Global Arbitration Review

The Arbitration Review of the Americas

2020

Energy Arbitration in Latin America

The Arbitration Review of the Americas

2020

Generated: February 8, 2024

Global Arbitration Review

Explore on GAR

Energy Arbitration in Latin America

Claudio Salas
WilmerHale

Summary

Commercial and investment arbitration is growing in Latin America. The number of International Chamber of Commerce (ICC) cases in Latin America has increased each year since 2009, [1] and Latin American countries have been respondents in approximately 30 per cent of all International Centre for Settlement of Investment Disputes (ICSID) cases. [2]

Additionally, a substantial number of these arbitrations are energy-related. [3] This is not surprising given the preference for arbitration in the energy industry [4] and Latin America's wealth in energy resources. The region holds the second largest proven oil reserves in the world after the Middle East, and Venezuela is the country with the largest proven oil reserves in the world. [5] Brazil and Mexico rank as the ninth and 11th largest oil producers in the world respectively. [6]

Latin America also boasts significant gas production and reserves. Venezuela has the ninth largest natural gas reserves in the world. [7] Argentina's natural gas resources include shale gas located in the Vaca Muerta region, which is the world's second-largest shale gas deposit. [8] Brazil's natural gas production has increased steadily over the years as it has increasingly tapped offshore reserves. [9]

Although it is difficult to generalise about the varied contracts, practices and legal frameworks pertaining to energy across Latin America, a few emerging trends can be identified. This article examines these trends and considers possible future directions for energy arbitration in the region.

LATIN AMERICA'S ENERGY REGULATORY FRAMEWORK

Latin America comprises more than 26 jurisdictions. [10] These jurisdictions approach both regulation of their energy sector and international arbitration differently. These differences are very often tied to political and economic changes experienced in the past 30 years.

Differences In The Regulation Of Subsoil Resources

In Latin America, unlike in the United States or Western Europe, subsoil resources belong to the state, and only the state can determine if and how private investors participate in resource exploitation. [11] Producing states not only exercise regulatory and control functions that affect energy ventures and contracts, they often take a commercial interest in these ventures and contracts. Accordingly, oil and gas arbitrations in Latin America frequently involve states or state-linked parties, whether these are commercial arbitrations arising out of contracts or arbitrations brought pursuant to investment treaties.

Latin American states differ in the degree to which private investors are involved in the hydrocarbons industry. Changes in approach to private investors have been driven by changing political winds as can be seen in the examples described below.

Venezuela, for example, currently allows limited foreign investor participation in the hydrocarbons industry. It transitioned from opening its energy markets to investors in the 1990s to the nationalisation of foreign (and local) investments in the early 2000s. [12]

When Hugo Chavez came to power in 1998, Venezuela began reversing laws and policies enacted only a few years earlier to encourage foreign investment in the oil industry. [13] In 2001, the New Hydrocarbons Law [14] established that private parties were only authorised to participate in new oil production activities through mixed enterprises with a majority state participation, [15] and the state would have the right to 30 per cent of all the oil produced (or its equivalent market price). [16] Concurrently, the government increased other taxes on oil projects. [17]

Subsequently, in February 2007, Venezuela passed a decree ordering that existing association agreements between PDVSA, Venezuela's state-owned oil company, and foreign oil companies be converted into mixed companies, with PDVSA or one of its affiliates holding a controlling interest of at least 60 per cent. [18] The government gave foreign companies four months to accept the terms of the new mixed company contracts, or the government would directly assume their activities. [19] While some companies (including BP, Chevron Corp, Statoil and Total) agreed to 'migrate' into the new mixed companies, others such as ExxonMobil and ConocoPhillips did not. [20]

In contrast to Venezuela, Peru has been more constant in its approach to foreign investment in the energy sector. In the 1990s, Peru implemented major changes in economic policy, including encouraging national and foreign private investment, abolishing price and exchange controls, privatising state companies, and liberalising internal and external trade. [21] As part of these reforms, Peru adopted the Organic Law of Hydrocarbons in 1993. This law created the state-owned company Perupetro SA, which can enter into exploration and exploitation contracts with private companies. [22] These contracts are governed by Peruvian law and can have terms of up to 40 years. [23] As a result of Peru's reforms, from 1990 to 1997, investment in the oil and gas sector increased from US$20 million to US$528.4 million and the areas under operation increased from 1 million hectares to 23 million hectares. [24]

Mexico provides yet a different example. Historically, the state-owned Petroleos Mexicanos (Pemex) exclusively conducted all exploration, exploitation, refining and marketing of hydrocarbons. This changed, however, in 2013 when Mexico reformed its energy sector, and permitted private companies to participate in these activities. Although the state continued to own the country's oil and gas resources, [25] the government would carry out the exploration and extraction of hydrocarbons through assignment to state companies or through contracts with private investors. [26]

Furthermore, while administrative law would govern all acts and procedures from the bidding to the award of the contract, private law would govern all the aspects concerning the performance of such contract. [27] Thus, Pemex may now agree to the terms and conditions that it deems best from a commercial standpoint and is not obliged to use the strict and inflexible contract terms that all Mexican governmental agencies were required to use. [28]

Similar to Mexico, in Brazil, the state-owned Petróleo Brasileiro SA (Petrobras) had a monopoly over oil exploration and production until relatively recently. The 1988 Constitution enshrined the government's monopoly. This changed in 1995, when the government amended the Constitution to authorise the participation of private parties in the energy sector. [29] In the following years, Brazil enacted legislation regulating the exploration of oil through concession agreements [30] and, subsequently, production agreements. [31]

While Brazil has taken steps to open its energy market and attract foreign investors, the market remains heavily regulated and the state is still one of the largest players in the sector as both the owner of subsoil natural resources and the controlling shareholder of Petrobras. For these reasons, the oil and gas sector is subject to national public policies and economic directives and susceptible to political changes. However, Brazil does not have a track record of expropriation of investments or abrupt changes in regulation.

Differences In Approach To Arbitration

Arbitration-friendly legal regimes are generally regarded as crucial for foreign investors, particularly when entering into significant or long-term contracts with a state or state-owned entity, which is often the case in the energy sector in Latin America. There are, however, significant differences among Latin American countries in their approach to arbitration. While some jurisdictions have taken legislative steps to introduce or consolidate pro-arbitration legislation, others have issued more restrictive rules.

Investment State Arbitration

Countries in Latin America are party to more than 600 bilateral investment treaties (BITs) or investment agreements, [32] many of which provide for the arbitration of investment disputes. A number of multilateral treaties cover the region, including the North American Free Trade Agreement (NAFTA), the Central American Integration System, the Andean Community, the Pacific Alliance, the Central America-Dominican Republic Free Trade Agreement, and the Southern Common Market. [33]

In the past decade, however, Bolivia, Ecuador and Venezuela denounced the ICSID Convention, [34] and have terminated a large number BITs. [35] Perhaps not coincidentally, these states have increased regulatory and tax burdens on foreign investments, including as described above, and consequently have had the most investment cases brought against them in recent years. After Argentina (with 60 claims against it) and Spain (with 49 claims against it), Venezuela is the most frequent respondent in investor-state arbitration with 47 claims against it. [36] Ecuador has 23 known investor-state cases against it, [37] and Bolivia has been the respondent in 16 investor-state arbitrations. [38]

Anti-investment arbitration sentiment, however, is not universal. Colombia, for example, has signed 14 BITs in the past 14 years, compared to five previously. [39] With a new government, Ecuador itself appears to be changing course. President Moreno (elected in 2017) has proposed renegotiating previously terminated bilateral investment treaties with 30 countries on the basis of a new model BIT that provides for resolution of disputes by arbitration. [40] In May 2019, Ecuador and the Netherlands signed a joint declaration to promote a new bilateral investment agreement. [41] Additionally, Ecuador enacted a new investment law (Ley de Fomento Productivo) that provides for arbitration to resolve investment disputes and for resulting awards to be enforceable in Ecuador without the need for further court recognition. Provided the value of the investment agreement exceeds US$10 million, investors may initiate arbitration against Ecuador in the Permanent Court of Arbitration, the International Chamber of Commerce (ICC) or the Interamerican Commercial Arbitration Commission (CIAC-IACAC) under the UNCITRAL Rules or the relevant institutional rules in effect at the time of enactment. [42]

In January 2018, Mexico signed the ICSID Convention, which entered into force in August 2018. [43] Until then, Mexico had been a party to ICSID cases through ICSID's Additional Facility Rules. However, uncertainty about NAFTA's future, including the continued existence of its investor-state arbitration mechanism, may have fuelled Mexico's desire to fully participate in the ICSID Convention and Centre as a 'member state.' [44]

In November 2018, NAFTA's successor, the United States–Mexico–Canada Agreement (USMCA), was signed. The USMCA does in fact curtail the use of investor-state arbitration, eliminating it altogether with respect to Canada, and limiting it between Mexico and the

United States to discrimination and direct expropriation with respect to most industries. However, investors in certain 'covered sectors,' including power generation and oil and gas, will still be able to claim for violations of any of the substantive protections of Chapter 14 (including fair and equitable treatment claims). [45] It is unclear when the USMCA will be ratified, and for now NAFTA remains in force.

