The Arbitration Review of the Americas

2023

Damages: geopolitics increases caseloads and complicates quantum

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The Arbitration Review of the Americas 2023 contains insight and thought leadership from 38 pre-eminent practitioners from the region. It provides an invaluable retrospective on what has been happening in some of Latin America's more interesting seats. This edition also contains an interesting think piece on concurrent delay as well as an excellent pair of reviews of decisions in the US and Canadian courts.

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Damages: geopolitics increases caseloads and complicates quantum

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Summary

In summary

This article analyses recent international arbitration cases and drivers of cross-border disputes in the Americas. Investment claims relating to the pandemic seem likely, as do cases following Russia's invasion of Ukraine. An economic downturn may trigger more disputes in the Americas. Geopolitics are likely to result in more claims as high energy prices hinder contractual performance, pandemic support programmes lead to investment claims and supply-chain constraints delay infrastructure projects. Calculations of quantum are likely to be complex. In investor–state disputes, an assessment of quantum may need to distinguish the effect of measures for which a respondent state is found liable from the impact of other policy measures. Such analyses present a particular challenge when breaches coincide with extreme economic and financial volatility, significant commercial disruption and extraordinary government pandemic-response policies.

Discussion points

- Recent economic trends
- Quantitative review of trends in arbitration in the Americas
- Fair and equitable treatment and quantum
- Potential for covid-related claims in Latin America
- Energy transition and the possibility of supply-chain disputes

Referenced in this article

- *Westmoreland v Canada*
- *Mercer v Canada*
- *United States–Canada–Mexico Agreement*
- *ADP International SA and Vinci Airports SAS v Chile*

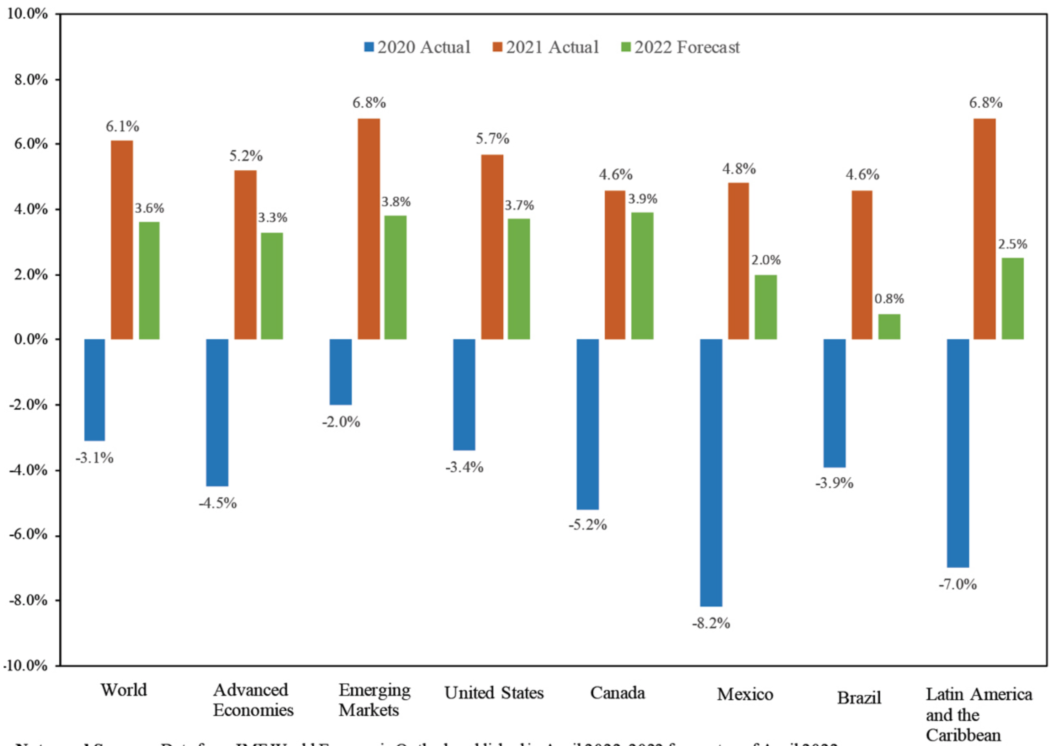
Introduction

Since covid-19 was declared a pandemic over two years ago, the global economy and financial markets have experienced massive disruption and dislocation. Government action cushioned an initial sharp economic downturn, and the development and dissemination of vaccines kickstarted a recovery. However, the economic consequences of the pandemic – including high inflation, commodity price volatility and supply chain disruptions – are still present in many industries around the world. In addition, recovery efforts have been slowed by rising energy prices following Russia's invasion of Ukraine. This article reviews recent economic trends in the Americas, analyses recent international arbitration cases and likely drivers of future cross-border disputes in the Americas, and comments on issues arising in the assessment of economic damages in such disputes.

Recent economic trends

After declining by 3.1 per cent in 2020, world output (as measured by real gross domestic product) rebounded in 2021. However, the global recovery is expected to slow substantially in 2022. Figure 1 shows the actual output growth for 2020 and 2021, as well as the forecast for 2022, for various regions and specific countries in the Americas.[1]

Figure 1: Actual and Forecast Growth by Region and Country *Annual Per Cent Change in Real GDP*

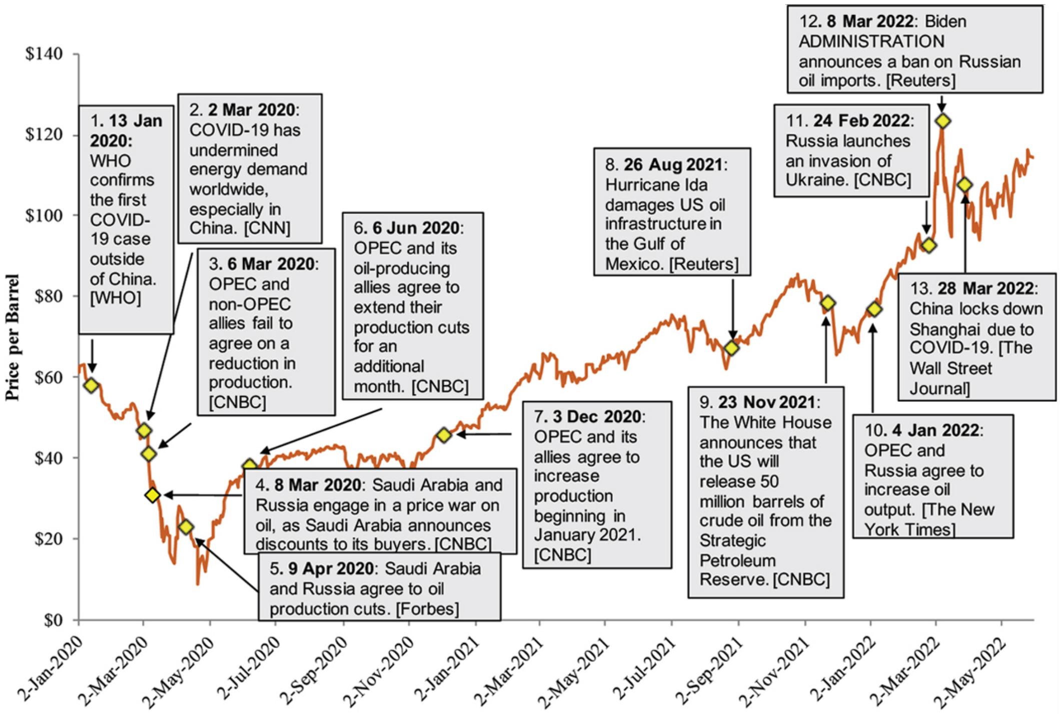


Notes and Sources: Data from IMF World Economic Outlook published in April 2022. 2022 forecast as of April 2022.

