The Arbitration Review of the Americas

2021

Investment Treaty Arbitration in the Americas

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Across 18 chapters, and spanning 120 pages, this edition provides an invaluable retrospective from 39 leading figures.Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.This edition covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; has overviews on nascent Brazilian jurisprudence on arbitration and corruption (in the wake of Operation Carwash) and on the coronavirus and investment arbitration, among other things; and an update on how Mexico's federal courts are addressing the problem of personal injunctions against arbitrators that have brought Mexico grinding to a halt as a seat.

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Investment Treaty Arbitration in the Americas

Dawn Yamane Hewett, **Lucas Loviscek**, **Julianne Jaquith** and **Woo Yong Chung**

Quinn Emanuel Urquhart & Sullivan LLP

Summary

IN SUMMARY

This article provides an overview of key issues and developments in investment treaty arbitration in Latin America, specifically highlighting legal developments and updates to last year's article that are expected to be important for arbitration practitioners, international investors and others interested in the investor-state dispute settlement system. First, we discuss the current status of the United States–Mexico–Canada Agreement (USMCA) and the future of investor-state arbitration under this new agreement. Second, we review significant substantive and procedural developments and measures related to the coronavirus (covid-19) and examine their impact on treaty arbitration in Latin America. Last, we review some key mining awards from Latin America that were released in 2019.

DISCUSSION POINTS

- Statistics regarding the participation of Latin American parties in international commercial and investment arbitrations in 2019.
- Current status of the USMCA and future of investor-state arbitration under the USMCA.
- Increasing use of technology in international arbitrations during the covid-19 pandemic and recommended practices for conducting arbitration proceedings remotely.
- Latin American governments' emergency responses to the covid-19 pandemic and their implications for investor-state arbitration.
- Review of key mining awards from Latin America in 2019.

REFERENCED IN THIS ARTICLE

- Chapter 14 of the USMCA and its investor-state dispute settlement (ISDS) provisions.
- Comprehensive Progressive Trans-Pacific Partnership.
- *Orlandini v Bolivia*.
- *TECO v Guatemala*.
- Police power doctrine.
- Customary international law defences of force majeure, necessity and distress.
- Mining award: *Anglo American v Venezuela*.
- Mining award: *Glencore International v Colombia*.

Investment treaty arbitration continues to grow as a mechanism to resolve cross-border disputes, and its prominence and use in Latin America continue to increase. Disputes involving Latin American countries continue to occupy a significant portion of the caseload at the International Centre for Settlement of Investment Disputes (ICSID). In 2019, 26 per cent of the 39 new investment arbitration cases registered before the institution (whether under the ICSID Convention or the ICSID Additional Facility Rules) included a South American country as a party,[1] while an additional 10 per cent included Spanish-speaking countries from the Caribbean, Central America or North America.[2] In the past year, ICSID registered a total of 14 cases involving:

- Venezuela (two);
- Uruguay (one);
- Peru (two);
- Colombia (three);
- Argentina (two);
- Mexico (two);
- Panama (one); and
- Costa Rica (one).[3]

Additionally, 14 per cent of the arbitrators, conciliators and ad hoc committee members appointed in cases registered in 2019 were South American nationals (27 total), 2 per cent were from Central America (four total) and 22 per cent were from North America (42 total).[4] In 2019, four of the Permanent Court of Arbitration's nine registered cases involved a party from the Americas.[5] Of the London Court of International Arbitration's cases, 3.1 per cent involved North American parties, 4.1 per cent involved parties from the Caribbean, and 4.8 per cent involved parties from Central and South America.[6] As at the time of writing, the International Chamber of Commerce statistics for 2019 were not yet available.

This article discusses legal developments and updates that are expected to be important for arbitration practitioners, international investors and others interested in the investor-state dispute settlement system. First, we discuss the current status of the United States–Mexico–Canada Agreement (USMCA) and the future of investor-state arbitration under this new agreement. Second, we review significant substantive and procedural developments and measures related to the coronavirus (covid-19) and examine their impact on treaty arbitration in Latin America. Last, we review some key mining awards from Latin America that were released in 2019.

