



International Arbitration and Other Environmental Dispute Resolution Strategies

Kevin T. Jacobs, Baker Botts L.L.P. - Houston
Gabriel Macchiavello - Rattagan, Macchiavello,
Arocena & Peña Robirosa - Argentina

Forum for Claims

- **Arbitration Is the Preferred Method for Resolving International Disputes**

- Arbitration, as an institution, dates back over three millennia
- George Washington's will from 1799 contains clause bearing many the hallmarks of today's state-of-art clauses:

"all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants--each having the choice of one--and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testator's intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States."

Arbitration's Key Features

- **Arbitration's Touchstones**
 - Created by Contract or International Treaty
 - Blending of Civil Law and Common Law
 - Flexible Rules
 - Confidentiality
 - Neutral Venue
 - Private, Neutral Decision-Makers
 - No Appeal
 - Enforceable Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 with Narrow Grounds to Challenge Awards (ratified by over 140 of the 193 nations of the world)

Arbitration's Key Features (cont'd)

- **Notable Institutions:**
 - International Chamber of Commerce
 - London Court of International Arbitration
 - International Centre for Settlement of Investment Disputes (ICSID)

Sources of Environmental Responsibilities

- **Good Practices Clause**

- “During the Development Period CONTRACTOR shall, using suitable up-to-date equipment, machinery and methods and conducting operations hereunder in accordance with good operator practice”

- **Environmental Assessments**

- Baseline Assessment with Predicted Impacts
- Periodic Re-evaluations

- **Legal Compliance Clause**

- "CONTRACTOR shall be bound by the laws . . . and regulations issued for the implementation hereof . . . provided no such laws, regulations . . . shall be contrary to or inconsistent with the provisions of the Agreement."

Environmental Responsibilities (cont'd)

- **Local Laws or Regulations Governing Environmental Impacts**
 - City or Township
 - County or Province
- **National Laws or Regulations Governing Environmental Impacts**
- **International Treaties Governing Environmental Impacts (Climate Change)**
- **Non-Governmental Guidelines for Environmental Impacts and Practices**
 - World Health Organization
 - World Bank

Environmental Laws, Regulations, Standards and Guidelines (cont'd)

- **The Stabilization Clause -- Another Hallmark of Many Contracts with the State**

"In the event that the STATE invokes any present or future law, decree or administrative order which contravenes the provisions of this Agreement or adversely effects the rights and interests of the CONTRACTOR as set forth in the terms and provisions of this Agreement, the STATE does hereby agree to indemnify the CONTRACTOR for any loss or damages that ensue therefrom and the STATE agrees to take appropriate measures to promptly resolve in CONTRACTOR's favour any conflict or anomaly between such law, decree or administrative order and this Agreement."

Contexts for Disputes

- **Contractor and the State for Breach of the Operating Agreement**
- **Contractor and the State for Breach of "Fair Treatment" Under a Treaty Such as NAFTA or DR-CAFTA**
- **Disputes Among Joint Venturers for Poor Practices by the Operator and Potential Loss of Project or Damages Because of Those Practices**

Recent Examples

- **NAFTA Disputes**

- Clayton/Bilcon v. Canada over quarry project in Nova Scotia with U.S. Investors claiming inequitable treatment over environmental approvals for a quarry and marine terminal that was reviewed by Nova Scotia authorities and by national authorities in Canada (nearly \$200 million in dispute)
- CANACAR v. USA over U.S. refusing to fund a pilot program allowing Mexican trucks to deliver goods across the U.S. border and citing environmental issues with Mexican trucks. CANACAR claims breach of NAFTA and of previous Tribunal's Order, seeking over \$2 billion in damages

- **DR-CAFTA Disputes**

- El Salvador Gold Mining Industry -- several treaty arbitrations by foreign investors over revoked permits and rejected permits

Recent Examples (cont'd)

- **International Court of Justice**
 - Argentina brought a claim against Uruguay under a 1975 bilateral treaty alleging that a new pulp mill will discharge toxins into the Uruguay River
- **Energy Charter Treaty**
 - Vattenfall--Swedish-owned energy company--contracted with the City of Hamburg to build a coal-fired power plant. New elections led to a coalition involving the Green Party, resulting in new environmental restrictions over air and water emissions. Vattenfall claims it is no longer economically feasible and filed an arbitration for over U.S.\$1 billion