Commercial Arbitration

Many Latin American states also embrace commercial arbitration to resolve disputes between the state or state-linked entities and private investors. Argentina, for example, has enacted legislation on public-private partnership contracts expressly providing for arbitration clauses in such contracts. Additionally, in July 2018, Argentina enacted a new international commercial arbitration law, based on the 2006 UNCITRAL Model Law. [46]

Specifically with respect to hydrocarbons, Peru permits disputes in this area to be submitted to national courts or to national or international arbitration, as the parties agree. [47] Mexico's hydrocarbons law provides for arbitration for disputes related to both exploration and production contracts. [48] It is not uncommon to see Pemex contracts be subject to arbitration under the ICC or the London Court of International Arbitration. [49] Importantly, disputes arising out of the unilateral administrative rescission of an exploration and production contract are, however, non-arbitrable. [50] These disputes must be resolved by Mexican administrative or judicial courts. [51]

Brazil is a unique case. While other Latin American countries have signed BITs to attract foreign investors, Brazil is not a party to the ICSID Convention and does not have a single treaty in force that permits investor-state arbitration. [52] This, however, has not prevented Brazil from attracting foreign investment. According to data from the World Bank, Brazil is one of the countries that received the most foreign investment in 2017, a total of US$70.6 billion. [53] This represents approximately 30 per cent of the foreign investment in the Latin America and Caribbean region in 2017. [54]

This success is a result, at least in part, of the fact that Brazilian national legislation provides some of the same protections as provided by BITs. [55] For example, Federal Law No. 4.131/62, which is the Brazilian statute that deals with foreign investments, provides in article 2 equal treatment to foreign capital invested in the country.

Furthermore, Brazil has a modern arbitration legal framework and it is perceived as an arbitration-friendly jurisdiction, with São Paulo being one the most popular seats in the world. [56] Brazil has ratified the New York Convention, and its arbitral legislation is partially based on the UNCITRAL Model Law and the 1988 Spanish Arbitration Act. [57] The Brazilian Arbitration Act, which was amended in 2015, provides for the arbitrability of disputes against the public administration (ie, state and state entities) involving transferable public property rights. [58] Arbitration involving the public administration is particularly relevant in the energy sector, which is heavily regulated. Additionally, several laws in Brazil related to the energy sector expressly provide for arbitration as a means for resolving disputes, including the Oil and Gas Laws, the Public–Private Partnership Law and the Concession of Public Services Law.

RECENT CASES

In recent years, international commercial and investment arbitrations in Latin America have resulted from the types of regulatory changes described above. Many of these cases have originated in Venezuela. Ecuador, Mexico and Argentina have also faced multimillion investment or commercial arbitration claims against them or their state-owned companies. Below we discuss some of the more prominent cases that have reached resolution or have entered the enforcement stage in recent years.

Investment State Arbitration

Two of the largest investment cases arising from Venezuela's 2007 nationalisation of the oil industry were brought by ExxonMobil [59] and ConocoPhillips. [60] The tribunal in the ExxonMobil case awarded damages of US$1.6 billion, [61] and the tribunal in ConocoPhillips awarded damages of US$8.7 billion. [62]

In both cases, the investors gained access to investor-state arbitration through corporate restructuring. The claimants incorporated companies in the Netherlands between 2005 and 2006 with the sole purpose of contesting Venezuela's measures under the Dutch-Venezuela BIT. [63] Both tribunals held that it was 'perfectly legitimate' to restructure the corporate chain of the investment for future disputes, but not for existing disputes. [64]

Both tribunals also found that Venezuela had expropriated the claimants' investment, but they differed on whether Venezuela's actions were lawful given that the BIT permitted nationalisation upon adequate compensation. In ExxonMobil, the tribunal found that Venezuela did not act improperly in only offering investors book value compensation during negotiations. [65] The ConocoPhillips tribunal, however, reached the opposite conclusion – Venezuela did not negotiate in good faith since the standard in the BIT was 'market value'. [66]

The damages decisions of these tribunals followed the different determinations on the lawfulness of the expropriation. To prevent Venezuela from benefitting from what it had deemed to be an unlawful taking, the ConocoPhillips tribunal decided that compensation should not be calculated as of the date of the expropriation but rather the date of the award. In the ExxonMobil case, however, the tribunal's finding that the expropriation was lawful resulted in the calculation of damages as of the date of the expropriation and not the later date of the award when oil prices were significantly higher. [67]

Although initially ExxonMobil was awarded US$1.6 billion, [68] its awarded damages were reduced to US$188.3 million, the largest reduction in ICSID history, after an ICSID annulment committee partially annulled the award. [69] The committee found that in determining damages the arbitral tribunal ignored a provision in the agreement between ExxonMobil and PDVSA that stipulated that compensation for 'adverse government action' would be decided under Venezuelan law, which in turn established a cap on compensation. [70] ExxonMobil has resubmitted the dispute for resolution by a new ICSID tribunal; that arbitration is in its early stages. [71]

In a new development relevant to future enforcement of awards against Venezuela, whether in the energy sector or otherwise, one US court found that PDVSA is so controlled by Venezuela that it is Venezuela's alter ego; therefore, an investor with an award against Venezuela can recover against PDVSA assets used for commercial activity. [72] That case is currently on appeal. Venezuela has argued that PDVSA assets are not being used for commercial activity because they have been frozen by recent sanctions the United States has imposed on Venezuela. [73]

Like Venezuela, Ecuador has faced a number of investment treaty claims in recent years due to measures affecting investors in the energy sector. In 2006, amid a significant rise in the price of crude oil, Ecuador imposed a 50 per cent windfall profit tax on investors' extraordinary income as defined by Law 42-2006, [74] which it then raised to 99 per cent. [75] In addition, the Ecuadorian government forced the renegotiation of several production sharing contracts into service contracts, terminating those where the state and private oil companies could not reach an agreement, and subsequently seizing various oil fields between 2009 and 2010. [76]

Two of the investors affected by these measures were Burlington Resources Inc (Burlington) [77] and Perenco Ecuador Limited (Perenco), [78] which were partners in the operation of the Blocks 7 and 21 oil fields and brought parallel ICSID claims under the US-Ecuador BIT and France-Ecuador BIT respectively. The Burlington tribunal found that Law 42-2006 did not amount to an expropriation because '[t]axation is an essential prerogative of State sovereignty.' [79] The tribunal did find, however, that 'Ecuador's physical takeover of blocks 7 and 21 was a complete and direct expropriation of Burlington's investment.' [80] The tribunal awarded Burlington US$379 million, and the parties settled the case for US$337 million. [81]

The Perenco tribunal agreed with the Burlington tribunal that Law 42 did not amount to an indirect expropriation. [82] The tribunal did find, however, that raising the tax to 99 per cent constituted a breach of contract. It stated that '[L]aw 42 at 99 per cent unilaterally converted the participation contracts into de facto service contracts while the state developed a new model of such contracts which it demanded the contractor to sign.' [83] The tribunal also found that Ecuador's declaration that the contracts had expired on 20 July 2010 amounted to an expropriation of Perenco's contractual rights. [84] The Perenco tribunal issued an award on liability on 12 September 2014. The final award on quantum is pending.