As reported by the International Monetary Fund, global output in 2021 increased by 6.1 per cent, as many countries implemented expansionary fiscal and monetary policies to bolster their economic recovery and covid-19 vaccines became widely available to the public.[2] On average, emerging economies experienced higher growth rates than advanced economies in 2021. However, following the robust rebound in 2021, the global recovery has begun to decelerate in 2022 and is expected to continue to slow throughout the year, as a consequence of the war in Ukraine, increasing inflation and high energy prices. Compared with Canada and the United States, economies in Latin America, such as Brazil and Mexico, are expected to experience very low growth rates in 2022. In addition, rising inflation and policy tightening are expected to have more pronounced effects on economies in Latin America, and recent covid-19 lockdowns in China may further disrupt global supply chains.[3]

Rising inflationary pressure from energy price shocks is one of the most significant headwinds for the global economic recovery.[4] For example, since the unprecedented collapse of oil prices during the early stages of the pandemic in April 2020, prices have been increasing steadily. Figure 2 shows the spot price of West Texas Intermediate (WTI) crude oil, along with some of the relevant key events, from January 2020 to May 2022.[5]

Figure 2: WTI Crude Oil Spot Prices and Key Events



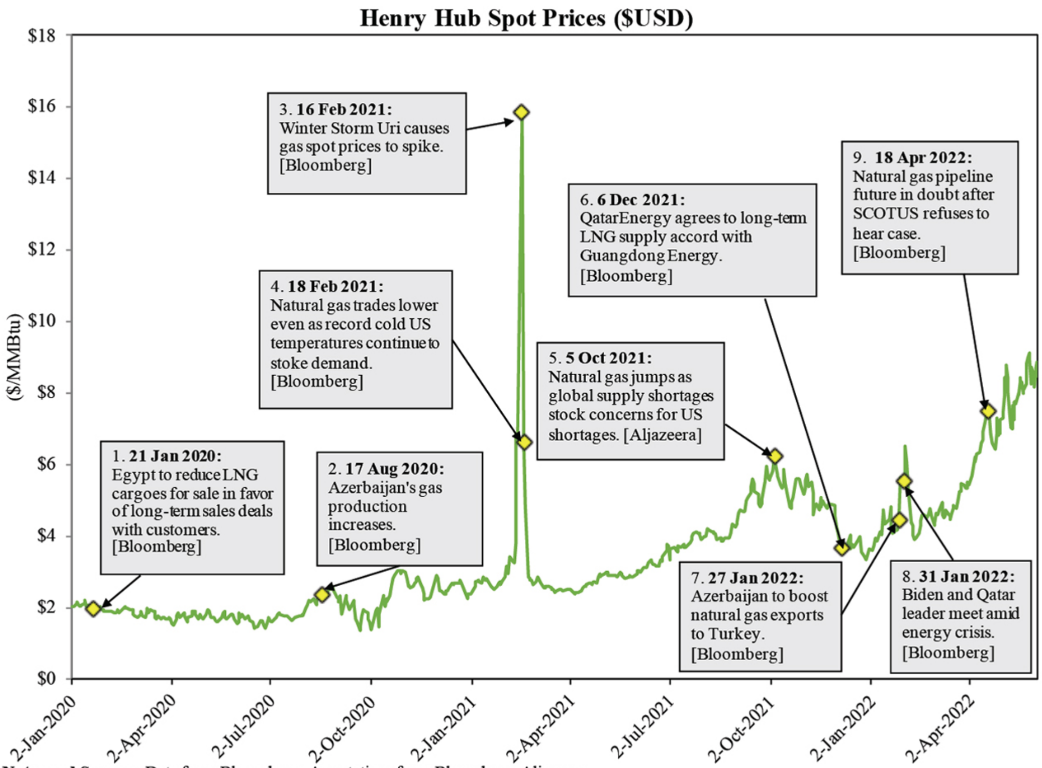
Notes and Sources: Data from FactSet Research Systems, Inc. Annotations from news articles obtained from Factiva and Google. WTI price set to the previous day's price on April 20, 2020 to eliminate negative price on that day.

In March and April 2020, oil prices declined precipitously. The pandemic undermined energy demand worldwide while, simultaneously, an oil price war between Russia and Saudi Arabia led to oversupply.[6] By the summer of 2020, oil prices began to recover, as Saudi Arabia and Russia agreed to lower their oil production[7] and OPEC+ agreed to extend production cuts.[8] Oil prices continued to climb through 2021, as a consequence of the global rollout of covid-19 vaccines, easing of restrictions and lockdowns, and continued production cuts by OPEC and its allies.

This rapid increase in oil prices was exacerbated by Hurricane Ida, which damaged US oil infrastructure in the Gulf of Mexico. Hurricane Ida shut down oil facilities for several weeks and more than 17.5 million barrels of oil were lost to the market, reducing US exports and leading to further increases in prices.[9] Even though the White House announced a planned release of strategic reserves in late 2021 and OPEC+ agreed to increase production gradually in early 2022, oil prices continued to rise.[10] In March 2022, prices hit another record high, as the Russian invasion of Ukraine disrupted exports of Russian oil and the US and other countries imposed bans on Russian oil imports.[11] Many experts expect oil prices to remain high for the foreseeable future, as the European Union recently imposed bans on oil from Russia while global demand remains strong.[12]

Similar to oil prices, natural gas prices have increased rapidly over the past two years, adding to inflationary pressures across the world. Since reaching lows at the beginning of the pandemic in early 2020, natural gas prices have increased steadily and, by May 2022, reached levels not seen since 2008.[13] Furthermore, in February 2021, natural gas spot prices exhibited extreme spikes during Winter Storm Uri on account of production and transportation disruptions. Figure 3 shows the spot prices for Henry Hub Natural Gas, along with relevant key events, from January 2020 to May 2022.[14]

Figure 3: Henry Hub Natural Gas Spot Prices



Notes and Sources: Data from Bloomberg, Annotations from Bloomberg, Aljazeera.

