Mexico Looks To Woo Investors Even As Trade Talks Drag On

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Law360, New York (January 18, 2018, 10:00 PM EST) -- Mexico's decision last week to allow disputes to be brought against it at the International Centre for Settlement of Investment Disputes sends a "loud message" that the country is open for business, attorneys say, regardless of what happens in trade talks with its North American neighbors.

Mexico's secretary of the economy, Ildefonso Guajardo Villarreal, signed the ICSID Convention on Jan. 11, paving the way for investors to initiate international arbitration under ICSID rules to resolve investor disputes with the country once the agreement is ratified.

While the possibility of Mexico signing the convention has been discussed for years, experts say the decision to pull the trigger now, as renegotiations for the North American Free Trade Agreement continue into 2018 without a definite end in sight, is no accident.

"Mexico wants to send a loud message to the world that we are open and ready for business regardless of what the current U.S. administration wants to really do with NAFTA," Hogan Lovells partner Juan Francisco Torres Landa, office managing partner for the firm in Mexico City, said. "Mexico is a serious country that is willing to offer certainty to companies investing from abroad and ... we are sending a strong message that we are so comfortable and willing to do so that signing the ICSID Convention is now a reality."

But the decision to sign the ICSID Convention is not just due to uncertainty regarding the future of NAFTA as a whole. There have also been ongoing discussions in the NAFTA renegotiations as to how that deal's dispute resolution provision, Chapter 11, might be changed. A proposal has reportedly **been floated** by U.S. negotiators that would allow the three NAFTA countries to opt in to Chapter 11, though it's unclear what what the proposal entails.

Meanwhile, there have also been questions on a broader scale about the future of investor-state dispute settlement, which has come under scrutiny in recent years by critics who say it's a "secret" justice system that allows the world's largest corporations to bend nations to their will. There's been much talk in Europe of replacing the current ad hoc investor state arbitration system with an investor court with sitting judges and an appellate mechanism, a proposal that was included in a new trade deal between Canada and the European Union.

But the investor court — **a nonstarter** in trade talks last year between Japan and the EU — has also been criticized for a variety of reasons. And Mexico's not particularly keen on changing the current system, which has worked well for it in the past, according to Marco Tulio Venegas, a partner with Von Wobeser y Sierra SC in Mexico City.

Another message that Mexico is trying to convey in ratifying the ICSID Convention is that "if there are already mechanisms in place that have been successful, let's use it," Venegas said. "Let's not try to create something new which is not justified."

Mexico's decision to become one of 162 ICSID Convention signatory countries in the world — 153 of which have ratified it — is in line with efforts the country has made in recent years to facilitate foreign investment, including by signing several bilateral investment treaties and free trade agreements. Many, if not all, of these deals include investment protection provisions.

Among the things that will change once the convention is ratified is the way those disputes are handled. Twenty-five previous proceedings identified in a United Nations database as having been brought against Mexico invoked either the United Nations Commission on International Trade Law arbitration rules or ICSID's additional facility rules, which apply in instances where either the investor's home country or the country being targeted is not an ICSID Convention signatory.

Now, investors can bring disputes under the regular ICSID rules and within the self-contained ISCID system. ICSID awards may only be annulled by an ICSID annulment committee — not by a court situated in the same jurisdiction as an arbitration, as is done with many other international arbitral awards — and ICSID contracting states are expected to recognize ICSID awards as a final court judgment.

That's “a great benefit“ because it gives the parties more legal certainty, according to Von Wobeser y Sierra managing partner Claus von Wobeser.

Nine of the 25 arbitrations against Mexico were decided in the investor's favor, according to the United Nations Conference on Trade and Development. Still, even though those awards favoring the investors resulted in millions of dollars of compensation from the Mexican government's coffers, von Wobeser told Law360 that the government clearly considers signing on to trade deals allowing for investor-state dispute settlement to be worth it.

"The amount that has been paid out is really symbolic compared to all the benefits in terms of investment," he said. "The Mexican government has said many times that [it] has honored all of its commitments in terms of investor state cases. ... Clearly foreign investors feel secure because Mexico has had 20 years of positive behavior."

The jury is still out on whether countries that join ICSID or sign BITs have more foreign investment than those that don't. Holland & Knight senior counsel Carlos Véjar told Law360 he's not aware of a formal reliable study that confirms this premise.

Brazil, which does not have any bilateral investment treaties in place, was listed by the U.S. International Trade Administration as the world's eighth largest destination for foreign direct investment in 2015, with inflows of $64.6 billion, according to information attributed to UNCTAD. Mexico's inflow of foreign direct investment, meanwhile, is approximately $26.7 billion, according to the ITA, which identified Mexico's National Statistics Institute as its source.

The uncertainty on this point is reflected in the stances of some of Mexico's neighbors. Venezuela, Ecuador and Bolivia have all denounced the ICSID Convention in recent years.

Still, Véjar acknowledged that "we cannot discard this possibility" that signing such agreements prompts additional foreign investment. And experts say it's important to keep the denunciation of the ICSID Convention by these other nations in perspective.

"Much attention is given to the exit from the ICSID Convention of [Venezuela, Ecuador and Bolivia] since 2009 but this ignores that, in that same decade, 11 countries have ratified the ICSID Convention — including Mexico's NAFTA partner, Canada," said Skadden Arps Slate Meagher & Flom LLP partner Timothy Nelson. "Overall, the numbers prove that the last 10 years have witnessed a substantial growth in adherence to the ICSID Convention, with 153 member states currently participating."

Moreover, it's worth noting that "with a different political regime, even countries that have denounced the ICSID Convention could make a comeback to the system," according to Skadden counsel Jennifer Permesly.

--Editing by Pamela Wilkinson and Catherine Sum.