In 2016, Ecuador settled an earlier oil-related arbitration brought by Occidental Petroleum Corporation (Occidental). In that case, the tribunal found that Ecuador's taking Occidental's investment as an administrative sanction was disproportionate and 'tantamount to expropriation.' [85] In 2012, the tribunal awarded Occidental US$1.76 billion, then the largest investment treaty award. However, the award was partially annulled and lowered to US$1.06 billion plus interest. Ecuador and Occidental settled the case for US$980 million. [86]

Most recently, in 2018, in an UNCITRAL claim filed by Ecuador TLC, the former subsidiary of Brazilian Petrobras, Cayman International Exploration Company SA and Teikoku Oil Ecuador, Ecuador TLC and its partners were awarded US$515 million against Ecuador and its national oil company Petroecuador, over the nationalisation of two Amazon oil projects. [87] The case settled with Ecuador agreeing to pay US$318.7 million in three instalments. [88]

Colombia's relatively recent adoption of investment arbitration has resulted in 11 ongoing investment treaty cases, one of them in the energy sector. In Gas Natural Fenosa v Colombia, Gas Natural brought claims against Colombia due to the government's decision to seize and liquidate Gas Natural subsidiary Electricaribe. The government contends that Electricaribe failed to deliver energy to 2.6 million customers. [89] The case is in the early stages.

Argentina has been the most frequent respondent in investor-state arbitration in the world. [90] These claims, including ones related to energy, arose predominantly from Argentina's 2001 economic crisis. These cases mostly resulted in awards against Argentina that went many years without being paid. However, this has changed in the past several years. In 2016, Argentina issued bonds for US$217 million to satisfy two gas-related awards: an UNCITRAL award in favour of BG Group and an ICSID award in favour of US company El Paso. [91] In 2017, Argentina issued another round of bonds for US$210 million to pay French oil company Total. [92]

Argentina settled an investment case of more recent vintage in 2014. In July 2012, the Argentine legislature passed a law expropriating 51 per cent of the shares of Yacimientos Petrolíferos Fiscales SA (YPF) (Argentina's main oil and gas company) held until then by Repsol, SA. After litigating on multiple fronts, [93] including an ICSID arbitration, the two sides settled the case for US$5 billion, which Argentina paid with treasury bonds. [94]

Generally, the trend has been for Latin American countries to settle cases in which awards have issued against them. This trend increases legal security for investors and has demonstrated the value of investment-state arbitration in resolving disputes.

Commercial Arbitration

Venezuela's 2007 nationalisation measures in the oil industry gave rise, not only to investment-state arbitration, but also to several commercial arbitration cases. For example, ConocoPhillips – by then the single-largest investor in Venezuela [95] – initiated various multibillion dollar commercial arbitrations against PDVSA and its subsidiaries in the region.

In one such case, an ICC tribunal granted ConocoPhillips US$2 billion in damages from PDVSA and two of its subsidiaries. [96] ConocoPhillips had claimed almost US$20 billion arguing that PDVSA was contractually responsible for any discriminatory actions undertaken by the Venezuelan government against the company and that PDVSA's subsidiaries wilfully breached their agreements. [97]

While the tribunal found that the increased income tax rates and the expropriation measures taken against the company in 2007 constituted discriminatory actions under the association agreements between the parties, the tribunal denied the US$17 billion claim for wilful breach of contract, ruling that ConocoPhillips had failed to prove that PDVSA and its subsidiaries had not performed their obligations under the agreements before the nationalisation. [98] The case recently settled with PDVSA agreeing to recognise the ICC award and pay approximately US$2 billion over a period of 4.5 years and ConocoPhillips agreeing to suspend enforcement of the ICC award. [99]

A long-running arbitration involving a subsidiary of Mexico's Pemex was finally settled in April 2017. Under the settlement agreement, Pemex – Exploracion y Produccion (PEP) was to pay US$435 million to Corporacion Mexicana de Mantenimiento Integral, SdeRLdeCV (Commisa) and all litigation between the parties was to be dismissed. [100] The case is well known because it involved the enforcement of the award by New York courts despite the annulment of the award by Mexican courts, where the arbitration was seated.

In 1997, Commisa, a Mexican subsidiary of American contractor KBR, entered into a contract with PEP for the construction of two offshore gas platforms in the Gulf of Mexico. [101] In 2004 Commisa began an ICC arbitration seated in Mexico City and governed by Mexican law for breach of contract (ICC Case 13613/CCO/JRF). [102] After the arbitration proceedings had started, the Mexican government rescinded the contract. [103] Commisa eventually sought damages for wrongful termination in the pending arbitration. [104] The arbitral tribunal ruled in 2009 in favour of Commisa and ordered PEP to pay US$300 million in damages. [105]

Commisa then tried to enforce the award in the US and, simultaneously, PEP filed an action in Mexico to set aside the award. [106] The Mexican courts rejected the annulment claim, but then overturned this decision after PEP filed a constitutional action. The Eleventh Collegiate Court on Civil Matters of the Federal District decided that the award breached Mexican public policy because the administrative termination of the contract was not arbitrable according to a law enacted in 2009 (long after the contract had been entered into). [107]

Despite the award's annulment in Mexico, both the US District Court for the Southern District of New York and then the US Second Circuit Court of Appeals recognised the award because the annulment violated basic notions of justice. [108] Among other things, these courts found that the retroactive application of the 2009 law violated Commisa's settled expectation that its dispute with PEP could be arbitrated.

While most of the best-known arbitration cases in the energy sector relate to the upstream sector (exploration and extraction), there are many other cases in the downstream and mid-stream sectors. These disputes may relate to the generation, transmission, distribution and sale of energy, contracts for construction, or commission and operation of facilities or pipelines – all of which involve thousands of contracts, many with arbitration provisions. [109] Argentina has had several of these types of arbitrations.

In 2017, for example, Argentina's state-owned energy company, YPF, paid US$114 million to a local gas pipeline company, Transportadora de Gas del Mercosur (TGM), to settle an ICC award issued in 2016 in favour of TGM and Brazilian energy companies AES Uruguaiana (AESU) and Sulgas. [110]

The dispute arose in 2004, when YPF reduced gas supplies to a power plant run by AESU in Brazil, allegedly due to a cap on gas exports imposed by the former Argentine government during Argentina's energy crisis. Both parties brought several claims before an ICC tribunal seated in Montevideo, Uruguay. The tribunal found that YPF had repudiated its gas supply contract with AESU and was responsible for losses caused to the other parties. [111]

The ICC award required YPF to pay US$319 million to TGM and US$185 million to AESU and Sulgas, plus interest. [112] YPF reached a US$60 million settlement with AESU and Sulgas in early 2017. The settlement with TGM put an end to a case in which YPF had faced claims of around US$1.4 billion. [113]

FUTURE TRENDS

According to Queen Mary University's recent survey, 85 per cent of respondents believe that the use of international arbitration in the energy sector is likely to increase even more in the future. [114] Given its natural resources and recent history, Latin America is likely to be part of this trend. As in the past, the energy arbitration landscape in the continent will likely be shaped by the regulatory measures taken by the different states. Recently, several Latin American countries have taken measures to attract foreign investment and provide protection to investors in the energy sector. Below we discuss the potential for arbitrations resulting from such measures in Mexico and Argentina, as well as in the renewable energy sector. In addition, we discuss the continuing effects of Venezuela's recent political turmoil on Venezuelan arbitrations, as well as the likely increase in arbitral tribunals needing to address corruption-related issues.

