



The Arbitration Review of the Americas

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Energy Arbitration in Latin America

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Energy Arbitration in Latin America

Claudio Salas and **Nicolás Costáble**

WilmerHale

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INTRODUCTION

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 industry⁴ 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, Mexico and Venezuela rank as the ninth, 11th and 12th largest oil producers in the world respectively.⁶

Latin America also boasts significant gas production and reserves. Venezuela has the eighth 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 Different 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 last 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 Law¹⁴ 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 or 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 Petróleos 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

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. 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 550 bilateral investment treaties (BITs) or investment agreements,²⁹ 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.[30](#)

In the past decade, however, Bolivia, Ecuador and Venezuela denounced the ICSID Convention,[31](#) and have terminated a large number BITs.[32](#) 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), Venezuela is the most frequent respondent in investor–state arbitration with 44 claims against it.[33](#) Ecuador has 23 known investor-state cases against it,[34](#) and Bolivia has been the respondent in 14 investor–state arbitrations.[35](#)

Anti-investment arbitration sentiment, however, is not universal. Colombia, for example, has signed 14 BITs in the last 14 years, compared to five previously.[36](#) 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.[37](#) Additionally, Ecuador's Foreign Trade Minister presented a new draft investment law containing wide-ranging reforms, including tax cuts for new investments and changes in stock market regulation.[38](#)

In January 2018, Mexico signed the ICSID Convention, which has already been ratified by the Senate, and it is waiting to have the ratification instrument deposited with ICSID.[39](#) Until now, Mexico has 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'.[40](#)

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, an international commercial arbitration law, based on the 2006 UNCITRAL Model Law, has been approved by the Senate and is now pending approval from the Representatives Chamber.[41](#)

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.[42](#) Mexico's hydrocarbons law provides for arbitration for disputes related both to exploration and production contracts.[43](#) It is not uncommon to see Pemex contracts be subject to arbitration under the ICC or the London Court of International Arbitration.[44](#) Importantly, disputes arising out of the unilateral administrative rescission of an exploration and production contract are, however, non-arbitrable.[45](#) These disputes must be resolved by Mexican administrative or judicial courts.[46](#)

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 has ratified only one BIT out of 22 signed.[47](#) This, however, has not prevented Brazil from attracting foreign investment. According to data from the World Bank, from 1997 to 2016 Brazil has attracted US\$938.828 billion in foreign direct investment.[48](#)

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.[49](#) For example, Federal Law No. 4.131/62, which is the Brazilian statute that deals with foreign investments, provides in article 2 that 'foreign capital invested in this country is to be afforded legal treatment which is identical to that given to national capital, and on equal conditions, with any discrimination not provided for in this law being prohibited'.

Moreover, Brazil has ratified the New York Convention and has passed several laws providing for the arbitrability of certain disputes against the state.[50](#) In 2015, Brazil amended its Arbitration Act to permit the Public Administration to resort to arbitration with respect to patrimonial rights it can dispose of.[51](#) In 2018, the state of Rio de Janeiro enacted Decree No. 46.245/2018, which regulates the participation of Rio de Janeiro and its entities in arbitration proceedings. The Decree provides that disputes concerning concession agreements, or any contract above R\$20 million, may be resolved through arbitration.[52](#) Finally, 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,[53](#) the Public–Private Partnership Law[54](#) and the Concession of Public Services Law.[55](#)

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[56](#) and ConocoPhillips.[57](#) The tribunal in the ExxonMobil case granted the then-third largest award in investment treaty arbitration (US\$1.6 billion)[58](#) and ConocoPhillips was initially seeking US\$30 billion.[59](#)

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.[60](#) Both tribunals held that it was 'perfectly legitimate' to restructure the corporate chain of the investment for future disputes, but not for existing disputes.[61](#)

Both tribunals 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.[62](#) The ConocoPhillips tribunal, however, reached the opposite conclusion – Venezuela did not negotiate in good faith since the standard in the BIT was 'market value'.[63](#)

In the ExxonMobil case, the tribunal's finding of lawfulness 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.[64](#) The ConocoPhillips tribunal will determine the quantification of damages in a later stage of the proceedings.