International Arbitration's Features As They Relate to Environmental Claims

- **Quick Timelines and Short Hearings Compared to U.S. and U.K. Litigation**
- **No Established Summary Judgment or Dismissal Procedures Even for Universally-Accepted Legal Defenses**
- **Limited Discovery**
 - IBA Rules on the Taking of Evidence in International Commercial Arbitration
 - Very limited disclosure of specifically identified documents and narrowly defined categories of documents
 - Depositions Rarely Taken

International Arbitration's Features As They Relate to Environmental Claims (cont'd)

- All Evidence Comes In--It is Like a Bench Trial Without the Rules of Evidence
- Direct Testimony Presented Via Written Statements and Reports
- Limited Time for Cross Examination of Experts and Witnesses
- The Paper Matters--legal briefs and contemporaneous documents key

Challenges Faced In An Environmental Dispute

- Access to files, local employees, and site
- Who has it?

Environmental Sampling Logistics

- **Baseline Data and Evidence of Damage**
 - Vast area may be at issue
 - Universe of data may be limited
 - Photographic "evidence" of contamination
- **Quality of Data Used**
 - Use of good sample collection and analytical methods
- **Hurdles to Collection of New Data**
 - Sampling, import/export, customs, sample integrity, local support, holding times, tight deadlines in arbitration
- **Language, Cultural Differences**
- **Security**

How to Be Prepared

- **Pre-Arbitration Filing**

- Maintain Files
- Document Prudence of Operations and Communications with Partners and/or Government (Conversely, If You See a Problem, Do You Risk Sitting On Your Rights?)
- Remember to Consider Document Retention Policies

- **Post-Arbitration Filing**

- Identify Potential Experts Early--Environmental Experts, Facilities Experts, Sampling and Testing Experts
- Propose and Request Procedures for Greater Expert Disclosures and for Sampling, Testing and Inspecting Protocols (Remember Flexibility Means No Uniform or Standard Methods for Procedures and Rules)
- Tribunal-Appointed Experts--Do you want them?



RATTAGAN, MACCHIAVELLO
AROCENA & PEÑA ROBIROSA
A B O G A D O S

Dispute resolution strategies

The Argentinean case

Gabriel R. Macchiavello



- 1. Environmental claims' impact on industry.**
- 2. Dispute resolutions: drawbacks of the current system**
- 3. How Courts managed the difficulties of the system.**

