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FEATURED Q&A

Have Cross-Border Disputes in Energy Risen Significantly?

Law firms have cautioned that the Covid-19 pandemic could lead to a wave of cross-border disputes, including in the energy sector. The International Center for Settlement of Investment Disputes is pictured above. // File Photo: World Bank.

Q: Attorneys at international law firms warned their clients last year that the Covid-19 pandemic and resulting recession could lead to a wave of cross-border commercial disputes, including in Latin America and the Caribbean's energy sector, amid unforeseen business disruptions. Has the situation turned out to be as bad as law firms cautioned, and are investor disputes likely to increase in the year ahead? To what extent have cases risen in the region's energy sector in particular, and why? What mechanisms are in place to handle cross-border commercial disputes, and how well will they be able to cope with the expected surge? What trends are emerging in international arbitration as hope builds for an end to the pandemic in the region by year-end?

A: Nigel Blackaby, member of the Energy Advisor board and partner and co-head of Freshfields' International Arbitration Group: "The pandemic has provided a unique set of challenges for international contracts and investment protection treaties that has given rise to a wave of new energy disputes, many of which are now in arbitration. On the commercial front, many disputes arose from the impact of Covid restrictions on the completion of major projects. The precise impact of public health measures on contract performance is under scrutiny. Tribunals are now analyzing the force majeure provisions of contracts to test whether suspensions or terminations were in fact justified. Some Latin American parties that signed contracts under common law systems are learning at their expense that unlike civil law systems,

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Colombia OKs Exxon Fracking Pilot Project

Colombia has given preliminary approval to ExxonMobil's plans to develop a fracking pilot project in the Andean nation's Valle Medio del Magdalena basin.

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Firms to Launch Solar Energy Program in Barranquilla

Two different sets of companies have been selected in an initiative to help the Colombian city of Barranquilla implement a three-phase solar energy program.

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USTR Expresses 'Concern' Over AMLO Measures

The office of the U.S. Trade Representative expressed concern over recent moves by Mexican President Andrés Manuel López Obrador to roll back energy reforms that opened up the sector to private and foreign investment.

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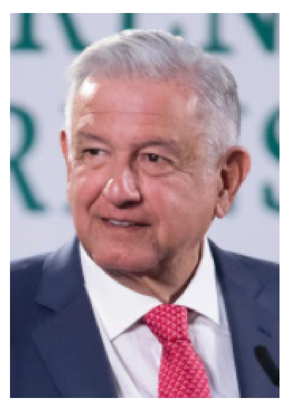

López Obrador // File Photo: Mexican Government.

OIL AND GAS NEWS

Colombia Approves ExxonMobil's Pilot Project for Fracking

Colombia has given preliminary approval to ExxonMobil's plan to develop a pilot project intended to kickstart fracking efforts in the country's Valle Medio del Magdalena basin, the oil company said last week, Reuters reported. While the final contract has not yet been signed, the project is expected to bring nearly $53 million in investment, Colombia's National Hydrocarbons Agency said. "We are pleased with the agency's evaluation," ExxonMobil spokesman Todd Spitler told Reuters in an email. While commercial development of non-conventional energy deposits such as fracking for gas and coal is not authorized in Colombia, the country's highest administrative court has permitted fracking pilot projects that seek to gather scientific information, which will then be used to advise future decisions regarding the commercial development of the activity. Exxon will become the second company to carry out fracking projects in Colombia, after state-owned oil company Ecopetrol. However, while energy companies argue that fracking has economic benefits and will help Colombia become energy independent, activists and civil society groups warn that it will harm the environment and local communities. [Editor's note: See related **Q&A** on Colombia's oil and gas sector in the Feb. 5 issue of the Energy Advisor.]