Although initially ExxonMobil was awarded US\$1.6 billion,[65](#) it has recently seen its awarded damages reduced to US\$188.3 million after an ICSID annulment committee partially annulled the award.[66](#) 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.[67](#)

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,[68](#) which it then raised to 99 per cent.[69](#) 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.[70](#)

Two of the investors affected by these measures were Burlington Resources Inc (Burlington)[71](#) and Perenco Ecuador Limited (Perenco),[72](#) 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'.[73](#) 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'.[74](#) The tribunal awarded Burlington US\$379 million, and the parties settled the case for US\$337 million.[75](#)

The Perenco tribunal agreed with the Burlington tribunal that Law 42 did not amount to an indirect expropriation.[76](#) 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'.[77](#) 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.[78](#) The Perenco tribunal issued an award on liability on 12 September 2014. The final award on quantum is pending.

Ecuador recently 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'.[79](#) 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 recently settled the case for US\$980 million.[80](#)

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.[81](#)

Argentina has been the most frequent respondent in investor–state arbitration in the world.[82](#) 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 last 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.[83](#) In 2017, Argentina issued another round of bonds for US\$210 million to pay French oil company Total.[84](#)

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,[85](#) including an ICSID arbitration, the two sides settled the case for US\$5 billion, which Argentina paid with treasury bonds.[86](#)

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[87](#) – initiated various multibillion dollar commercial arbitrations against PDVSA and its subsidiaries in the region.

In one such case, an ICC tribunal recently granted ConocoPhillips US\$2 billion in damages from PDVSA and two of its subsidiaries.[88](#) ConocoPhillips had claimed almost US\$20 billion arguing that PDVSA was contractually responsible for any discriminatory actions undertaken by the Venezuela government against the company and that PDVSA's subsidiaries wilfully breached their agreements.[89](#)

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.[90](#) On 26 April 2018, ConocoPhillips filed an application in a New York court to enforce the award,[91](#) and on 4 May 2018, it seized oil products belonging to PDVSA on the Dutch island of Curacao and elsewhere in the Caribbean.[92](#)

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, S de RL de CV (Commisa) and all litigation between the parties was to be dismissed.[93](#) The case is well known because it involved the enforcement of an 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.[94](#) 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).[95](#) After the arbitration proceedings had started, the Mexican government rescinded the contract.[96](#) Commisa eventually sought damages for wrongful termination in the pending arbitration.[97](#) The arbitral tribunal ruled in 2009 in favour of Commisa and ordered PEP to pay US\$300 million in damages.[98](#)

Commisa then tried to enforce the award in the US and, simultaneously, PEP filed an action in Mexico to set aside the award.[99](#) 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).¹⁰⁰

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.¹⁰¹ 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.¹⁰² 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 Uruguiana (AESU) and Sulgás.¹⁰³

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 its 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.¹⁰⁴

The ICC award required YPF to pay US\$319 million to TGM and US\$185 million to AESU and Sulgás, plus interest.¹⁰⁵ YPF reached a US\$60 million settlement with AESU and Sulgás 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.¹⁰⁶

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.¹⁰⁷ 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 sectors. Below we discuss the potential for arbitrations resulting from such measures in Mexico and Argentina, as well as in the renewable energy sector.

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'.¹⁰⁸ 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'.¹⁰⁹ Cases will be heard by a tribunal of first instance whose decisions can be referred to an appeals tribunal.¹¹⁰ Investment protection standards under the deal will include:

- guarantees on non-discrimination;
- no expropriation without prompt and adequate compensation; and
- fair and equitable treatment.¹¹¹

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.¹¹²

Although Mexico is the seventh most frequent respondent in investor–state arbitration in the world and the third in the region with 25 claims,¹¹³ none of the registered cases so far are energy-related.¹¹⁴ This, however, might change in the next few years as the frontrunner for the July 2018 presidential election in Mexico, Andrés Manuel López Obrador, has pledged to hold a referendum on the energy reform and review the oil contracts with international firms.¹¹⁵ Thus, 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. There is also potential for contractual, downstream disputes even in the absence of any change in regulation.