Throughout 2020, natural gas prices remained low as a mild winter and the economic slowdown resulting from the pandemic muted demand.[15] Increases in supply also contributed to prices remaining low (eg, in August 2020, Azerbaijan increased gas production, as a newly completed pipeline allowed exports to Greece and Italy).[16] By the second half of 2021, however, natural gas prices began to recover, as governments eased covid-19 restrictions and global demand increased. Producers, meanwhile, were slow to increase output after 2020's unprecedented downturn.[17]

Furthermore, a colder and longer-than-expected 2020 winter depleted inventory levels worldwide, which led to further increases in prices.[18] Similar to oil prices, natural gas prices continued to rise throughout 2022, with the Russian invasion of Ukraine disrupting exports of Russian gas to Europe and the US banning gas imports from Russia.[19] The increase in natural gas prices has flowed through to increase costs across many industries, and prices are expected to remain at elevated levels as the US exports more gas to Europe to compensate for the shortfall from Russia.[20]

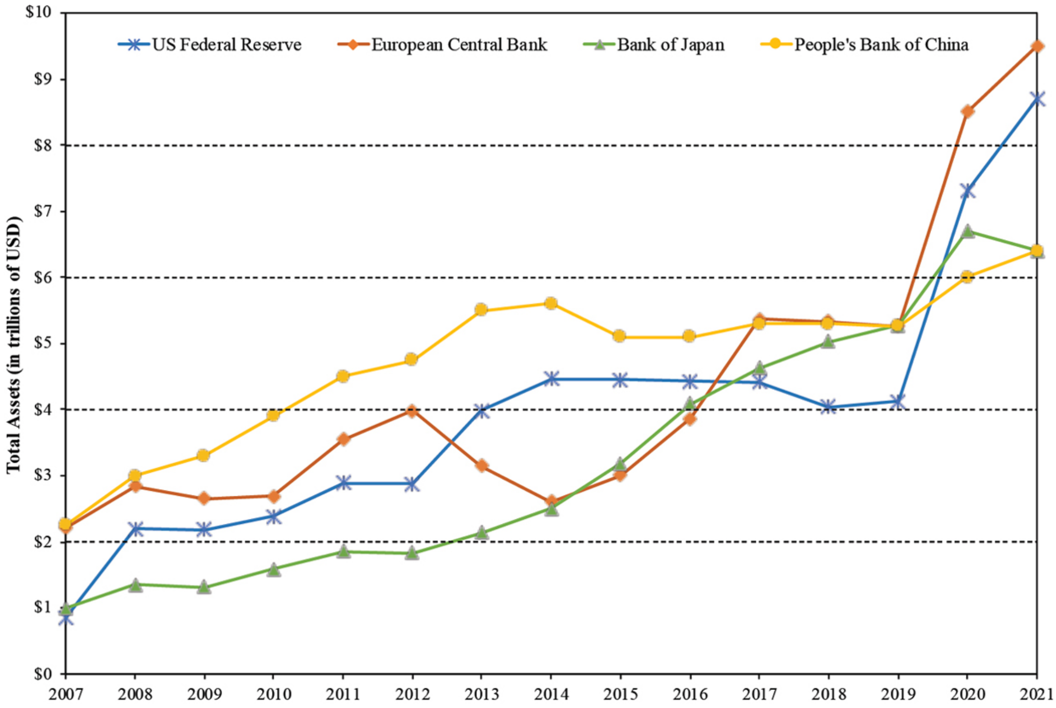
Because of the increase in energy prices, companies may find it challenging to perform under contracts that are tied to key energy prices (eg, Henry Hub for gas and WTI for oil), particularly when the company has no hedge against increases in those prices. In the liquefied natural gas (LNG) market, for example, supply contracts have traditionally been tied to oil prices, but Henry Hub has gained favour as a tool for indexation.[21] In addition, some LNG customers have signed fixed-price agreements in recent years. Regardless of the form of indexation, buyers of LNG are likely to struggle to the extent they do not have a timely mechanism for passing on the higher cost of fuel in markets where their products are sold. Further, in the case of fixed-priced contracts, sellers may have difficulty providing the fixed-price gas to the extent they need to meet production imbalances through market purchases and face higher transportation costs. Failure to perform on these contracts could lead to disputes.

Another area in which it could be difficult to perform in the higher-cost environment is in the construction of new infrastructure facilities. Increases in prices of raw materials have left turbine manufacturers struggling to maintain margins on their existing contracts to deliver turbines, affecting the electricity generation sector and investments in new wind farms.[22] If margins erode even further, the contracts may end up being litigated.

On top of constrained energy supplies and higher energy prices, companies across the world face unusually steep cost increases resulting from inflation. Over the past 14 years, the Federal Reserve and other major central banks have aggressively printed money and acquired financial assets. Massive policy interventions during and after the global financial crisis have greatly increased the balance sheets of major central banks. In response to the pandemic, central banks pursued additional expansionary measures that led to further increases in their balance sheet holdings. For example, over the course of 2020 and 2021, the European Central Bank, the Bank of Japan and the US Federal Reserve increased their aggregate net financial asset holdings by approximately US$8 trillion.[23]

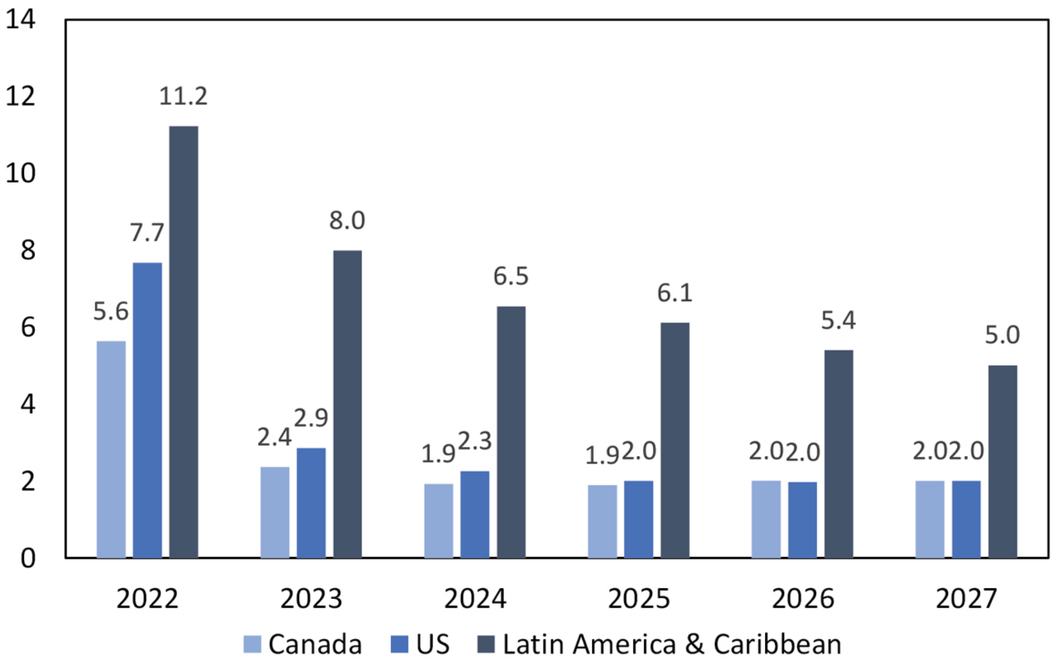
These monetary expansions have contributed to inflation climbing to levels not witnessed since the 1970s. As shown in Figure 5, inflation is expected to rise to 11.2 per cent in Latin America for calendar year 2022, slowing modestly to 8.0 per cent in 2023. For the United States, analysts expect inflation for 2022 to be 7.7 per cent, but to fall back to 2.9 per cent next year. In Canada, inflation has risen steadily, with expected 2022 consumer price index growth reaching 5.6 per cent – elevated in comparison to recent levels but not as extreme as in other parts of the Americas – before slowing to 2.4 per cent in 2023.[24]

Figure 4: Total Assets of Major Central Banks (2007-2022)



Notes and Sources: Data from Thomson Reuters and Yardeni Research, Inc. Total assets as of December of each year.