Mexico

In addition to its ratification of the ICSID convention (discussed above), on 23 April 2018 Mexico agreed on the outlines of a new trade deal with the European Union, including provisions that will 'fundamentally [reform] the old-style ISDS system.' [115] Among its announced features, the new trade deal will provide for a permanent two-tier investment court to hear investor-state disputes. Members of the court will be appointed in advance by the European Union and Mexico and be subject to 'strict requirements of independence and integrity.' [116] Cases will be heard by a tribunal of first instance whose decisions can be referred to an appeals tribunal. [117] Investment protection standards under the deal will include:

- guarantees on non-discrimination;
- no expropriation without prompt and adequate compensation; and
- fair and equitable treatment. [118]

According to the European Union, the new system promises more transparency, with hearings to be held in public and documents relating to disputes to be published online. Third parties will be allowed to make submissions in cases. [119]

Although Mexico is the sixth-most frequent respondent in investor-state arbitration in the world and the third in the region with 30 claims, only one of them is energy related. [120] This, however, might change in the next few years as Mexico's new president Andres Manuel López Obrador has taken actions that have alarmed investors. Before he took office, Mr López Obrador announced plans to have Pemex prioritise making gasoline for domestic consumption and reduce the number of barrels of crude sent abroad, leading Fitch to downgrade Pemex's credit rating. [121] Mr López Obrador also cancelled an ongoing construction project for a new airport on the basis of a public referendum in which less than a 1 per cent of Mexico's population participated. [122] In January 2019, Mr López Obrador also cancelled a planned auction of renewable energy rights and indicated that Mexico would hold no further such auctions, which had been held annually the previous three years. [123]

Given Mr Obrador's populist leaning, there is a possibility that Mexico's fairly recent opening of the energy sector to foreign investors described earlier could be reversed at least to some extent. When this has happened in other Latin American countries, investment and commercial arbitrations against the state or state-owned companies have ensued.

Argentina

President Macri of Argentina has taken a number of measures to restore Argentina's energy sector by restructuring it and focusing on the collaboration between investors and YPF. For example, YPF recently announced a strategy plan for the next five years (2018-2022), with planned investments over US$30 billion. [124] In this scheme, private oil companies would play a paramount role through partnership agreements with YPF. [125] Investors such as ExxonMobil, Chevron Corp, Schlumberger, American Energy Partners LP and Statoil, [126] among others, are reportedly interested in such agreements.

In addition, Argentina has sought to develop the Vaca Muerta field, the second largest shale gas reservoir in the world. [127] Following a number of government measures, pricing and labour costs are being settled, [128] and a tender for a US$500 million train line is being placed. [129]

Stakeholders in Argentina's efforts to develop its energy resources will not only include the government and foreign investors but other players such as local companies and labour unions. [130] If the government subsequently faces economic or political pressure to backtrack on some of its commitments to foreign investors, disputes may arise in the near future. This may be even more likely if a left-leaning government is elected in this year's presidential election.

Renewable Energy

Latin America has seen significant investment in renewable energy in recent years, exceeding US$80 billion over the period 2010-2015 (excluding large hydropower projects). [131] For the first time in 2015, in addition to Brazil, both Mexico and Chile joined the list of the top 10 largest renewable energy markets globally. [132]

Argentina is also making significant efforts to boost its renewable energy market and attract foreign investment. For example, in 2016, Macri's government launched RenovAr – a programme aimed at diversifying the country's energy matrix, easing dependence on imported fossil fuels, and reducing carbon emissions. Its target is to produce 20 per cent of Argentina's electricity from renewable sources (wind, solar, biogas and biomass) by 2025, by attracting about US$35 billion in investments. [133]A few years before Latin America, many European countries also saw significant investment in their renewable energy sectors. When the global financial crisis hit, many such countries cut back on incentives made to attract this investment, and dissatisfied foreign investors brought claims against some of them under the Energy Chartered Treaty (ECT). [134]

It is possible that Latin America could be the next region hit by renewable energy arbitration, but with some differences. The most important incentives in Europe were feed-in-tariffs, [135] which have been the main focus of current European renewable energy disputes. [136] However, the incentives given to renewable energy investors by Latin American countries have mostly been tax-based. Accordingly, potential renewable energy cases in Latin America would likely be tax-related rather than tariff-related. Notably, under many investment treaties, tax matters cannot be arbitrated.

In any case, Latin America's renewable energy market is still at the investment stage. Before any renewable energy arbitration cases arise in the region, the incentives offered to investors would have to be curtailed. Although there is no sign of this happening now, given Latin America's historical political swings, this could change in the not-so-distant future.

Venezuela

For the past two decades, Venezuela has been the locus of the largest energy arbitrations in Latin America. As described above, these disputes arose from Hugo Chavez's reversal of an earlier government's liberalisation of the energy market. Now, the end of Hugo Chavez's and his successor's (Nicolás Maduro) regime seems possible and Venezuela is in an economic, political and social crisis.

Currently Maduro clings to power, but the great majority of countries in Latin America and most countries in Western Europe have recognised Juan Guaidó as Venezuela's interim president. While it is impossible to predict what a Guaidó or other regime would mean for the country's energy policies, the political uncertainty has had immediate repercussions for ongoing disputes. A law professor appointed by Mr Guaidó as his 'special attorney general' recently notified ICSID that it should not recognise any instruction by lawyers acting on behalf of Nicolás Maduro. [137] The DC Circuit recently granted a stay (requested by Mr Guaidó's representatives) of enforcement proceedings for a US$1.4 billion ICSID award in Rusoro Mining v Venezuela (ARB(AF)/12/5). [138] The Third Circuit has also allowed Mr Guaidó's representatives to intervene in enforcement proceedings of an ICSID award. [139] Additionally, an ICC tribunal in a case involving PDVSA has stayed proceedings following uncertainty as to who is the proper representative of PDVSA. [140] However, the Annulment Committee in Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v Venezuela has reportedly rejected Mr Guaidó's representative's request for the centre to discard any submissions or correspondence issued by Mr Maduro's representatives. [141]

Corruption

In the past 20 years, with the increased enforcement of anti-bribery laws in a variety of jurisdictions, corruption scandals have increasingly come to light around the globe, including Latin America. Brazil's Operation Car Wash, a sprawling corruption investigation, has ensnared, among others, Petrobras, which paid US$853 million in fines to Brazilian and US authorities as a result of bribes its former directors and executives paid government officials, [142] and the construction company Odebrecht, which kept a slush fund to bribe government officials across Latin America and will pay at least US$2.6 billion in fines to Brazilian, US and Swiss authorities. [143]

In a climate of increased awareness and prosecution, it is not surprising that tribunals across the world have increasingly had to grapple with the issue of corruption. For example, states and state-owned entities have used allegations of corruption as a defence against contract claims. [144] Such a defence is likely to become more prevalent in Latin America energy arbitrations, whether commercial or investor state, given that the typical contract in dispute in these arbitrations involves a government or a state-owned entity as a party.

In a very recent example, Vantage Deepwater Company v Petrobras America, a US court confirmed a US$728 million ICDR award against Petrobras for the wrongful termination of a contract. In opposing confirmation, Petrobras alleged that the contract at issue, the long-term lease of a deepwater drilling ship, was invalidly obtained through bribery of former Petrobras officials and that confirming the award would violate public policy. The tribunal had found that Petrobras ratified the contract after becoming aware of the bribery allegations and was therefore estopped from claiming the contract was void. The court in turn concluded that:

> [i]t does not violate public policy to enforce an arbitration award against parties who were alleged to have mutually engaged in some misconduct during the formation of a contract, particularly when the contract was later ratified. [145]

This result, however, would likely have been different in an investor-state case since many treaties include an express legality requirement, making the illegality of a contract a jurisdictional bar.

The author thanks Jozi Maria Uehbe, Nicolas Caffo, Jordi de la Torre and Gabriela Sandino de Luca for their contributions to this chapter.

Notes

[1] According to ICC statistics, in 2009 Latin American and the Caribbean parties represented 11 per cent of the total caseload, with 241 cases. The caseload from the region has increased steadily in the years since then, reaching 800 cases in 2016.

See ICC 2009 Statistical Report, ICC 2010 Statistical Report and 2016 ICC Dispute Resolution Statistics, available at https://library.iccwbo.org/dr-statisticalreports.htm. In 2017, Latin American cases increased around 8 per cent. See ICC, 'ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes', https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/.