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, Argentina's state-controlled energy company. For example, YPF recently announced a strategy plan for the next five years (2018–2022), with planned investments over US\$30 billion.¹¹⁶ In this scheme, private oil companies would play a paramount role through partnership agreements with YPF.¹¹⁷ Investors such as ExxonMobil, Chevron Corp, Schlumberger, American Energy Partners LP and Statoil,¹¹⁸ among others, are reportedly interested in such agreements.

In addition, Argentina's new administration seeks to develop the Vaca Muerta field, considered the second largest shale gas reservoir in the world.¹¹⁹ Following a number of government's measures, pricing and labour costs are being settled,¹²⁰ and a tender for a US\$500 million train line is being placed.¹²¹

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.¹²² 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.

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).¹²³ 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.¹²⁴

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.¹²⁵

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 Charter Treaty (ECT).¹²⁶

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,¹²⁷ which have been the main focus of current European renewable energy disputes.¹²⁸ 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.

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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. In 2017, Latin American cases increased around 8 per cent. See 'ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes', available at <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 2018-1), at page 11, available at [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(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, December 2017.

⁴ As of 31 December 2017, 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 [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf), at p 12. In a survey conducted by Queen Mary University of London, 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 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/pwc-international->

[arbitration-study2013.pdf](#); see also International Centre for Energy Arbitration, Dispute Resolution in the Energy Sector: Initial Report (2015) (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>, at p 9.

⁵ British Petroleum, BP Statistical Review of World Energy June 2017, at p 12, available at <https://www.bp.com/content/dam/bp/en/corporate/pdf/energy-economics/statistical-review-2017/bp-statistical-review-of-world-energy-2017-full-report.pdf>.

⁶ US Energy Information Administration, available at www.eia.gov/beta/international/index.php?view=production.

⁷ See <https://www.worldenergy.org/data/resources/region/latin-america-the-caribbean/gas/>.

⁸ See <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/10/Unconventional-Gas-in-Argentina-Will-it-become-a-Game-Changer-NG-113.pdf>, at p 1.

⁹ See www.worldenergy.org/data/resources/region/latin-america-the-caribbean/gas/.

¹¹ Elisabeth Eljuri and Clovis Trevino, Energy Investment Disputes in Latin America: The Pursuit of Stability, 33, Berkeley Journal of International Law, 306 (2015), at 307.

¹² Nigel Blackaby, 'Energy Investment Disputes in Latin America: A Historical Perspective', in Artur W Rovine (ed) Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2013 (2014), at 222–225.

¹³ Ibid, at 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, article 22.

¹⁶ Decree with Force of the Organic Hydrocarbons Law, Decree No. 1510, Official Gazette No. 37,323, published 13 November 2001, articles 44–47.

¹⁷ Nigel Blackaby and Caroline Richard, 'Regulatory Change in Oil and Gas Arbitration: The Latin American Experience', in James M Gaitis (ed) The Leading Practitioners' Guide to International Oil & Gas Arbitration (2015), Juris Publishing, at 88.

¹⁸ Elisabeth Eljuri and Clovis Trevino, 'Energy Investment Disputes in Latin America: The Pursuit of Stability', 33, Berkeley Journal of International Law, 306 (2015), at 314.

¹⁹ Eduardo Silva Romero, 'Energy Investor-State Disputes in Latin America', in Maxi Scherer, International Arbitration in the Energy Sector (2018), Oxford University Press, at 305.

²⁰ Nigel Blackaby and Caroline Richard, 'Regulatory Change in Oil and Gas Arbitration: The Latin American Experience', in James M Gaitis (ed), The Leading Practitioners' Guide to International Oil & Gas Arbitration (2015), Juris Publishing, at 89.

