should have financial independence and autonomy from the central government in order to be able to provide continuous representation and determine appropriate (and when necessary, coordinated and consistent) legal strategies. Independence would ensure that determinations could be made without influence or other political maneuvering, and without concern for internal liability matters and budgetary restraints. The problem of lawyer turnover due to changes in political leadership would be eliminated. How such a unit would be financed would have to be considered.

The representation and defense of Mexico's assets is a question of great public interest. The proposal advanced here would serve that interest by providing the best defense to Mexico and its assets, as well as the benefits described above. For these reasons, we believe that this is an appropriate time for Mexico to consider the benefits of an independent Mexican Procuración and assess how to make it a reality. ■