Figure 5: Inflation Projections for the Americas (Change in Average Consumer Price Index)



Recent regional arbitration trends

Many significant disputes involving parties from the Americas are resolved through international arbitration. For example, a review of publications from ***Global Arbitration Review*** and ***Law360*** on international arbitration cases in the Americas indicates that, from September 2020 to May 2022, more than 130 international arbitration proceedings were commenced involving at least one party from the Americas.[25] Moreover, as many commercial arbitrations are confidential, these figures do not encompass all arbitration proceedings initiated over this period. The sector most frequently involved in these disputes is the energy sector, which accounts for approximately 25 per cent of cases. Manufacturing, construction, infrastructure and transportation account for 23 per cent of cases, mining for 18 per cent, finance, insurance and real estate for 12 per cent, and information and communications for 9 per cent.

One case, ***Westmoreland v Canada***,[26] was poised to raise fascinating questions of liability and damages, but was dismissed before these issues were heard. The case involved coal mines that had been purchased by Westmoreland Coal Company and that, according to the claim, allegedly should have been provided special compensation when the Province of Alberta decided to shift its fuel mix from coal to cleaner fuels. The claim – that Canada treated Westmoreland discriminatorily and unfairly under NAFTA by not providing special compensation – was dismissed by a tribunal on jurisdictional grounds.[27]

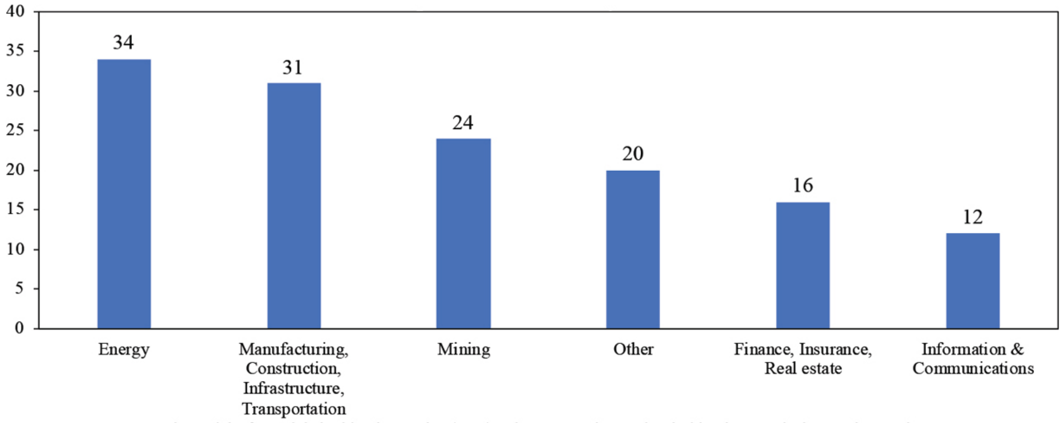
The liability questions – whether there was in fact discriminatory and unfair treatment – would have required substantial analysis regarding whether a commitment made by Alberta to compensate coal power plant owners for early retirement also applied to coal mine owners. In our experience, when cases of undue discrimination are considered, the tribunal must determine whether the defendant applied dissimilar treatment to a similar situation or applied similar treatment to a dissimilar situation.

As borne out in ***Mercer v Canada***[28] – a case in which NERA provided expert economic testimony – dissimilar treatment does not necessarily equate to discriminatory and unfair treatment if a dissimilar situation can be established. In other words, different circumstances can justify different treatment under a reasonable and consistently applied government or regulatory policy. Nevertheless, in ***Westmoreland v Canada***, the claimant noted that a Canadian company had been paid to close its coal mine, while Westmoreland, an American company, had not. Had the case moved forward, its specific fact pattern would have given the tribunal much to consider as to whether different circumstances justified that different treatment.

Similarly, assessments of quantum would have raised issues beyond the traditional areas of expert debate such as the quantum of lost profits, which typically involve examination of revenue and costs forecasts in the actual and counterfactual scenarios and debate over the proper discount rate. The economic damages experts would have had to consider how, and to what degree, Westmoreland could have mitigated its lost opportunities in Alberta outside the province. As noted, this case would also have required analysis to determine if coal plants and coal mines were both properly eligible for special compensation under the province's policy.

Looking ahead, the volume and nature of investor–state arbitration in North America could be affected by the 2020 replacement of NAFTA with the United States–Canada–Mexico Agreement.[29] Some legal observers have noted that under the new agreement, the scope of potential arbitration claims that may be pursued is in some respects narrower than under NAFTA. Hence, the change in framework could reduce the volume of investor–state claims within North America.[30]

Figure 6: Publicly Disclosed International Arbitration Cases in the Americas by Sector September 2020 – May 2022



Notes and Sources: Based on articles from Global Arbitration Review (GAR) and Law360 on international arbitration cases in the Americas. "Other" category includes services & trade, fishing & forestery, agriculture, pharmaceutical, intellectual property, administrative, entertainment, food & beverage, tobacco, gaming, waste management, and water supply.

Covid-related investor–state arbitrations

Measures taken by national governments in the covid-19 pandemic may affect the value of investments in those countries and give rise to claims in investor–state arbitrations. Such claims could entail complex calculations of damages.

Legal and policy commentators have pointed to a variety of measures taken in the context of the pandemic that may become the focus of investor allegations.[31] These include:

- lockdowns and travel bans;
- government takeovers of private hospitals;
- price controls;
- capital controls;
- mandatory production orders;
- export bans; and
- support to domestic businesses.

In addition, policies aimed at addressing the economic consequences of the pandemic may attract claims. These include, inter alia, measures suspending or reducing rent payments or payments due on mortgages and other loans; staying bankruptcy proceedings; and reducing or suspending payments due for the provision of toll roads, water, energy or other services.[32] If these actions can be alleged to have harmed the value of an investment, an investor may advance a claim under a bilateral investment treaty or under the dispute resolution clause of a multilateral trade treaty.

Claims made by investors may include, for example, that measures: improperly favoured certain investors based on nationality; did not provide foreign investors with fair and equitable treatment; improperly restricted the claimant's ability to transfer funds out of the respondent country; or amounted to expropriation of an investment.[33]

The first pandemic-related claim at the International Centre for Settlement of Investment Disputes was brought by French airport operators against the Republic of Chile.[34] The claimants allege losses relating to their concessions operating the international airport in Santiago, owing to flight closures and other pandemic-related restrictions.[35]

Other pandemic-related claims seem to be on the horizon. One example relates to the Peruvian government's 2020 emergency measure suspending collection of tolls on its roads. According to Peruvian government officials, one concessionaire has declared its intention to file an arbitration claim against Peru and other toll operators are expected to follow suit.-[36] The Peruvian Constitutional Court found the government's emergency measures to be unconstitutional in August 2020.[37]

Another potential filing relates to Mexico's 2020 restrictions on the production of renewable energy. The Mexican government attributed the policy to the decline in demand caused by a reduction in economic activity during the pandemic. However, an industry group described the measure as an excuse to provide an advantage to the state energy company in selling traditional fossil fuel-based energy, and observers indicate a claim is likely.[38]

Respondent states may advance a variety of legal arguments in defence of the measures, including that the policy actions were necessary to safeguard health, security and other essential interests in a crisis.[39] However, claimants may argue that such measures were not necessary or proportionate to address the challenges posed by covid-19. Some commentators have noted that recently signed bilateral investment treaties (BITs) often give states more scope to carry out emergency measures even if these may harm an investment, whereas many earlier BITs were more restrictive.[40]

Assessments of quantum in such cases may be complex. For example, if a tribunal finds that a policy measure implemented in the context of the pandemic exceeded what was necessary and proportionate, a damages assessment may need to compare the effect of the disputed measure on the claimant with a but-for scenario in which a lesser or otherwise different policy measure was implemented (rather than no measure).