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, article 6.

²³ Peruvian Organic Law of Hydrocarbons, articles 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, 9 February 2018, available at: https://eiti.org/sites/default/files/documents/vi_informe_nacional_de_transparencia_de_las_industrias_extractivas_-_2015_y_2016.pdf, p 37.

²⁵ OF Cabrera Colorado and A Orta Gonzalez Sicilia, 'Bestiary of Mexican State Contracts: Treatise on Various Real and Mythical Kinds of Arbitration', Transnational Dispute Management (2016), Vol 3, Issue 2, at 17.

²⁶ Ibid, at 17-18.

²⁷ CA Moran and A Carvallo, 'Pemex Contracting Regime After the Energy Reform', Oil, Gas & Energy Law Intelligence (2016), Vol 4, Issue 1, at 9.

²⁸ Ibid.

²⁹ As of the date of this publication, Latin American countries are parties to 568 investment agreements, including 446 BITs and 122 treaties with investment provisions. A total of 450

investment agreements are in force, including 355 (BITs) and 95 treaties with investment provisions.

³⁰ The recently agreed Comprehensive and Progressive Agreement for Trans–Pacific Partnership (CPTPP) also involves Latin American countries but has not yet entered into force.

³¹ 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>.

³² Bolivia terminated BITs with Argentina, Austria, Belgium-Luxembourg Economic Union, Denmark, France, Germany, Netherlands, Spain, Sweden and United States of America. Ecuador terminated BITs with Argentina, Cuba, Dominican Republic, El Salvador, Finland, Germany, Guatemala, Honduras, Nicaragua, Paraguay, Peru, Romania and Uruguay. Venezuela terminated its BIT with the Netherlands.

³³ See Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>.

³⁴ See Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>.

³⁵ See Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>.

³⁶ See Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/45#iialInnerMenu>.

³⁷ See <https://globalarbitrationreview.com/article/1166677/ecuador-model-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.

³⁸ See <https://globalarbitrationreview.com/article/1159285/ecuador-begins-talks-over-new-bits>.

³⁹ See <https://www.gob.mx/shcp/prensa/comunicado-shcp-se-mexico-firma-convenio-sobre-arreglo-de-diferencias-relativas-a-inversiones-entre-estados-y-nacionales-de-otros-estados>.

⁴⁰ See <https://globalarbitrationreview.com/article/1152707/mexico-signs-icsid-convention>.

⁴¹ Nicolás Costábile, 'Argentina's Arbitration Legal Reform: Steps in the Right Direction?', Kluwer Arbitration Blog, November 1 2017, <http://arbitrationblog.kluwerarbitration.com/2017/11/01/booked-argentin-as-arbitration-legal-reform-steps-right-direction/>.

⁴² Peruvian Organic Law of Hydrocarbons, article 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, article 15.

⁴³ 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.

⁴⁴ CA Moran and A Carvallo, 'Pemex Contracting Regime After the Energy Reform', Oil, Gas & Energy Law Intelligence (2016), Vol 4, Issue 1, at 16.

⁴⁵ 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.

⁴⁶ Elisabeth Eljuri and Clovis Trevino, 'Energy Investment Disputes in Latin America: The Pursuit of Stability', 33, Berkeley Journal of International Law, 306 (2015), at 332.

⁴⁷ See <http://investmentpolicyhub.unctad.org/IIA/CountryBits/27>.

⁴⁸ See <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2016&location=BR&start=1997&view=chart>.