[2] See ICSID, The ICSID Caseload – Statistics (Issue 2019-1), at p 11, available at https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf.

[3] The sectors affected by the largest number of investment claims in Latin America are the mining and oil sectors (54 cases), and the electricity and gas sectors (37 cases). See C Olivet, B Müller and L Ghiotto, 'ISDS in numbers: Impacts of investment arbitration against Latin America and the Caribbean', Transnational Institute, dated December 2017.

[4] As of 31 December 2018, arbitrations in the energy sector represent 41 per cent of all ICSID cases, where 24 per cent of the registered cases are in the oil, gas and mining sector and 17 per cent in electric power and other energy. See ICSID, The ICSID Caseload – Statistics (Issue 2019-1), at p 12, available at https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf. In a survey conducted by Queen Mary University of London (2013 QMUL Survey), 56 per cent of energy industry respondents preferred arbitration to resolve cross border disputes, and 78 per cent of energy industry respondents strongly agreed or agreed that arbitration is well suited to the energy industry. Queen Mary University of London, Corporate Choices in International Arbitration: Industry Perspectives, at p 2, available at www.arbitration.qmul.ac.uk/media/arbitration/docs/pwc-international-arbitration-study2013.pdf. In the 2018 QMUL Survey, 85 per cent of the respondents believed that the use of international arbitration for resolving cross-border disputes will increase in the energy sector. Queen Mary University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, at p 30, available at www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf. See also International Centre for Energy Arbitration, Dispute Resolution in the Energy Sector: Initial Report (2015), at p 9 (in which arbitration was the most popular first choice for dispute resolution in the energy sector), available at https://www.scottisharbitrationcentre.org/wp-content/uploads/2015/05/ICEA-Dispute-Resolution-in-the-Energy-Sector-Initial-Report-Square-Booklet-Web-version.pdf.

[5] British Petroleum, BP Statistical Review of World Energy, dated June 2018, at p 12, available at https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2018-full-report.pdf.

[6] US Energy Information Administration, '2018 ranking', https://www.eia.gov/beta/international/index.php?view=production.

[7] See Knoema, 'Proved reserves of natural gas', https://knoema.com/atlas/topics/Energy/Gas/Reserves-of-natural-gas.

[8] See Oxford Institute for Energy Studies, Unconventional Gas in Argentina: Will it become a Game Changer?, dated October 2016, at p 1, available at https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/10/Unconventional-Gas-in-Argentina-Will-it-become-a-Game-Changer-NG-113.pdf. See also BBVA, 'Argentina's Vaca Muerta field: the world's second-largest shale gas deposit', dated 16 December 2017, https://www.bbva.com/en/vaca-muerta-worlds-second-largest-shale-gas-deposit/.

[9] See World Energy Council, 'Energy resources: Brazil', https://www.worldenergy.org/data/resources/country/brazil/. See also Enerdata, 'Natural gas production', Global Energy Statistical Yearbook 2018, https://yearbook.enerdata.net/natural-gas/world-natural-gas-production-statistics.html.

[10] See World Atlas, 'Latin American Countries', https://www.worldatlas.com/articles/which-countries-make-up-latin-america.html.

[11] E Eljuri and C Trevino, 'Energy Investment Disputes in Latin America: The Pursuit of Stability', 33 Berkeley J Int'l Law 306, at p 307 (2015).
[12] N Blackaby, 'Energy Investment Disputes in Latin America: A Historical Perspective', in AW Rovine (ed) Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2013, at pp 222–225 (2014).
[13] Ibid, at p 223.
[14] Decree with Force of the Organic Hydrocarbons Law, Decree No 1510, Official Gazette No 37,323, published 13 November 2001.
[15] Decree with Force of the Organic Hydrocarbons Law, Decree No 1510, Official Gazette No 37,323, published 13 November 2001, art 22.
[16] Decree with Force of the Organic Hydrocarbons Law, Decree No 1510, Official Gazette No 37323, published 13 November 2001, arts 44–47.
[17] N Blackaby and C Richard, 'Regulatory Change in Oil and Gas Arbitration: The Latin American Experience', in JM Gaitis (ed) The Leading Practitioners' Guide to International Oil & Gas Arbitration, at p 88 (Juris Publishing 2015).
[18] E Eljuri and C Trevino, 'Energy Investment Disputes in Latin America: The Pursuit of Stability', 33 Berkeley J Int'l Law 306, at p 314 (2015).
[19] E Silva Romero, 'Energy Investor-State Disputes in Latin America', in M Scherer (ed), International Arbitration in the Energy Sector, at p 305 (Oxford University Press 2018).
[20] N Blackaby and C Richard, 'Regulatory Change in Oil and Gas Arbitration: The Latin American Experience', in JM Gaitis (ed), The Leading Practitioners' Guide to International Oil & Gas Arbitration, at p 89 (Juris Publishing 2015).
[21] J Vega Castro, 'Los efectos de la política de liberalización del comercio exterior en el Perú durante el período 1990–1994', Revista Economía, Vol. XXX, No 59-60 (June–December 2007).
[22] Peruvian Organic Law of Hydrocarbons, art 6.
[23] Peruvian Organic Law of Hydrocarbons, arts 12 and 22.
[24] E&Y, 'Sexto Informe Nacional de Transparencia de las Industrias Extractivas (Sexto Estudio de Conciliación Nacional – EITI Peru) Periodos 2015 y 2016, dated 9 February 2018, p 37, available at

https://eiti.org/sites/default/files/documents/vi_informe_nacional_de_transparencia_de_las_industrias_extractivas_-_2015_y_2016.pdf.
[25] OF Cabrera Colorado and A Orta Gonzalez Sicilia, 'Bestiary of Mexican State Contracts: Treatise on Various Real and Mythical Kinds of Arbitration', 3 Transnational Dispute Management 2, at p 17 (2016).
[26] Ibid, at p 17-18.
[27] CA Moran and A Carvallo, 'Pemex Contracting Regime After the Energy Reform', 4 Oil, Gas & Energy Law Intelligence 1, at p 9 (2016).
[28] Ibid.

[29] Brazilian Federal Constitution, art 177, section 1.
[30] Petroleum Act, Law n. 9,478 of 1997.
[31] Brazilian National Agency of Petroleum, Natural Gas and Biofuels, 'About the bidding rounds', http://rodadas.anp.gov.br/en/.
[32] As of the date of this publication, Latin American countries are parties to 603 investment agreements, including 479 BITs and 124 treaties with investment provisions, of which a total of 441 investment agreements are in force, including 343 BITs and 98 treaties with investment provisions.
[33] The recently agreed Comprehensive and Progressive Agreement for Trans–Pacific Partnership (CPTPP) also involves Latin American countries but has not yet entered into force.
[34] Bolivia denounced the convention on 2 May 2007 and its withdrawal was effective as of 3 November 2007. Ecuador denounced the convention on 6 July 2009 and its withdrawal was effective as of 7 January 2010. Venezuela denounced the ICSID Convention on 24 January 2012 and its withdrawal was effective as of 25 July 2012. See ICSID, 'Lista de Estados Contratantes y Signatarios del Convenio' (as of 11 January 2018), available at:

https://icsid.worldbank.org/en/Documents/icsiddocs/Lista%20de%20Estados%20Contratantes%20y%20Signatarios%20del%20Convenio-%20Latest.pdf.

[35] Bolivia terminated BITs with Argentina, Austria, Belgium-Luxembourg Economic Union, Denmark, France, Germany, Italy, Netherlands, Spain, Sweden and United States of America. Ecuador terminated BITs with Argentina, Bolivia, Canada, Chile, China, Cuba, Dominican Republic, El Salvador, Finland, France, Germany, Guatemala, Honduras, Italy, the Netherlands, Nicaragua, Paraguay, Peru, Romania, Sweden, Switzerland, the United Kingdom, the United States of America, Uruguay and Venezuela. Venezuela terminated its BIT with the Netherlands.