Project delays

A major transformation of the energy sector is afoot throughout the Americas, with power companies investing in greening their power supply to meet greenhouse gas emissions reduction targets. In Latin America alone, the energy transition will require hundreds of gigawatts in new clean-energy facilities. Much of this will be accomplished through utility-scale investment, although technological change has allowed some consumers to take energy supply decisions into their own hands and build rooftop solar and other forms of behind-the-meter generation. New investment in clean energy technologies benefits from favourable economics and, in some countries, favourable tax treatment. In addition, as battery costs decline, utilities and their customers will increasingly rely on batteries to manage electricity demand economically.

The major energy transition investments being undertaken in the energy sector depend on supply chains that are relatively new in the Americas and that have exhibited vulnerability in the face of burgeoning demand. The pandemic has triggered shortages in some key components, semiconductors in particular. In addition, some new clean technologies require raw materials that are scarce or difficult to commercialise at scale.

In addition to strained supply chains, investments in clean energy projects in Latin America face further challenges. For example, starting well before the pandemic, local communities have opposed many large projects and engaged in tactics such as road blockades. In other cases that ended up in litigation, government bodies have allegedly acted prejudicially against project developers, for example by denying permits, that impede their ability to carry out the necessary investments.[41]

In the United States, energy transition investments are in full development. President Biden announced a 30-gigawatt-by-2030 national offshore wind energy goal. Individual US states are procuring contracts to facilitate construction of thousands of megawatts of new offshore wind capacity, yet the commercial operation dates for these facilities may be pushed back due to various supply-chain constraints and litigation related to effects of the new facilities on the local environment and communities. Time will tell which projects make it on time and which do not.

Notably, offshore wind reflects a global investment environment, with European developers leading most investments in the United States. For delayed projects, the parties may be able to work out solutions. Nevertheless, we anticipate that some parties will inevitably seek to resolve their disputes through international arbitration. To the extent that delays may be tied to the pandemic, parties may seek contractual protection from the standard liquidated damages. Not all contracts are the same, and the applicability of pandemic-related relief from missed milestones or delayed commercial operation will need to be assessed based on the particulars of each contract.

To the extent damages that go beyond contractually stipulated delay amounts can be claimed, the analyses will require thoughtful and careful work to construct reasonable but-for assumptions. As noted, cost increases derive from a variety of factors ranging from the ground war in Europe to central bank policies to supply chain constraints. While it is difficult to predict the specific nature of any given claim, it is clear that isolating a quantum of damages directly tied to a set of alleged acts will require the expert to parse out the effects of various economic drivers.

* *The authors would like to thank colleagues Spencer Kang and Sigela Muharremi for research assistance and Willis Geffert and David Tabak for useful comments on earlier drafts.*

Footnotes

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[23] Ibid.

[24] Source: IMF, World Economic Outlook, April 2022.

[25] Note this is a general review of relevant GAR and Law360 publications rather than a comprehensive review of all international arbitration disputes in the Americas.

[26] ***Westmoreland Coal Company v Government of Canada***, ICSID Case No. UNCT/20/3.

[27] Final Award, ICSID Case No. UNCT/20/3, 31 January 2022.

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IN SUMMARY

This article analyses recent international arbitration cases and drivers of cross-border disputes in the Americas. Investment claims relating to the pandemic seem likely, as do cases following Russia's invasion of Ukraine. An economic downturn may trigger more disputes in the Americas. Geopolitics are likely to result in more claims as high energy prices hinder contractual performance, pandemic support programmes lead to investment claims and supply-chain constraints delay infrastructure projects. Calculations of quantum are likely to be complex. In investor–state disputes, an assessment of quantum may need to distinguish the effect of measures for which a respondent state is found liable from the impact of other policy measures. Such analyses present a particular challenge when breaches coincide with extreme economic and financial volatility, significant commercial disruption and extraordinary government pandemic-response policies.

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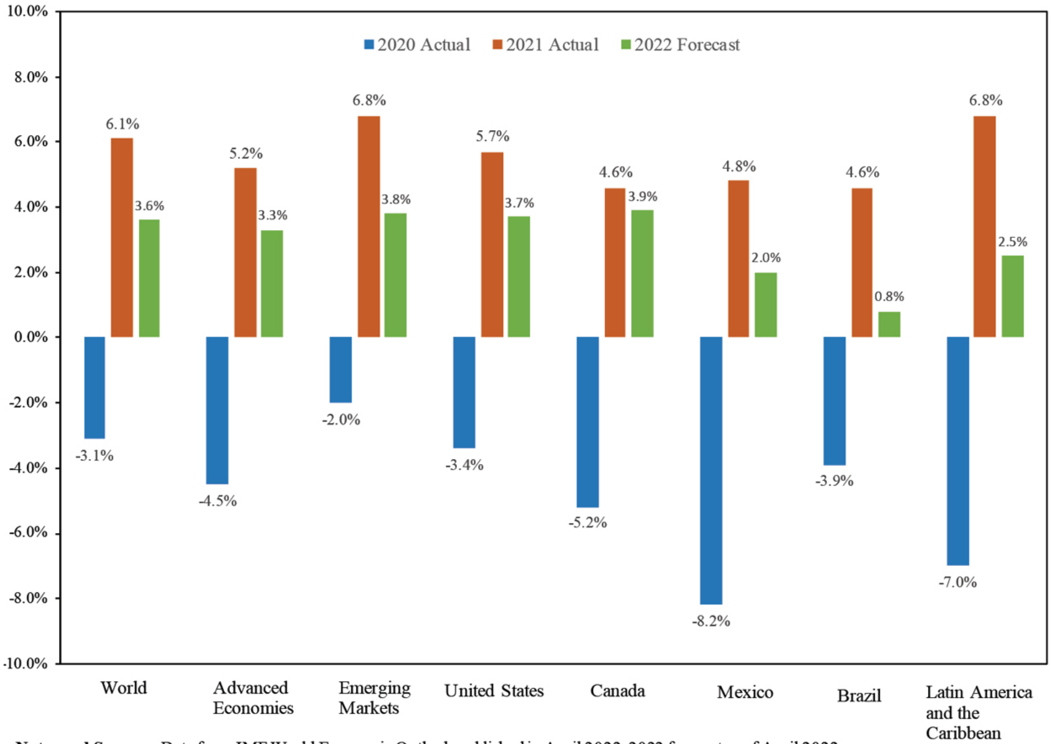
INTRODUCTION

Since covid-19 was declared a pandemic over two years ago, the global economy and financial markets have experienced massive disruption and dislocation. Government action cushioned an initial sharp economic downturn, and the development and dissemination of vaccines kickstarted a recovery. However, the economic consequences of the pandemic – including high inflation, commodity price volatility and supply chain disruptions – are still present in many industries around the world. In addition, recovery efforts have been slowed by rising energy prices following Russia's invasion of Ukraine. This article reviews recent economic trends in the Americas, analyses recent international arbitration cases and likely drivers of future cross-border disputes in the Americas, and comments on issues arising in the assessment of economic damages in such disputes.