USMCA ENTERED INTO FORCE WITH REMARKABLE CHANGES TO INVESTOR-STATE DISPUTE SETTLEMENT ON 1 JULY 2020

On 30 September 2018, the United States, Canada and Mexico agreed to the terms of a new trade deal, the USMCA, to modify the North American Free Trade Agreement (NAFTA).[7] On 30 November 2018, the parties signed the new agreement. On 10 December 2019, the parties signed a revised version of the agreement, which was ratified by the Mexican legislature in June 2019, by the US Congress in January 2020, and by the Canadian parliament in March 2020.[8] The agreement formally entered into force on 1 July 2020 at which time the legacy NAFTA treaty terminated.[9] The USMCA will result in remarkable changes to the investor-state dispute settlement (ISDS) regime among the three countries.

Pending ISDS claims are not affected by the USMCA and will continue to be governed by NAFTA Chapter 11.[10] Moreover, even though the USMCA has entered into force, 'legacy investments', that is, investments made while the NAFTA was in effect, will still have access to the dispute settlement provisions of the NAFTA 'as long as those claims are brought within three years following the NAFTA's termination'.[11] In other words, investors may bring claims under the NAFTA until 1 July 2023 with respect to investments made when NAFTA was still in force and investments still in existence on 1 July 2020.[12] After the three-year period, each state party's consent to arbitrate under NAFTA Chapter 11 expires, and any disputes concerning existing investments will then be subject to the new USMCA regime.[13]

Chapter 14 of the USMCA replaces Chapter 11 of NAFTA. Canada opted completely out of ISDS so the USMCA will eliminate ISDS for US investors with existing or future investments in Canada (and vice versa) and for Mexican investors with existing or future investments in Canada (and vice versa).[14] Investors from the US with treaty claims against Canada, and Canadian investors with existing or future investments in the US, would have had to lodge those claims under NAFTA Chapter 11 before it expired, assuming they qualify to do so. Three years after the USMCA's entry into force, US investors with existing or new investments in Canada, and Canadian investors with existing or new investments in the United States, will be forced to resort to local courts to resolve their disputes, absent the two countries' entrance into another investment agreement. Canadian investors in Mexico and Mexican investors in Canada will be able to rely on the legacy NAFTA until 1 July 2023 and on ISDS provisions in the Comprehensive Progressive Trans-Pacific Partnership, which took effect at the end of December 2018.[15] For US investors in Mexico and Mexican investors in the United States, there is a new regime for treaty claims under the USMCA with an initial domestic hurdle.

Annex 14-D of the USMCA governs investment disputes between US investors and Mexico and Mexican investors and the United States.[16] Specifically, Annex 14-D provides that investors must first try to resolve their disputes through the domestic courts (for 30 months or until they have received a final decision) before they can resort to arbitration under the USMCA.[17] Furthermore, investors will have four years from the date of the governmental measures to initiate a claim under the treaty, after which they will become time-barred.[18] If the domestic proceedings are ongoing as the statute of limitations nears, investors face a choice. If investors choose to initiate arbitration, they must waive the right to continue any domestic court proceedings with respect to any measure alleged to constitute a breach of the treaty.[19] Otherwise, they can continue with their domestic proceedings, but they likely will be found to be barred from future treaty arbitration if such proceedings are initiated after the four-year bar has expired.

The USMCA also limits the types of claims that US and Mexican investors may bring under the treaty. Under the USMCA, US investors in Mexico and Mexican investors in the US are still allowed to assert claims based on direct expropriation (article 14.8), a denial of national treatment once the investment has been established (article 14.4) (ie, that the state provided preferential treatment to a domestic investor in like circumstances), and violations of the 'most-favoured nation' obligation once the investment has been established (article 14.5) (ie, that the state provided preferential treatment to a foreign investor from a third-party country in like circumstances). However, Annex 14-D expressly excludes claims alleging (i) indirect expropriation (ie, measures tantamount to expropriation), and also excludes claims alleging (ii) violations of the obligation to accord fair and equitable treatment and full protection and security under international law.[20] These are very significant limitations on the rights of investors from both countries.