[36] Colombia has signed five BITs in the last eight years with: United Arab Emirates, Turkey, France, Japan, Brazil and Singapore. See UNCTAD, Investment Policy Hub, https://investmentpolicyhubold.unctad.org/IIA/CountryBits/45#iiaInnerMenu.

[37] See UNCTAD, Investment Policy Hub, http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry.

[38] See UNCTAD, Investment Policy Hub, http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry.

[39] See UNCTAD, Investment Policy Hub, http://investmentpolicyhub.unctad.org/IIA/CountryBits/45#iiaInnerMenu.

[40] See Global Arbitration Review, 'Ecuador model BIT gives state space to regulate', dated 16 March 2018, https://globalarbitrationreview.com/article/1166677/ecuadormodel-bit-gives-state-space-to-regulate. Although the proposed text has been kept confidential, it is expected that parties will have to exhaust local remedies first and only then file for arbitration, which would be seated in a Latin American country and administered by the PCA or ICC.

[41] Fresh Plaza, 'Ecuador and the Netherlands consolidate their commercial relationship', dated 16 May 2019, https://www.bilaterals.org/?ecuador-and-the-netherlands.

[42] See B Sanderson, R Pardo and A Lapunzina Veronelli, 'Ecuador reforms investment law', dated 24 September 2018, https://www.dlapiper.com/en/us/insights/publications/2018/09/ecuador-reforms-investment-law/; Global Arbitration Review, 'Ecuador gives go-ahead to arbitration of investment disputes', dated 22 August 2018, https://globalarbitrationreview.com/article/1173443/ecuador-gives-go-ahead-to-arbitration-of-investment-disputes.

[43] See ICSID, 'Database of ICSID Member States', https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx#.

[44] See A Ross, 'Mexico signs ICSID Convention', Global Arbitration Review, dated 12 January 2018, https://globalarbitrationreview.com/article/1152707/mexicosigns-icsid-convention.

[45] See USMCA, ch 14, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14_Investment.pdf.

[46] Chartered Institute of Arbitrators, 'The new Argentinian law on international commercial arbitration', CIArb News, dated 19 December 2018, https://ciarb.org/news/the-new-argentinian-law-on-international-commercial-arbitration/.

[47] Peruvian Organic Law of Hydrocarbons, art 67. Foreign companies that want to enter into these contracts must set up a branch or incorporate a company with domicile in Peru and with a Peruvian representative. See Peruvian Organic Law of Hydrocarbons, art 15.

[48] Article 21 of Decreto por el que se Expide la Ley de Hidrocarburos y se Reforman Diversas Disposiciones de la Ley de Inversion Extranjera, Ley Minera, y Ley de Asociaciones Publico Privadas.

[49] CA Moran and A Carvallo, 'Pemex Contracting Regime After the Energy Reform', 4 Oil, Gas & Energy Law Intelligence 1, at p 16 (2016).

[50] Article 20 of Decreto por el que se Expide la Ley de Hidrocarburos y se Reforman Diversas Disposiciones de la Ley de Inversion Extranjera, Ley Minera, y Ley de Asociaciones Publico Privadas.

[51] E Eljuri and C Trevino, 'Energy Investment Disputes in Latin America: The Pursuit of Stability', 33 Berkeley J Int'l Law 306, at p 332 (2015).

[52] UNCTAD, Investment Policy Hub, 'Brazil', https://investmentpolicyhubold.unctad.org/IIA/CountryBits/27#iiaInnerMenu.

[53] See World Bank, 'Foreign direct investment, net inflows', https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=BR-ZJ&year_high_desc=false.

[54] The FDI in the region in 2017 was 235.922 billion. See World Bank, 'Foreign direct investment, net inflows', https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=BR-ZJ&year_high_desc=false.

[55] D de Andrade Levy, 'The ICSID Convention and Non-Contracting Parties: The Brazilian Position Methaphor', in C Baltag (ed), ICSID Convention After 50 Years. Unsettled Issues, at p 514-517 (Kluwer Law International 2017).

[56] See Queen Mary University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, at p 10 ('Latin America reported a striking popularity of São Paulo which took fourth place in that region and also came eighth in the overall ranking.'), available at www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf.

[57] AL Monteiro, JA Fichtner and SN Mannheimer, 'Is Brazil an Arbitration-Friendly Jurisdiction?', Kluwer Arbitration Blog, 6 January 2019, http://arbitrationblog.kluwerarbitration.com/2019/01/06/is-brazil-an-arbitration-friendly-jurisdiction/.

Brazilian Arbitration Act, article 1, section 1.

[58] Brazilian Arbitration Act, art 1, section 1.

[59] Venezuela Holdings BV et al v Bolivarian Republic of Venezuela (ICSID case no ARB/07/27) (ExxonMobil).

[60] ConocoPhillips Petrozuata B, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela (ICSID case no ARB/07/30) (ConocoPhillips).

[61] L Timmers and V Giraud, 'Payback Time: ICSID Adverse Awards Against Venezuela are Just the Tip of the Iceberg', 13 Transnational Dispute Management 5, at p 12 (2016).

[62] See ConnocoPhillips v. PDVSA, ICSID Case No ARB/07/30, Award, 8 March 2019, at paragraphs 227–229.

[63] Venezuela Holdings BV et al v Bolivarian Republic of Venezuela (ICSID case no ARB/07/27), Decision on Jurisdiction, 10 June 2010, at p 190; ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela (ICSID case no ARB/07/30), Decision on Jurisdiction and the Merits, 3 September 2013, at p 279.

[64] Venezuela Holdings BV and others v Bolivarian Republic of Venezuela (ICSID case no ARB/07/27), Decision on Jurisdiction, 10 June 2010, at p 204; ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela (ICSID case no ARB/07/30), Decision on Jurisdiction and the Merits, 3 September 2013, at pp 278–281. See also M Casas, 'Nationalities of convenience, personal jurisdiction, and access to investor-state dispute settlement', 49 NYU J Int'l L & Pol 1 (2016).

[65] E Silva Romero, 'Energy Investor-State Disputes in Latin America', in M Scherer (ed), International Arbitration in the Energy Sector, at pp 305–306 (Oxford University Press 2018).

[66] E Silva Romero, 'Energy Investor-State Disputes in Latin America', in M Scherer (ed), International Arbitration in the Energy Sector, at p 306 (Oxford University Press 2018).

[67] N Blackaby and C Richard, 'Regulatory Change in Oil and Gas Arbitration: The Latin American Experience', in JM Gaitis (ed), The Leading Practitioners' Guide to International Oil & Gas Arbitration, at p 91 (Juris Publishing 2015).

[68] Ibid.

[69] C Stanley, 'ICSID Nixes $1.4B Exxon Award For Venezuelan Oil Assets (2017)', Law360, https://www.law360.com/articles/900480.

[70] Ibid.

[71] See Venezuela Holdings BV et al v Bolivarian Republic of Venezuela (ICSID case no ARB/07/27), https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/07/27; see also Global Arbitration Review, 'Exxon resubmits Venezuela claim after quantum slashed', dated 26 October 2018, https://globalarbitrationreview.com/article/1176036/exxon-resubmits-venezuela-claim-after-quantum-slashed.