RECENT ECONOMIC TRENDS

After declining by 3.1 per cent in 2020, world output (as measured by real gross domestic product) rebounded in 2021. However, the global recovery is expected to slow substantially in 2022. Figure 1 shows the actual output growth for 2020 and 2021, as well as the forecast for 2022, for various regions and specific countries in the Americas.[1]

Figure 1: Actual And Forecast Growth By Region And Country Annual Per Cent Change In Real GDP



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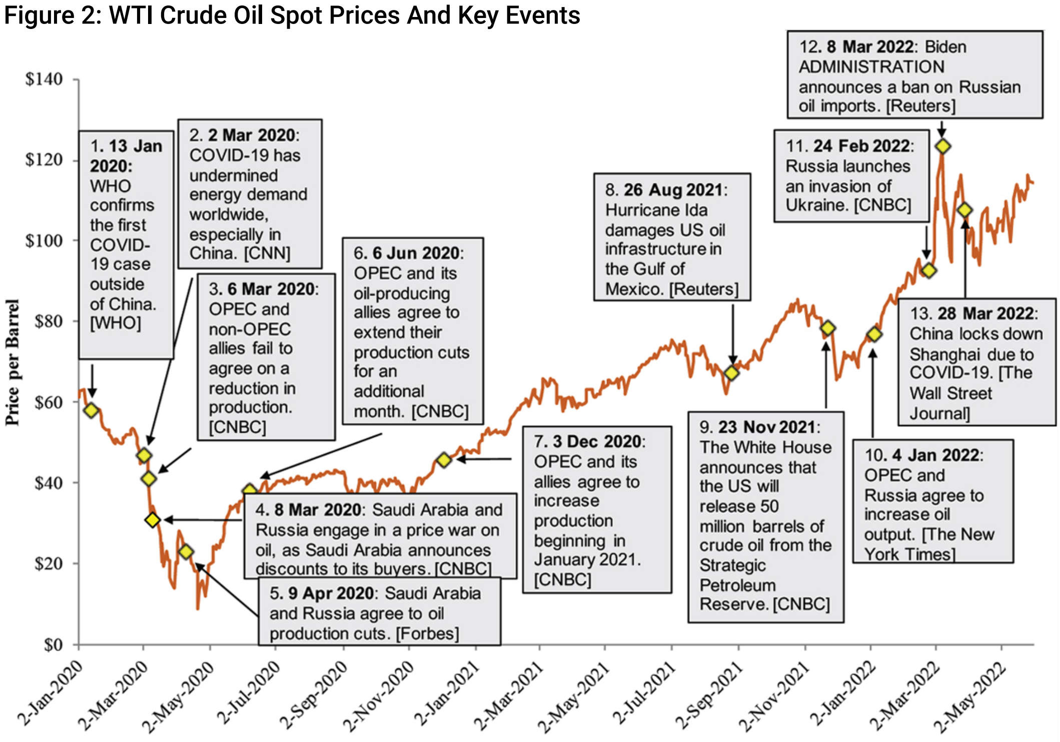

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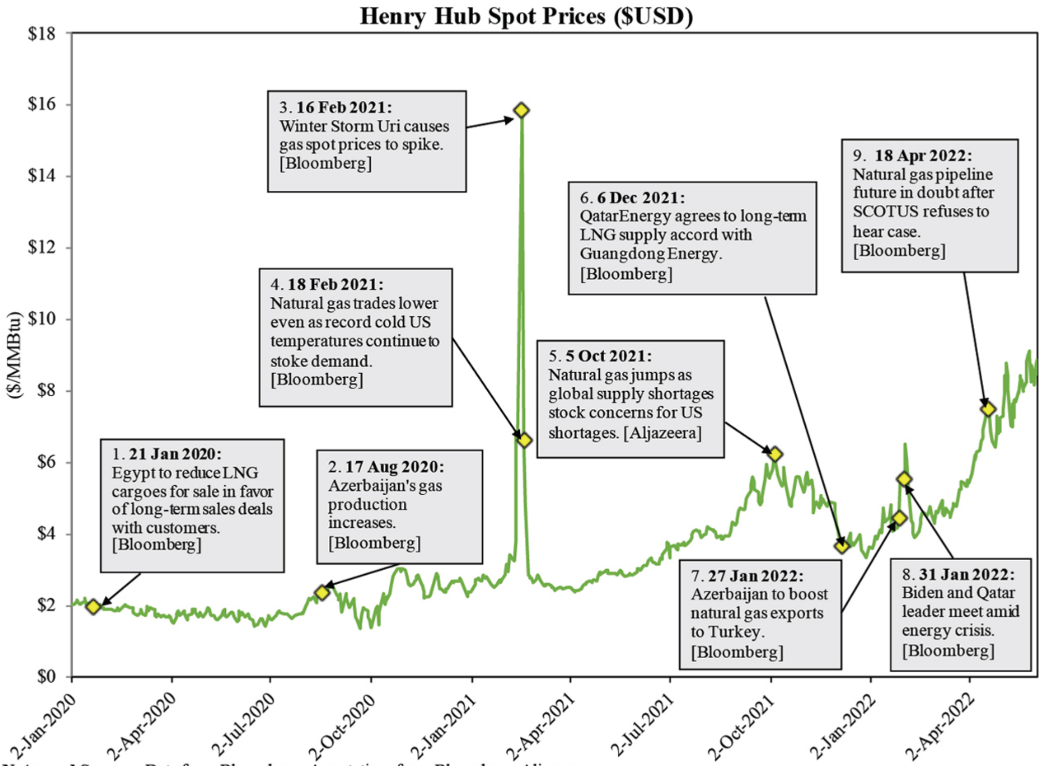

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Figure 4: Total Assets Of Major Central Banks (2007-2022)