Some limited but important categories of investments in the US and Mexico will continue to have substantially the same protections under the USMCA as in NAFTA Chapter 11. Annex 14-E of the USMCA specifically states that government contracts in 'covered sectors', including oil and natural gas, power generation services, telecommunications services, transportation services, or the ownership or management of roads, railways, bridges or canals, will still be able to assert claims alleging indirect expropriation and violations of the obligation to accord fair and equitable treatment. Additionally, there is no requirement that investors in covered sectors pursue local remedies before resorting to arbitration. Investors

in these categories may still pursue arbitration claims under this section as long as six months have elapsed from the events giving rise to the claim and not more than three years have elapsed since the claimant first knew or should have known of the breach, as also required under the NAFTA.

Annex 14-E of the USMCA also contains a provision that allows the Annex to be modified or eliminated at the USMCA parties' discretion, suggesting that the protections for specific categories of investments could be curtailed even more in the future or that the Annex could be expanded to include new categories yielding greater protections for what are currently non-covered sectors.[21] Further, as a requirement for bringing a treaty claim for a government contract in a covered sector under Annex E, the respondent state must be a party to another international trade or investment agreement that permits investors to initiate dispute settlement procedures to resolve an investment dispute with a government.[22] In other words, if the United States or Mexico were to retreat from ISDS in all of their other trade or international investment agreements, the United States or Mexico could avoid liability for future government-contract-based treaty claims under the USMCA.

Interestingly, the USMCA does provide limited protections to public debt, which the NAFTA did not allow. Appendix 2 on 'Public Debt' clarifies that any default or non-payment of debt issued by a party may not be a violation of the agreement unless the investor meets its burden of proving that the default or non-payment of the debt was a violation of the agreement.[23] This provision allows for the possibility that measures in connection with a public debt could be a violation of the USMCA. The NAFTA, however, specifically excludes any 'debt security, regardless of original maturity, of a state enterprise' from the definition of 'investment', thus parties may not bring claims related to public debt under the NAFTA.[24]

Chapter 14 of the USMCA represents a major change to the ISDS landscape among the United States, Canada and Mexico, upending decades of ISDS practice between these three trading partners and significantly limiting the protections available to various categories of foreign investors from each country. It also imposes many new limitations on the parties' substantive obligations with respect to investments. As the USMCA takes effect this year, US and Canadian entities and individuals considering cross-border investments and potential claims in Mexico after 1 July 2020 and those with existing investments in Mexico will need to carefully consider the impact of this new regime. It will be interesting to see whether these changes remain in place as new political administrations take hold in each of the countries.

NEW TECHNOLOGY AND PROCEDURES FOR CONDUCTING ARBITRATIONS IN THE MIDDLE OF THE COVID-19 PANDEMIC

The covid-19 pandemic has dramatically affected people's lives as well as commercial relationships, international investment and the global economy. Its effects have created a new reality to which society has had to adapt in many different ways. International arbitration has also had to adapt to this new reality. International arbitration institutions and tribunals have reacted quickly to continue assisting parties in the resolution of existing disputes and with disputes arising from the pandemic.

The flexibility of most arbitration rules and arbitral institutions has allowed parties and tribunals to confront the challenges of the current situation with more ease than national courts, especially in Latin America, where most countries' national courts do not allow or are not used to electronic filings or virtual hearings.

Most arbitral institutions continue to be operative. They are supplying services remotely and coordinating with tribunals and the parties to minimise the disruption of arbitration proceedings, including by accepting written submissions and the registration of new cases electronically.[25] Parties are encouraged to use electronic means to submit their filings and communicate with the tribunal and the counterparty. Correspondence and submissions in hard copy have become a rarity.

However, despite the availability of remote technology, some delays are unavoidable, and arbitral tribunals and courts have dealt with rather unusual requests for time extension and stay of proceedings arising from the impact of the current pandemic. For instance, in ***Orlandini v Bolivia,*** an investment treaty arbitration administered by the Permanent Court of Arbitration, Bolivia requested the suspension of the time-limit for the submission of its statement of defence indefinitely on grounds of force majeure, in relation to the covid-19 health crisis.[26] Specifically, it argued that any breach of its treaty obligation to arbitrate the dispute could be excused by a force majeure situation under article 61(1) of the Vienna Convention on the Law of the Treaties and article 23 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts.-[27] In Bolivia's view, the difficulties caused by the current pandemic met the international law definition of force majeure, constituting 'an unforeseen event leading to the irresistible conditions which (i) are beyond Bolivia's control'; and (ii) make submission of the statement of defence by the tribunal's deadline 'materially impossible'.[28] The tribunal refused to suspend the proceedings entirely, and did not opine on whether the covid-19 pandemic was a force majeure event.[29] Instead, the tribunal granted Bolivia a 30-day extension to file its statement of defence.[30]