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- [52](#) See José Antonio Fichtner, Sergio Nelson Mannheimer and Andre Luis Monteiro, 'Arbitration involving State-owned Entities in Rio de Janeiro: We Cannot See the Wood for the Trees', Kluwer Arbitration Blog, May 2 2018, <http://arbitrationblog.kluwerarbitration.com/2018/05/02/arbitration-involving-state-owned-entities-riode-janeiro-brazil-cannot-see-wood-trees/>.
- [53](#) Law No. 9478 of 6 August 1997, article 43(X) and Law No. 12351 of 22 December 2010, article 29(XVIII).
- [54](#) Law No. 11079 of 30 December 2004, article 11(3).
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- [56](#) Venezuela Holdings BV and others v Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27) (ExxonMobil).
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- [58](#) Leonie Timmers and Vanessa Giraud, 'Payback Time: ICSID Adverse Awards Against Venezuela are Just the Tip of the Iceberg', Transnational Dispute Management (2016), Vol 13, Issue 5, at 12.
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- [62](#) Eduardo Silva Romero, 'Energy Investor-State Disputes in Latin America', in Maxi Scherer, International Arbitration in the Energy Sector (2018), Oxford University Press, at 305–306.
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⁶⁸ See Jaime Zaldumbide-Serrano, 'Windfall Profit Tax in Ecuadorian Petroleum Industry', *Transnational Dispute Management*, Vol 5, Issue 2 (2008).

⁶⁹ Executive Decree 662-2007, which introduced the amendment to the Implementing Regulation of Law 42-2006.

⁷⁰ Nigel Blackaby and Caroline Richard, 'Regulatory Change in Oil and Gas Arbitration: The Latin American Experience', in James M Gaitis (ed), *The Leading Practitioners' Guide to International Oil & Gas Arbitration* (2015), Juris Publishing, at pp 100–101. 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.

⁷¹ *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5.

⁷² *Perenco Ecuador Ltd v Republic of Ecuador*, ICSID Case No. ARB/08/6.

⁷³ *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/case-documents/italaw1094_0.pdf.

⁷⁴ *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, at para 123, available at https://www.italaw.com/sites/default/files/case-documents/italaw1094_0.pdf.

⁷⁵ See <http://ciarglobal.com/ecuador-pagara-379-millones-de-dolares-a-conocophilli-ps-por-el-arbitraje>. 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.

⁷⁶ *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>.

⁷⁷ *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 para 409, available at <https://www.italaw.com/sites/default/files/case-documents/italaw4003.pdf>.

⁷⁸ *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 442 and 710. Available at <https://www.italaw.com/sites/default/files/case-documents/italaw4003.pdf>.

⁷⁹ *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>.

⁸⁰ See <https://globalarbitrationreview.com/article/1035042/oxy-and-ecuador-settle>.

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⁸² See Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>.

⁸³ See <https://globalarbitrationreview.com/article/1036330/argentina-to-settle-more-treaty-awards>.

⁸⁴ See <https://globalarbitrationreview.com/article/1144742/argentina-and-total-settle>.

⁸⁵ *Repsol, SA and Repsol Butano, SA v Argentine Republic*, ICSID case ARB/12/38. See Elisabeth Eljuri and Clovis Trevino, 'Energy Investment Disputes in Latin America: The Pursuit of Stability', 33, *Berkeley Journal of International Law*, 306 (2015), at p 314.

⁸⁶ See www.reuters.com/article/us-repsol-argentina/spains-repsol-agrees-to-5-billion-settlement-with-argentina-over-ypf-idUSBREA101LJ20140225.

⁸⁷ Caroline Simson, 'ConocoPhillips Wins \$2B in Claim Against Venezuela Oil Co.' (2018), available at www.law360.com/internationalarbitration/articles/1037020/conocophillips-wins-2b-in-claim-against-venezuela-oil-co-?nl_pk=77d7c301-8c27-49f7-8fb7-cbaf2324ce14&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration.

⁸⁸ *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 para1163, available at

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[128](#) See KPMG, Taxes and Incentives for Renewable Energy (2015). See also International Renewable Energy Agency (2016), Renewable Energy Market Analysis: Latin America, at 68–69.



Claudio Salas
Nicolás Costábile

claudio.salas@wilmerhale.com
nicolas.costabile@wilmerhale.com

<https://www.wilmerhale.com/en>

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