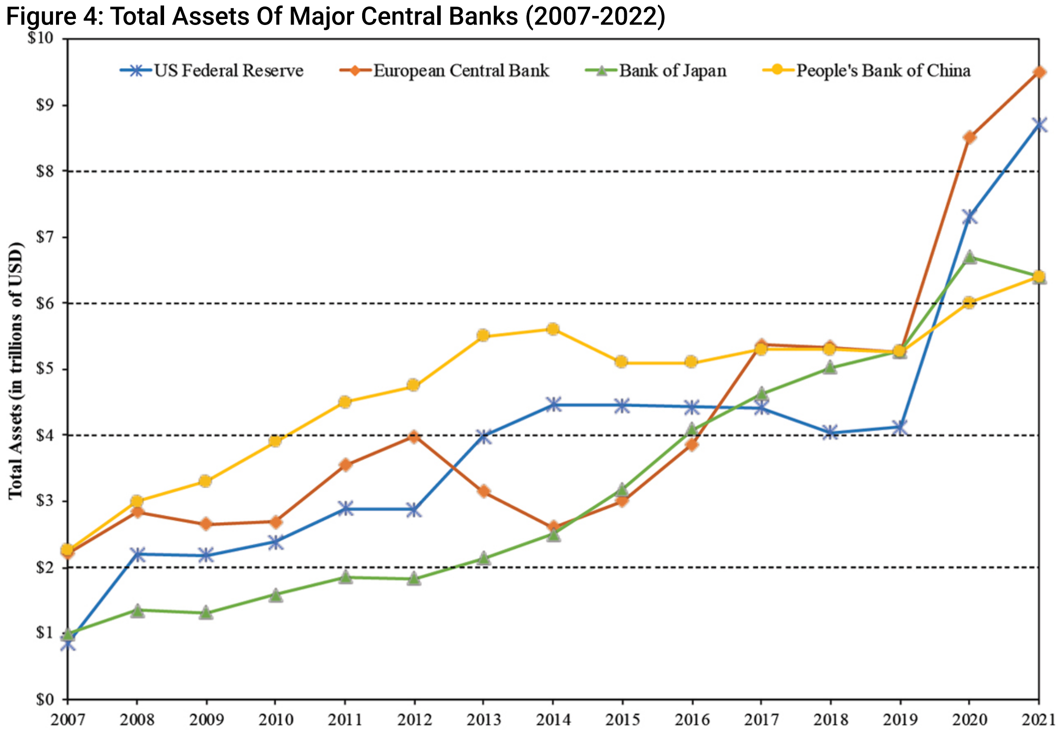

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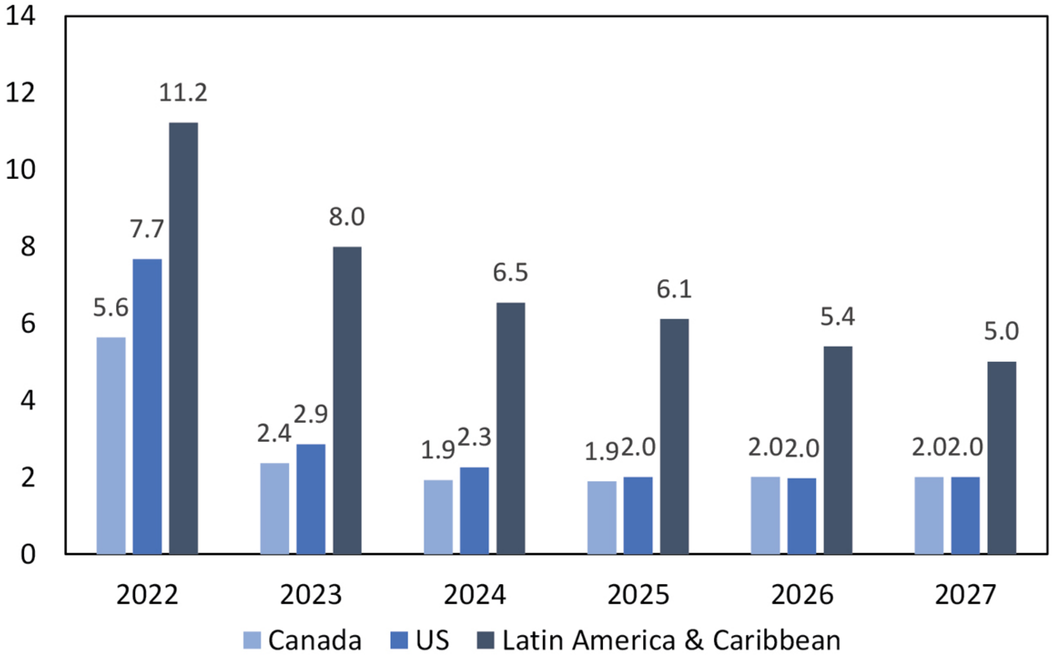
Figure 5: Inflation Projections For The Americas (Change In Average Consumer Price Index)



RECENT REGIONAL ARBITRATION TRENDS

Many significant disputes involving parties from the Americas are resolved through international arbitration. For example, a review of publications from ***Global Arbitration Review*** and ***Law360*** on international arbitration cases in the Americas indicates that, from September 2020 to May 2022, more than 130 international arbitration proceedings were commenced involving at least one party from the Americas.[25] Moreover, as many commercial arbitrations are confidential, these figures do not encompass all arbitration proceedings initiated over this period. The sector most frequently involved in these disputes is the energy sector, which accounts for approximately 25 per cent of cases. Manufacturing, construction, infrastructure and transportation account for 23 per cent of cases, mining for 18 per cent, finance, insurance and real estate for 12 per cent, and information and communications for 9 per cent.

One case, ***Westmoreland v Canada***,[26] was poised to raise fascinating questions of liability and damages, but was dismissed before these issues were heard. The case involved coal mines that had been purchased by Westmoreland Coal Company and that, according to the claim, allegedly should have been provided special compensation when the Province of Alberta decided to shift its fuel mix from coal to cleaner fuels. The claim – that Canada treated Westmoreland discriminatorily and unfairly under NAFTA by not providing special compensation – was dismissed by a tribunal on jurisdictional grounds.[27]

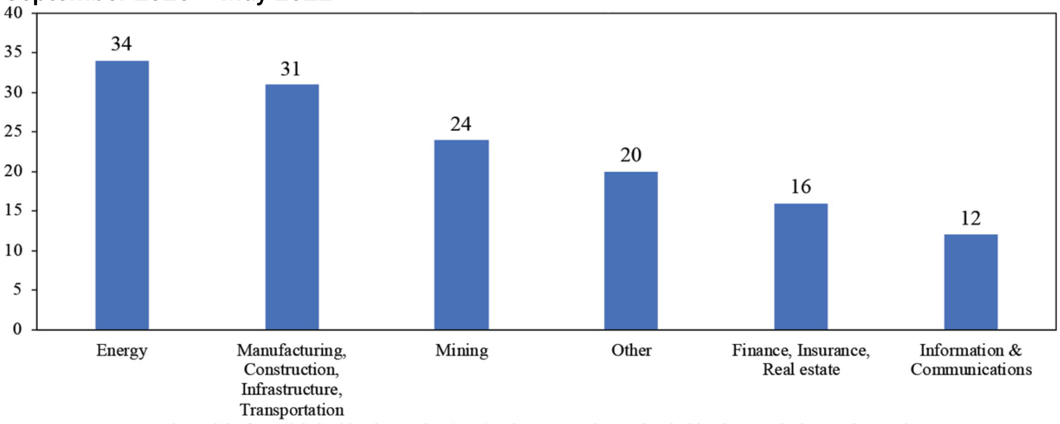
The liability questions – whether there was in fact discriminatory and unfair treatment – would have required substantial analysis regarding whether a commitment made by Alberta to compensate coal power plant owners for early retirement also applied to coal mine owners. In our experience, when cases of undue discrimination are considered, the tribunal must determine whether the defendant applied dissimilar treatment to a similar situation or applied similar treatment to a dissimilar situation.