Similarly, before the United States Court of Appeals for the District of Columbia Circuit, Guatemala argued that the enforcement of the US$35 million arbitral award from an ICSID tribunal should be stayed because the country should not be deprived of the resources it needs to fight the covid-19 pandemic.[31] Specifically, Guatemala argued that if it were forced to pay the award now, it would affect the country's budget that it needs to fulfil its obligations to its people. The DC Circuit rejected Guatemala's motion, finding that Guatemala did not meet the requirements for a stay of enforcement pending appeal.[32] Subsequently, the lower court allowed the investor to proceed with the attachment and execution of Guatemala's property located in the United States, while noting that the state had already delayed its compliance with the award for months before the pandemic began.[33]

Despite the challenges posed by the covid-19 pandemic and some resistance from the parties, the investment dispute resolution process has largely proceeded with little disruption, due to its inherent flexibility. Of course, the use of remote technology is not new in the international arbitration practice, but it has certainly become more important and widely adopted during the pandemic. In the current environment of remote arbitrations, one particular issue that has sparked greater discussion and has made the arbitration community rethink its existing practices is whether and to what extent hearings that cannot be held in person due to travel restrictions, social distancing and other measures resulting from the pandemic, should be postponed, or instead should be held virtually using remote technology.

As noted earlier, virtual hearings are not something entirely new in international arbitration,-[34] though the norm has been for hearings to be held in person. However, the development of new technologies and the needs that the pandemic has created, seem to require the

transition to this model of virtual hearings that, on the one hand, could help avoid indefinite delays of arbitration proceedings due to the uncertainty as to when hearings would be held and, on the other hand, could help modernise and make international arbitration more cost-effective. This is why almost all of the arbitral institutions have taken steps to provide guidelines and offer different platforms for virtual hearings[35] and have even organised webinars to share the successful experience that arbitrators, counsel, experts and witnesses have recently had in hearings held remotely with the use of video-conferencing technology.-[36] Hearings are, in fact, being held via remote video conferencing.[37]

Some of the most relevant recommendations that arbitral institutions, arbitrators, practitioners and commentators have made include, among others, that the parties:

- conduct test sessions before the hearing takes place to avoid technical issues during the hearing;
- select a single IT support provider that would assist all the participants in the test sessions and during the hearing;
- seek clarification from counsel and the tribunal as to whether all attendees will participate from distinct locations, and, if so, arrange private virtual rooms for deliberations of the tribunal and for internal meetings of counsel teams during the hearing;
- arrange the use of separate screens for different functions (eg, one screen to see the arbitrators and other participants, and another screen to display documents);
- agree on the rules and schedule to follow in case connection fails; and
- agree on the procedure to be followed to examine witnesses and experts and to make documents available to them and to opposing counsel during their examination (including whether someone from the counsel team of each party will be present in the room with the witness).

Finally, to ensure the equal accessibility and treatment that should be given to both parties, tribunals should be attuned to concerns regarding time zone differences among the different participants.

The practical issues mentioned above implicate parties' rights in virtual hearings, and thus must be addressed. The parties' right to be heard and to be treated equally should be duly respected, and ultimately, such consideration will help preserve the integrity and legitimacy of the hearing and ultimately, the award. The truth is that the pandemic has created a new reality that has also imposed new demands on the practice of international arbitration but also is revealing that the use of remote technologies can help reduce costs and increase efficiencies. As explained, the international arbitration community has reacted positively and adapted quickly to this new reality relying on already known tools, improving them, and adapting to the use of new technologies in order to avoid disruption of arbitral proceedings while protecting the health of its participants.