[72] Crystallex Int'l Corp v Bolivarian Republic of Venezuela, 333 F Supp 3d 380, 406-411 (D Del 2018).
[73] Ibid, at p 419.
[74] See J Zaldumbide-Serrano, 'Windfall Profit Tax in Ecuadorian Petroleum Industry', 5 Transnational Dispute Management 2 (2008).
[75] Executive Decree 662-2007, which introduced the amendment to the Implementing Regulation of Law 42-2006.
[76] N Blackaby and C Richard, 'Regulatory Change in Oil and Gas Arbitration: The Latin American Experience', in JM Gaitis (ed), The Leading Practitioners' Guide to International Oil & Gas Arbitration, at pp 100–101 (Juris Publishing 2015), Juris Publishing. According to media releases, in 2009 Ecuador took over operations in the concession areas of the French oil company Perenco. Subsequently, in 2010 Ecuador assumed control of four oil fields that were operated by Petrobras and other three minor private oil companies.
[77] Burlington Resources Inc v Republic of Ecuador (ICSID Case No. ARB/08/5).
[78] Perenco Ecuador Ltd v Republic of Ecuador (ICSID Case No. ARB/08/6).
[79] Burlington Resources Inc v Republic of Ecuador (ICSID case no ARB/08/5), Decision on Liability, 14 December 2012, at para 391, available at https://www.italaw.com/sites/default/files/casedocuments/italaw1094_0.pdf.
[80] Ibid, at para 123.
[81] See CIAR Global, 'Ecuador pagará 379 millones de dólares a ConocoPhillips por el arbitraje Burlington', http://ciarglobal.com/ecuador-pagara-379-millones-de-dolares-a-conocophillips-por-el-arbitraje-burlington/. The award also granted US$42 million in favour of Ecuador for remedying the environmental damage to blocks 7 and 21, which was reflected in the lower amount of the settlement.
[82] Perenco Ecuador Ltd v Republic of Ecuador (ICSID Case No. ARB/08/6), Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, at paras 671–674, available at https://www.italaw.com/sites/default/files/case-documents/italaw4003.pdf.
[83] Ibid, at para 409.
[84] Ibid, at paras 442 and 710.
[85] Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador (ICSID case no ARB/06/11), Award, 5 October 2012, at para 455, available at https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf.
[86] See L Yong, 'Oxy and Ecuador settle', Global Arbitration Review, dated 11 January 2016, https://globalarbitrationreview.com/article/1035942/oxy-andecuador-settle.
[87] See Global Arbitration Review, 'Former Petrobras subsidiary wins claim over Ecuadorean oil projects', dated 27 February 2018, https://globalarbitrationreview.com/article/1166151/formerpetrobras-subsidiary-wins-claim-over-ecuadorean-oil-projects.
[88] See El Comercio, 'Ecuador acuerda pagar hasta mayo 318 millones por laudo', Juicio Crudo, dated 27 March 2018, https://www.juiciocrudo.com/articulo/ecuador-acuerda-pagar-hasta-mayo-318-millones-por-laudo/9190.
[89] See LE Peterson, 'Colombia Round-Up: New Developments in Treaty-Based Investment Arbitrations', IA Reporter, dated 17 June 2018, https://www.iareporter.com/articles/colombia-round-up-new-developments-in-treaty-based-investment-arbitrations/. See also Portafolio, 'Colombia está preparada para enfrentar demanda de Gas Natural Fenosa, Mincomercio', dated 22 March 2017, https://www.portafolio.co/economia/gobierno/colombia-se-defendera-ante-demanda-de-gas-natural-fenosa-504334.
[90] See UNCTAD, Investment Policy Hub, https://investmentpolicyhubold.unctad.org/ISDS/FilterByCountry.
[91] See Global Arbitration Review, 'Argentina to settle more treaty awards', dated 16 May 2016, https://globalarbitrationreview.com/article/1036330/argentinato-settle-more-treaty-awards.
[92] See D Thomson, 'Argentina and Total settle', Global Arbitration Review, dated 19 July 2017, https://globalarbitrationreview.com/article/1144742/argentina-and-total-settle.

[93] Repsol, SA and Repsol Butano, SA v Argentine Republic (ICSID case no ARB/12/38). See E Eljuri and C Trevino, 'Energy Investment Disputes in Latin America: The Pursuit of Stability', 33 Berkeley J of Int'l Law 306, at p 314 (2015).

[94] See T Rucinski, A Gonzalez and K Gray, 'Spain's Repsol agrees to $5 billion settlement with Argentina over YPF', Reuters, dated 25 February 2014, https://www.reuters.com/article/us-repsol-argentina/spains-repsol-agrees-to-5-billion-settlement-with-argentina-over-ypf-idUSBREA1O1IJ20140225.

[95] C Simson, 'ConocoPhillips Wins $2B In Claim Against Venezuela Oil Co', Law360, dated 25 April 2018, https://www.law360.com/articles/1037020.

[96] Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata BV v Petroleos de Venezuela, SA, Corpoguanipa, SA and PDVSA Petroleo, SA (ICC case 20549/ASM/JPA), Final award, at para 1163, available at http://res.cloudinary.com/lbresearch/image/upload/v1525081480/conoco_award2_303118_1044.pdf.

[97] Ibid, at para 71.

[98] Ibid, at para 491.

[99] See Global Arbitration Review, 'ConocoPhillips settles with PDVSA for US$2 billion', dated 20 August 2018, https://globalarbitrationreview.com/article/1173275/conocophillips-settles-with-pdvsa-for-ususd2-billion; ConocoPhillips news release, 'ConocoPhillips Signs $2 Billion Settlement Agreement with PDVSA on ICC Arbitration Award', dated 20 August 2018, available at https://static.conocophillips.com/files/resources/pr-pdvsa-settlement.pdf.

[100] See KBR press release, 'KBR recovers almost half billion dollar judgment, resolves lengthy commercial dispute', dated 10 April 2017, https://kbr.com/en-au/insights-events/press-release/kbr-recovers-almost-half-billion-dollar-judgment-resolves-lengthy?language_content_entity=en.

[101] Corporación Mexicana de Mantenimiento Integral v Pemex-Exploración y Producción, case no 13-4022 (2d Cir, 2 August 2016), at pp 5–6, available at https://cases.justia.com/federal/appellatecourts/ca2/13-4022/13-4022-2016-08-02.pdf?ts=1470150006.

[102] Ibid, at pp 6–8.

[103] Ibid, at pp 7–8.

[104] S Finizio and S Bejarano, 'Annuled Commisa v Pemex arbitration award enforced', LexisPSL Arbitration, dated 10 October 2016, at p 2.

[105] Corporación Mexicana de Mantenimiento Integral v Pemex-Exploración y Producción, case no 13-4022 (2d Cir, 2 August 2016), at p 10, available at: https://cases.justia.com/federal/appellatecourts/ca2/13-4022/13-4022-2016-08-02.pdf?ts=1470150006.

[106] Ibid.

[107] Ibid.

[108] Corporación Mexicana de Mantenimiento Integral v Pemex-Exploración y Producción, 962 F Supp 2d 642 (SDNY 2013), available at: https://casetext.com/case/corporacion-mexicana-demantenimiento-integral-v-p-roduccion; Corporación Mexicana de Mantenimiento Integral v Pemex-Exploración y Producción, case no 13-4022 (2d Cir, 2 August 2016), at p 10, available at: https://cases.justia.com/federal/appellatecourts/ca2/13-4022/13-4022-2016-08-02.pdf?ts=1470150006.

[109] GE Kaiser, 'Disputes Involving Regulated Utilities in The Guide to Energy Arbitrations', in Global Arbitration Review: The Guide to Energy Arbitrations (2d ed), at pp 133–134 (2017).

[110] See Global Arbitration Review, 'YPF settles gas exports saga', dated 2 January 2018, https://globalarbitrationreview.com/article/1152093/ypf-settlesgas-exports-saga.

[111] Ibid.

[112] See YPF's filing before the Buenos Aires Stock Exchange, dated 27 April 2016, available at https://www.ypf.com/inversoresaccionistas/Lists/HechosRelevantes/27-04-2016-BCBA-Notificacion-laudo-sobredanos-en-el-Arbitraje-CCI-Nro-16232-JRF-CA-YPF-c-AESU-y-TGM.pdf.

[113] See Global Arbitration Review, 'YPF settles gas exports saga', dated 2 January 2018, https://globalarbitrationreview.com/article/1152093/ypf-settlesgas-exports-saga.

[114] Queen Mary University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, at p 29, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf.

[115] See New EU–Mexico agreement, The agreement in principle, dated 23 April 2018, at p 11, available at http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156791.pdf.

[116] Ibid.

[117] Ibid.

[118] Ibid, at p 10.

[119] Ibid, at p 11.