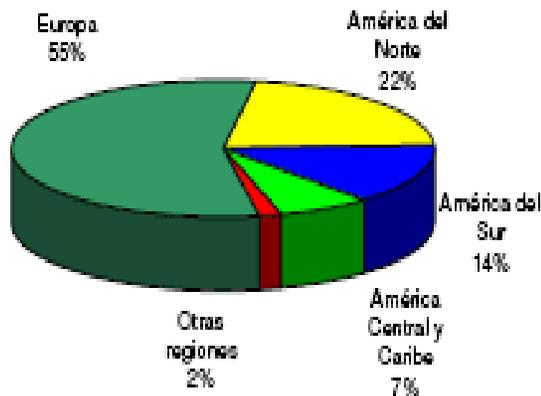


RATTAGAN, MACCHIAVELLO
AROCENA & PEÑA ROBIROSA
ABOGADOS

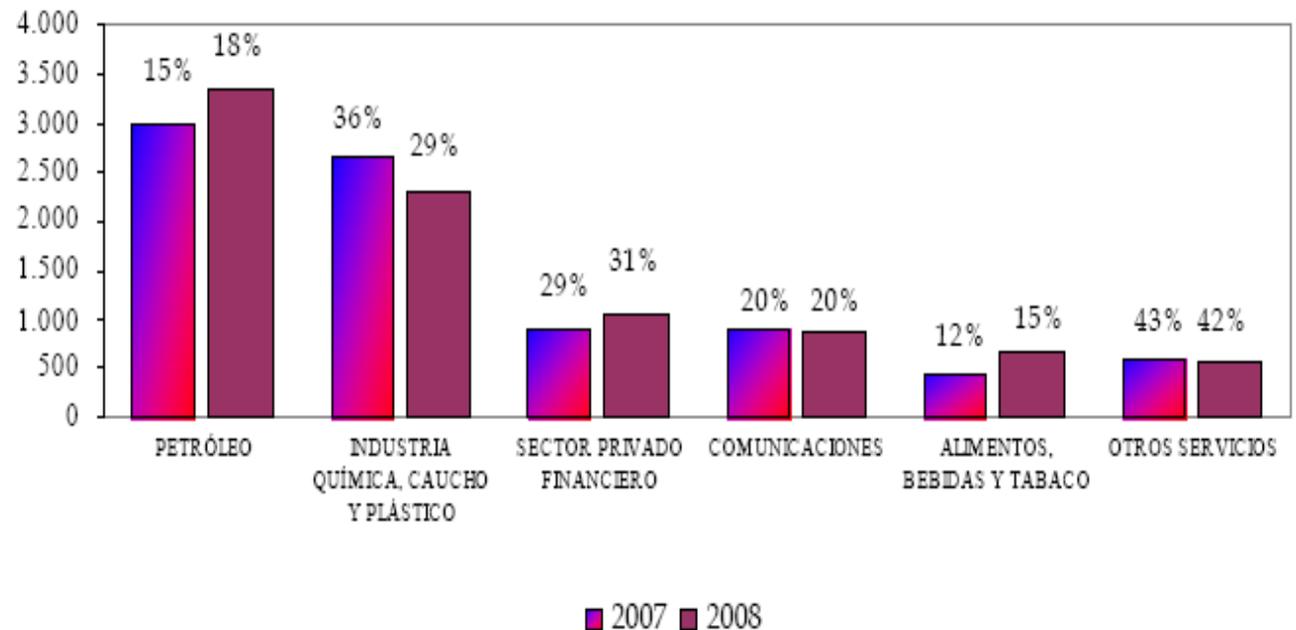
1. Environmental claims' impact on industry.

1. Environmental claims' impact on industry

- Foreign investment in Argentina -



ESTADOS UNIDOS



* Data according Central Bank of the Republic of Argentina, 2007/2008



1. Environmental claims' impact on industry

- Increase in enforcement
 - awareness of population on environmental matters.
 - new laws passed in 2002 (currently 7 minimum standards laws).
- Enforcement conducted by Administrative Authorities and Courts.
- Legal standing to sue environmental damage is wide.
- Plaintiffs "prefer" deep pocket defendants.



2. Dispute resolutions: Drawbacks of the current system



2. Dispute resolutions: drawbacks of the current system

- Collective damage \neq individual damage (torts).

- **Who** can sue?

Wide legal standing to ask for injunctive relief. (Section 43 NC)

Wide legal standing to file lawsuits: Federal State, Provinces, Municipalities, Ombudsman, NGO's and affected individuals. (General Environmental Act – GEA)

- *Affected individual // individual who owns an interest in the impaired resource*
- *Ability to sue on behalf of the community // aggrieved party*
- *No Attorney General intervention (in civil and environmental cases)*
- *Waiver to litigate without cost - in forma pauperis*



2. Dispute resolutions: drawbacks of the current system

▪ On what grounds?

Injunctive relief (*"Amparo"* - Action for protection of a Constitutional Right).

- Right to a healthy environment – Section 41 NC
- Cease of contamination or injunction to prevent the environment's modification
- Imminent risk or damage
- No need for the counter party participation

Ordinary procedure.

- Civil Code, Sec. 1113: Strict liability. Harm resulting from the "danger or defectiveness of a good". Dangerous good = to dangerous activity
- General Environmental Act (GEA), Sec. 28: Who caused environmental damage must restore it (pollutant's pay principle).
- Defenses and evidence must be rendered at the beginning of the trial. No discovery period - trial starts with complaint.



2. Dispute resolutions: drawbacks of the current system

- **Who** can be sued?