As borne out in ***Mercer v Canada***[28] – a case in which NERA provided expert economic testimony – dissimilar treatment does not necessarily equate to discriminatory and unfair treatment if a dissimilar situation can be established. In other words, different circumstances can justify different treatment under a reasonable and consistently applied government or regulatory policy. Nevertheless, in ***Westmoreland v Canada***, the claimant noted that a Canadian company had been paid to close its coal mine, while Westmoreland, an American company, had not. Had the case moved forward, its specific fact pattern would have given the tribunal much to consider as to whether different circumstances justified that different treatment.

Similarly, assessments of quantum would have raised issues beyond the traditional areas of expert debate such as the quantum of lost profits, which typically involve examination of revenue and costs forecasts in the actual and counterfactual scenarios and debate over the proper discount rate. The economic damages experts would have had to consider how, and to what degree, Westmoreland could have mitigated its lost opportunities in Alberta outside the province. As noted, this case would also have required analysis to determine if coal plants and coal mines were both properly eligible for special compensation under the province's policy.

Looking ahead, the volume and nature of investor–state arbitration in North America could be affected by the 2020 replacement of NAFTA with the United States–Canada–Mexico Agreement.[29] Some legal observers have noted that under the new agreement, the scope of potential arbitration claims that may be pursued is in some respects narrower than under NAFTA. Hence, the change in framework could reduce the volume of investor–state claims within North America.[30]

Figure 6: Publicly Disclosed International Arbitration Cases In The Americas By Sector September 2020 – May 2022



Notes and Sources: Based on articles from Global Arbitration Review (GAR) and Law360 on international arbitration cases in the Americas. "Other" category includes services & trade, fishing & forestery, agriculture, pharmaceutical, intellectual property, administrative, entertainment, food & beverage, tobacco, gaming, waste management, and water supply.

COVID-RELATED INVESTOR–STATE ARBITRATIONS

Measures taken by national governments in the covid-19 pandemic may affect the value of investments in those countries and give rise to claims in investor–state arbitrations. Such claims could entail complex calculations of damages.

Legal and policy commentators have pointed to a variety of measures taken in the context of the pandemic that may become the focus of investor allegations.[31] These include:

- lockdowns and travel bans;
- government takeovers of private hospitals;
- price controls;

- capital controls;
- mandatory production orders;
- export bans; and
- support to domestic businesses.

In addition, policies aimed at addressing the economic consequences of the pandemic may attract claims. These include, inter alia, measures suspending or reducing rent payments or payments due on mortgages and other loans; staying bankruptcy proceedings; and reducing or suspending payments due for the provision of toll roads, water, energy or other services.[32] If these actions can be alleged to have harmed the value of an investment, an investor may advance a claim under a bilateral investment treaty or under the dispute resolution clause of a multilateral trade treaty.

Claims made by investors may include, for example, that measures: improperly favoured certain investors based on nationality; did not provide foreign investors with fair and equitable treatment; improperly restricted the claimant's ability to transfer funds out of the respondent country; or amounted to expropriation of an investment.[33]

The first pandemic-related claim at the International Centre for Settlement of Investment Disputes was brought by French airport operators against the Republic of Chile.[34] The claimants allege losses relating to their concessions operating the international airport in Santiago, owing to flight closures and other pandemic-related restrictions.[35]

Other pandemic-related claims seem to be on the horizon. One example relates to the Peruvian government's 2020 emergency measure suspending collection of tolls on its roads. According to Peruvian government officials, one concessionaire has declared its intention to file an arbitration claim against Peru and other toll operators are expected to follow suit.-[36] The Peruvian Constitutional Court found the government's emergency measures to be unconstitutional in August 2020.[37]

Another potential filing relates to Mexico's 2020 restrictions on the production of renewable energy. The Mexican government attributed the policy to the decline in demand caused by a reduction in economic activity during the pandemic. However, an industry group described the measure as an excuse to provide an advantage to the state energy company in selling traditional fossil fuel-based energy, and observers indicate a claim is likely.[38]

Respondent states may advance a variety of legal arguments in defence of the measures, including that the policy actions were necessary to safeguard health, security and other essential interests in a crisis.[39] However, claimants may argue that such measures were not necessary or proportionate to address the challenges posed by covid-19. Some commentators have noted that recently signed bilateral investment treaties (BITs) often give states more scope to carry out emergency measures even if these may harm an investment, whereas many earlier BITs were more restrictive.[40]

Assessments of quantum in such cases may be complex. For example, if a tribunal finds that a policy measure implemented in the context of the pandemic exceeded what was necessary and proportionate, a damages assessment may need to compare the effect of the disputed measure on the claimant with a but-for scenario in which a lesser or otherwise different policy measure was implemented (rather than no measure).

PROJECT DELAYS

A major transformation of the energy sector is afoot throughout the Americas, with power companies investing in greening their power supply to meet greenhouse gas emissions reduction targets. In Latin America alone, the energy transition will require hundreds of gigawatts in new clean-energy facilities. Much of this will be accomplished through utility-scale investment, although technological change has allowed some consumers to take energy supply decisions into their own hands and build rooftop solar and other forms of behind-the-meter generation. New investment in clean energy technologies benefits from favourable economics and, in some countries, favourable tax treatment. In addition, as battery costs decline, utilities and their customers will increasingly rely on batteries to manage electricity demand economically.

The major energy transition investments being undertaken in the energy sector depend on supply chains that are relatively new in the Americas and that have exhibited vulnerability in the face of burgeoning demand. The pandemic has triggered shortages in some key components, semiconductors in particular. In addition, some new clean technologies require raw materials that are scarce or difficult to commercialise at scale.

In addition to strained supply chains, investments in clean energy projects in Latin America face further challenges. For example, starting well before the pandemic, local communities have opposed many large projects and engaged in tactics such as road blockades. In other cases that ended up in litigation, government bodies have allegedly acted prejudicially against project developers, for example by denying permits, that impede their ability to carry out the necessary investments.[41]

In the United States, energy transition investments are in full development. President Biden announced a 30-gigawatt-by-2030 national offshore wind energy goal. Individual US states are procuring contracts to facilitate construction of thousands of megawatts of new offshore wind capacity, yet the commercial operation dates for these facilities may be pushed back due to various supply-chain constraints and litigation related to effects of the new facilities on the local environment and communities. Time will tell which projects make it on time and which do not.

Notably, offshore wind reflects a global investment environment, with European developers leading most investments in the United States. For delayed projects, the parties may be able to work out solutions. Nevertheless, we anticipate that some parties will inevitably seek to resolve their disputes through international arbitration. To the extent that delays may be tied to the pandemic, parties may seek contractual protection from the standard liquidated damages. Not all contracts are the same, and the applicability of pandemic-related relief from missed milestones or delayed commercial operation will need to be assessed based on the particulars of each contract.

To the extent damages that go beyond contractually stipulated delay amounts can be claimed, the analyses will require thoughtful and careful work to construct reasonable but-for assumptions. As noted, cost increases derive from a variety of factors ranging from the ground war in Europe to central bank policies to supply chain constraints. While it is difficult to predict the specific nature of any given claim, it is clear that isolating a quantum of damages directly tied to a set of alleged acts will require the expert to parse out the effects of various economic drivers.

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