[120] UNCTAD, 'Special Update on Investor–State Dispute Settlement: Facts and Figures', IIA Issues Note, Issue 3, dated November 2017, at p 3. In Alicia Grace and others v United Mexican States (ICSID case no UNCT/18/4), the claimants allege that their business leasing offshore drilling rigs to PEMEX was destroyed after they refused to pay bribes to PEMEX and Mexican government officials. See C Sanderson, 'Mexico faces claims from oil and hotel investors', Global Arbitration Review, dated 26 February 2019, https://globalarbitrationreview.com/article/1180676/mexico-faces-claims-from-oil-and-hotel-investors.

[121] See E Martin, '33 days before AMLO's inauguration, investors are fleeing Mexico', Bloomberg, dated 30 October 2018, https://www.bloomberg.com/news/articles/2018-10-30/33-days-before-amlo-s-inauguration-investors-are-fleeing-mexico.

[122] See ibid.

[123] WilmerHale, 'Investment Disputes Arising From Regulatory Changes in Clean Energy', dated 28 February 2019, https://www.wilmerhale.com/en/insights/client-alerts/20190228-investment-disputes-arising-from-regulatory-changes-in-clean-energy.

[124] See J Castilla and C Plumb, 'Argentina's YPF to invest $21.5 billion from 2018 to 2022', Reuters, dated 25 October 2017, https://reut.rs/2i4SwLd. See also YPF press release, 'Más energía para los argentinos: Plan estratégico', dated 25 October 2017, https://www.ypf.com/YPFHoy/YPFSalaPrensa/Paginas/Noticias/Nuevo-Plan-Estrategico.aspx.

[125] See YPF press release, 'Más energía para los argentinos: Plan estratégico', dated 25 October 2017, https://www.ypf.com/YPFHoy/YPFSalaPrensa/Paginas/Noticias/Nuevo-Plan-Estrategico.aspx.

[126] See Reuters, 'Exxon Mobil plans $200 mln investment in Argentina's Vaca Muerta', dated 1 September 2017, https://www.reuters.com/article/exxon-mobil-plans-200-mln-investment-in-argentinas-vaca-muerta-idUSL2N1LJ1RA; A Lifschitz and K Grazina, 'Chevron, Argentina's YPF sign $1.24 billion Vaca Muerta shale deal', Reuters, dated 16 July 2013, http://reut.rs/12TXGtd; YPF press release, 'YPF y Schlumberger firmaron un acuerdo de asociación para el desarrollo de un piloto de shale oil en el área Bandurria Sur', dated 12 April 2017, available at https://www.ypf.com/YPFHoy/YPFSalaPrensa/Lists/ComunicadosDePrensa/06-Acuerdo-YPF-Schlumberger.pdf; YPF press release, 'Acuerdo con American Energy Partners para Vaca Muerta', dated 14 January 2016, https://www.ypf.com/YPFHoy/YPFSalaPrensa/Paginas/Noticias/Acuerdo-con-American-Energy-Partners-para-Vaca-Muerta-.aspx; Oil & Gas Year, 'YPF, Statoil in Argentina MoU', dated 6 March 2018, https://www.theoilandgasyear.com/news/ypf-statoil-in-argentina-mou/.

[127] See B Mander, 'Argentina strikes $15bn a year shale investment deal', Financial Times, dated 10 January

2017, https://www.ft.com/content/031d1674-d74f-11e6-944b-e7eb37a6aa8e. See also BBVA, 'Argentina's Vaca Muerta field: the world's second-largest shale gas deposit', dated 16 December 2017, https://www.bbva.com/en/vaca-muerta-worlds-second-largest-shale-gas-deposit/.

[128] See BBVA, 'Argentina's Vaca Muerta field: the world's second-largest shale gas deposit', dated 16 December 2017, https://www.bbva.com/en/vaca-muerta-worlds-second-largest-shale-gas-deposit/.

[129] See AR Martinez, J Gilbert and J Do Rosario, 'Argentina eyes $500 million rail project to boost shale play', Bloomberg, dated 22 March 2018, https://www.bloomberg.com/news/articles/2018-03-22/argentina-to-tender-shale-train-to-develop-vaca-muerta-drilling.

[130] See J Castilla, 'Troubled labor pact raises obstacle to Argentina shale development', Reuters, dated 26 March 2018, https://reut.rs/2pG7N9L.

[131] See IRENA, Renewable Energy Market Analysis: Latin America (2016), at p 10, www.irena.org/-/media/Files/IRENA/Agency/Publication/2016/IRENA_Market_Analysis_Latin_America_2016.pdf.

[132] See ibid, at p 3.

[133] See V Bauza, 'A New Dawn: Argentina Taps Into Its Renewable Energy Potential', IFC, dated April 2017, https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/argentina-taps-into-its-renewable-energy-potential.

[134] N Gallagher, 'ECT and Renewable Energy Disputes', in M Scherer (ed), International Arbitration in the Energy Sector, at p 256 (Oxford University Press 2018). There are currently almost 66 pending claims relating to renewable energy disputes under the ECT. See International Energy Charter, 'Changing dynamics of investment cases under the Energy Charter Treaty (ECT)', https://energycharter.org/what-we-do/dispute-settlement/cases-up-to-18-may-2018/. According to the last published UNCTAD statistics, Spain is the third most internationally sued country in the world, (with 43 cases as respondent), and the Czech Republic is fourth (with 35 cases as respondent). See UNCTAD, 'Investor–State Dispute Settlement: Review of Developments in 2017', IIA Issues Note, Issue 2, dated June 2018, available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf.

[135] Feed-in tariffs (FITs) are fixed electricity prices that are paid to renewable energy producers for each unit of energy produced and injected into the electricity grid. The payment of the FIT is guaranteed for a certain period of time that is often related to the economic lifetime of the respective renewable energy project (usually between 15–25 years).

[136] See KPMG, 'Taxes and Incentives for Renewable Energy' (2015), available at https://assets.kpmg/content/dam/kpmg/pdf/2015/09/taxes-and-incentives-2015-web.pdf. See also IRENA, Renewable Energy Market Analysis: Latin America (2016), at pp 68–69, http://www.irena.org/-/media/Files/IRENA/Agency/Publication/2016/IRENA_Market_Analysis_Latin_America_2016.pdf.

[137] JI Hernández G (@ignandez), Twitter (27 March 2019, 12:38 PM), https://twitter.com/ignandez/status/1110989446189645825.

[138] See T Jones, 'Venezuela's rival governments clash in US court', Global Arbitration Review, dated 26 February 2019, https://globalarbitrationreview.com/article/1180830/venezuela's-rival-governments-clash-in-us-court.

[139] Reuters, 'US court allows Venezuela's Guaido to argue in Crystallex case', dated 21 March 2019, https://ca.reuters.com/article/companyNews/idCAL1N2180KX.

[140] See T Jones and S Perry, 'ICC panel stays PDVSA case after Guaidó intervenes', Global Arbitration Review, dated 27 March 2019, https://globalarbitrationreview.com/article/1189313/icc-panel-stays-pdvsa-case-after-guaido-intervenes.

[141] See Global Arbitration Review, 'ICSID Committee Rebuffs Guaidó', dated 10 May 2019, https://globalarbitrationreview.com/article/1192627/icsid-committee-rebuffs-guaido.

[142] See US DOJ press release 18-1258, 'Petróleo Brasileiro SA – Petrobras agrees to pay more than $850 million for FCPA violations', dated 27 September 2018, https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations.

[143] See US DOJ press release 16-1515, 'Odebrecht and Braskem plead guilty and agree to pay at least $3.5 billion in global penalties to resolve largest foreign bribery case in history', dated 21 December 2016, https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

[144] See MW Friedman, F Lavaud and JJ Marley, 'Corruption in international arbitration: Challenges and consequences', Global Arbitration Review, dated 29 August 2017, https://globalarbitrationreview.com/chapter/1146893/corruption-in-international-arbitration-challenges-and-consequences.

[145] Vantage Deep Water Co v Petrobras America Inc, Case No 4:18-CV-02246, slip op at p 22 (WD Tex May 17, 2019).

WilmerHale

Claudio Salas claudio.salas@wilmerhale.com

https://www.wilmerhale.com/en