SUBSTANTIVE MEASURES TAKEN IN RESPONSE TO COVID-19 AND POTENTIAL FOR INVESTMENT DISPUTES

In addition to changing the ways of conducting arbitration proceedings, the covid-19 outbreak will likely be a new and important source of investment disputes in the years to come. In the middle of the pandemic, states around the world have taken profound and

unprecedented measures to limit the spread of the virus and prevent the economic fallout from the pandemic. Countries in Latin America are no exception. Since the first case in Latin America was confirmed in Brazil on 26 February 2020, most countries in the region, although with different speed, have adopted significant public health and economic measures in response to the pandemic, such as travel restrictions, closure of non-essential businesses, suspension of utility payments and tax relief.

Historically, state measures taken in times of national or regional crisis triggered a spate of arbitration claims by foreign investors under investment treaties, as can be seen from the examples of the 2002 Argentinean financial crisis and the Arab Spring in 2011–2012. In light of this historical trend and given the exceptional nature of covid-19 and its mitigation measures, many of which affect foreign investors, a new wave of claims involving pandemic responses – including those taken by Latin American countries – also seems likely.

Indeed, the possibility of treaty arbitration over covid-19-related measures is looming large in the minds of foreign investors, practitioners and government officials. For instance, in recent months, Mexican authorities placed restrictions on renewable energy production, including by issuing a resolution on 29 April 2020 that temporarily suspended all pre-operation tests for wind and solar projects and gave preferential grid access to non-renewable electricity generation facilities.[38] Notwithstanding that Mexico justifies these measures citing to the falling demand for electricity caused by the current pandemic, some foreign renewables investors and related interest groups suspect that Mexico is trying to use the current pandemic as a 'pretext' to protect its struggling state energy company Pemex by eliminating competing energy sources.[39] In Peru, a proposed emergency measure that would suspend the collection of fees on the country's road network sparked warnings of the potential arbitration claims brought by private toll-road operators.[40] Noticeably, unlike in Mexico, such warnings came first from state officials, including the president of Peruvian transport regulator Ositran.[41]

In Argentina, in an attempt to help protect oil producers that have been hit hard by the global price crash arising from the pandemic, the government enacted a decree fixing local oil prices at US$45 a barrel, almost 30 per cent higher than Brent crude prices.[42] While this decree marks a big win for oil producers at the country's giant Vaca Muerta shale field, it critically affects the businesses of the companies in the downstream sector (ie, refineries and gas stations), thus creating the potential for investment disputes. Other covid-19-related measures implemented (or being considered) by states have also been discussed in the context of potential investment disputes. Examples include, among others, the freeze on mortgage and credit card payments (El Salvador), deferral of utility payments (El Salvador and Bolivia) and resort to compulsory licensing scheme for patents related to coronavirus technologies (Ecuador).[43]

Whether foreign investors' claims over pandemic responses will prevail will be fact-specific and will also turn on the text of the particular treaty at issue. That said, such claims will almost inevitably require tribunals to revisit one of the most contentious issues in the field of international investment arbitration (ie, the proper balance between investors' rights and a state's regulatory power in times of crisis). In general, international law accords states latitude in dealing with emergencies and matters of important public interest. Such latitude can be expressly set forth in investment treaties, allowing the host states to take measures otherwise inconsistent with their treaties when, for example, their actions are necessary 'for

the protection of essential security, the maintenance of public order, or to respond to a public health emergency'.[44]

Even in the absence of an express exception provision, states may rely on the doctrine of police power in order to defend measures that, in other circumstances, might constitute a breach of the substantive investor protection – as shown by the recent awards in ***Philip Morris v Uruguay***[45]and ***Marfin v Cyprus***.[46] Apart from the doctrine of police power, states can potentially invoke customary international law defences, such as force majeure,[47] distress[48] and necessity,[49] to avoid liability in relation to covid-19-related claims.[50] The jurisprudence on these defences are either rare or not settled and it is likely that covid-19, which is expected to become a major source of investment disputes in the year to come, may lead to the important developments in the status of these defences under customary international law.

Again, whether states will be able to defend the propriety of any measures adopted in the face of the covid-19 pandemic will turn, inter alia, on the specific facts of each case, whether the measures adopted were necessary, narrowly tailored and proportional to address issues arising directly from the pandemic and whether investors can prove that the measures, even if needed, negatively impacted their investments and breached their rights as protected by the treaties and public international law.