Anyone suspected to have caused environmental damage.

Exemption of liability: Proving third party's fault + good diligence.

- *No need for the plaintiff to file a previous complaint before administrative authorities = no technical info to support the claim*
- *No need for the plaintiff to gather previous evidence to be able to sue*
- *Complaints usually drafted in general terms. Lack of specific allegations against defendants*
- *Discovery period // Evidentiary period*



2. Dispute resolutions: drawbacks of the current system

▪ **What** can be sought?

Environment restoration: environmental damage is any relevant alteration negatively affecting the environment.

If remediation technically unfeasible: Pay off to the Environmental Compensation Fund.

- *Environmental damages. Permits. Compliance with standards (air emissions and wastewaters discharge limits)*
- *Remediation*
- *Enforcement authorities vs. Courts*
- *Collective emotional distress?*



2. Dispute resolutions: drawbacks of the current system

▪ **When?**

Statues of limitations.

- *Courts tendency to consider no time bar for environmental claims.*
- *Consequences of an incident (ex. spill) may be noticed years after its occurrence.*
- *Continuous industrial impact: when does it start to be negative and relevant?*

▪ **Where?**

Jurisdiction: Provincial Courts or Federal Courts

Supreme Court?

Venue: place where facts occurred or defendant's domicile



2. Dispute resolutions: drawbacks of the current system

- **How?**
 - Require investigation to Enforcement Authorities.
 - Mediation: Mandatory prior lawsuit in Federal jurisdiction.
 - Courts: injunctive relief / ordinary procedure.



2. Dispute resolutions: drawbacks of the current system

- Main issues during the litigation process -

- Lack of accuracy of the alleged facts compensated with “investigative” evidence = opportunity for defensive arguments has precluded.
- Judge’s broad jurisdiction vs. Judge’s lack of expertise in environmental matters.
- Evidence: Management of scientific matters.
 - *Problems with appointed experts witness*
 - *Lack of criteria for the admissibility of scientific evidence. No validation test.*
 - *Methodology of analysis should have general acceptance of the scientific community .*



3. How Courts managed the difficulties of the system.



3. How Courts managed the difficulties of the system

"ALMADA" case.

- New concept of damage, which implies that the existence of risk is sufficient to award monetary compensation.
- Environmental damages imply a personal health damage caused by the reduction of the generic vital capacity of the victim.
- Statute of limitations for lawsuits seeking cease of contamination not to be applied while pollution persists.

"SAGARDUY" case.

- Final decision on environmental damage has "*erga omnes*" effect. = Possibility to seek individual damages without proving the environmental damage.
- *Res judicata*. Case where a final judgment has been rendered and is no longer subject to appeal = discussion should be limited to determine whether or not pollution has continued after the previous case.



3. How Courts managed the difficulties of the system

"ASSUPA" case.

- Vagueness of the complaint. Motion for a more definite statement

Court ruling:

- Necessity to describe all the facts in the complaint. Court can not substitute the plaintiff's activity.
- It is not acceptable to incorporate the facts in future stages different from the complaint.
- The protection of the environmental damage is an important constitutional right with the same constitutional status as the right to defend in trial.



3. How Courts managed the difficulties of the system

“MENDOZA” case.

- Federal Supreme Court Jurisdiction: individual damages \neq collective environmental damage
- New procedural rules: mandatory public hearings with defendants (National and Provincial States, companies located along Riachuelo basin).
- Final decision: cease and restoration (future) \neq damage (past)

↓

Governments must conduct a clean up program and – through the creation of a Basin Authority - call the industries located along the Riachuelo for an industrial restructuring

↓

Decision upon industries liability and monetary contribution to the contamination is still pending



3. How Courts managed the difficulties of the system

“MENDOZA” case.

- A Basin Authority was created: ACUMAR. Increase in inspection and control over industries.
- Tendency of the Federal Supreme Court to order Administrative Authorities to conduct preventive actions and remediation programs.
- New administrative regulations due to ACUMAR creation.
- Delegation to a Federal Judge to execute the Federal Supreme Court’s final decision.
- Request environmental insurance.