KEY MINING AWARDS INVOLVING LATIN AMERICA IN 2019

Anglo American PLC V Bolivarian Republic Of Venezuela, ICSID Case No. ARB(AF)/14/1

In January 2019, Venezuela narrowly defeated claims by Anglo American that it had expropriated its investment and breached various other obligations in the UK–Venezuela BIT. After the expiration of mining concessions held indirectly by Anglo American in 2012, Venezuela took possession of Anglo American's mining assets, reasoning that these assets reverted to the state as per the concession agreement. Anglo American alleged that Venezuela expropriated its assets, as they were 'non-reversionary assets'. It also claimed a fair and equitable treatment (FET) breach for discontinuing VAT refunds to its locally held company in 2010 and full protection and security and national treatment claims. Venezuela filed a counterclaim against Anglo American, seeking damages for breaches of the concession agreement. In the end, a split tribunal dismissed all claims and counterclaims and awarded no costs or fees to either party.

Glencore International AG And CI Prodeco SA V Republic Of Colombia, ICSID Case No. ARB/16/6

In December of 2019, a tribunal constituted under the Colombia–Switzerland BIT ordered Colombia to repay a US$19 million fine it had levied on Glencore, a Swiss mining company, noting that Colombia had frustrated its legitimate expectations and impaired the use of its investment. In addition to the US$19 million, the tribunal ordered Colombia to pay arbitration costs (US$1.3 million), Colombia's fees and costs (US$3.4 million) and approximately 50 per cent of Glencore's legal expenses (US$1.69 million). However, the tribunal denied Glencore's demand for US$775 million as well as its requests for specific performance.

Crystallex Int'l Corp V Petróleos De Venezuela, SA,

3rd Circuit

In July 2019, the Third Circuit for the US Court of Appeals ruled that the Canadian gold mining company, Crystallex, can seize shares in Citgo, indirectly owned by Venezuela's state-owned oil refining firm, to collect on its US$1.2 billion judgment plus interest. Crystallex had earlier prevailed in an international arbitration against Venezuela under the Canada–Venezuela BIT for expropriation and breach of the FET obligation through Venezuela's denial of an environmental permit for the Las Cristinas mining project and termination of Crystallex's mining contract.

Endnotes

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43 'Cashing in on the Pandemic: How Lawyers are Preparing to Sue States Over COVID-19 Response Measures', Corporate Europe Observatory (18 May 2020), available at https://corporateeurope.org/en/2020/05/cashing-pandemic-how-lawyers-are-preparing-sue-states-over-covid-19-response-measures. Back to section

44 Article XI of the 1991 US–Argentine BIT. Back to section

45 In Philip Morris v Uruguay, the tribunal concluded that Uruguay's adoption of certain anti-smoking policy measures was a 'valid exercise of the State's police powers [for the protection of public health], with the consequence of defeating the claim for expropriation.' Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016, paragraph. 287. Back to section

46 In Marfin v Cyprus, the tribunal found that the measures taken by the Cypriot government in response to the Greek debt crisis, including the acquisition of a majority ownership in a bank, did not constitute an illegal expropriation but rather 'non-discriminatory, proportional measures taken in good faith in the exercise of Cyprus' regulatory powers in the pursuit of a legitimate public policy objective – the protection of the health of Cyprus' financial system during a time of profound economic crisis'. Marfin Investment Group v The Republic of Cyprus, ICSID Case No. ARB/13/27, Award, 26 July 2018, paragraph. 830. Back to section

47 Article 23 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles). Back to section

48 Article 24 of the ILC Articles. Back to section

49 Article 25 of the ILC Articles. Back to section

50 For more information on these defences, see Federica Paddeu and Kate Parlett, 'COVID-19 and Investment Treaty Claims', Kluwer Arbitration Blog, available at http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims/?doing_wp_cron=1591042112.4456000328063964843750. Back to section

quinn emanuel trial lawyers
quinn emanuel urquhart & sullivan, llp

Dawn Yamane Hewett dawnhewett@quinnemanuel.com
Lucas Loviscek lucasloviscek@quinnemanuel.com
Julianne Jaquith juliannejaquith@quinnemanuel.com
Woo Yong Chung wooyongchung@quinnemanuel.com

https://www.quinnemanuel.com/