USTR 'Concerned' About Investment Climate in Mexico

The United States is concerned that Mexican President Andrés Manuel López Obrador's recent efforts to reform Mexico's energy sector have created an unsuitable climate for U.S. energy investors, said the Office of the United States Trade Representative, or USTR, Reuters reported last week. In its annual report, the USTR noted that throughout 2020, U.S. energy companies expressed concern about several aspects of Mexico's investment climate, including discriminatory enforcement of regulations and lack of notice for regulatory and policy changes. "The United States has raised concerns with Mexico regarding the deteriorating climate for U.S. energy investors in Mexico," said the USTR report, which was published on March 31. The report also said "the U.S. Government is committed to ensuring that U.S. investors are treated fairly and that Mexico adheres to its USMCA commitments," Reuters reported. U.S. companies are also wary about extended delays on permit approvals for retail fuel stations and efforts by Mexican state oil firm Pemex to seize operational control of a crude oil deposit that a consortium led by U.S. company Talos discovered in 2017. The proposed changes to Mexico's energy sector are part of a broader effort by López Obrador to roll back the country's 2013 energy reforms, which opened the state's energy sector to foreign and private investors. The president has long criticized the reforms. His efforts have drawn criticism from Canada, the United States and other European countries and investors. "By pausing the renewable energy auctions and pausing the oil auctions, the president has basically given a 'stay away' signal to foreign investment in the energy sector," David Goldwyn, chairman of the Atlantic Council Global Energy Center's Energy Advisory Board, told Natural Gas Intelligence's Mexico Gas Price Index. López Obrador's recent policy decisions have "put into question Mexico's adherence to the rule of law and the integrity of the regulatory system, which raises above-ground risk considerably," he added.

> **"The United States has raised concerns with Mexico regarding the deteriorating climate for U.S. energy investors in Mexico."**
>
> **— U.S. Trade Representative**

NEWS BRIEFS

Canada's Parex Launches Geothermal Plant in Colombia's Casanare

Canadian oil and gas company Parex Resources launched a pilot geothermal power generation unit in Colombia's Casanare department in conjunction with the National University of Colombia and the Colombian Ministry of Mines and Energy, Renewables Now reported last week. The plant will produce hydrocarbons and approximately 100 kilowatts of electrical power from geothermal resources, the energy ministry said in a statement. The plant will also generate up to 72,000 kilowatt-hours of electrical energy, or the equivalent to the average monthly consumption of about 480 families.

VINCI Acquires ACS Energy Unit for $5.75 Bn

France-based construction firm VINCI said last week it will spend $5.75 billion to acquire the energy business of Spanish rival ACS. The deal involves ACS Industrial Services' contracting business, which has a work force of around 45,000 employees and a heavy footprint in Spain, Mexico, Brazil, Peru and Chile. Over the past three years, the unit's average revenues exceeded 6 billion euros ($7.05 billion). In a statement, VINCI said it will focus on electricity transmission projects and renewables development.

Russia Signs Energy Deals With Venezuela

During a visit to Caracas last week, a Russian delegation led by Deputy Prime Minister Yuri Ivanovich Borisov signed 12 agreements, including in relation to energy, financial services, transportation and other areas, Argus Media reported. Among the firms that were part of the Russian delegation was Rostec, the country's state advanced technology company, which is reportedly working with Venezuela to apply its technology to the Andean nation's oil industry.

Ex-Gunvor Official Pleads Guilty in Petroecuador Case

A former representative of Gunvor, one of the world's largest commodities trading houses, on Tuesday pleaded guilty to helping channel more than $22 million in bribes to high-level officials in Ecuador in exchange for securing contracts with state-run oil firm Petroecuador, the Associated Press reported. As part of his plea deal in Brooklyn federal court, Raymond Kohut agreed to pay $2.2 million in forfeiture of funds he received from the bribery scheme, which occurred between at least 2012 and August of last year. Kohut, 68, a Canadian citizen who lives primarily in Panama and the Bahamas, is facing as many as 20 years in prison for his role in the scheme. Switzerland-based Gunvor said it was cooperating with the U.S. Justice Department in connection with the case. Kohut said in court that he worked with two of his supervisor at Gunvor as well as two independent consultants in the money laundering scheme, The Wall Street Journal reported. The scheme involved Petroecuador and two state-owned oil and gas companies in Asia, according to court documents. The Asian firms allegedly provided loans to the Ecuadorean company secured by oil to be delivered over a period of years, and Gunvor had deals with the Asian firms to market and sell the oil products that Petroecuador supplied. A lawyer for Petroecuador declined the newspaper's request for comment.

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there is no general principle of force majeure and that all depends on the terms negotiated. The pandemic has also provided a convenient pretext for some parties that would likely have been in default in any event, including the termination of expensive PPAs for electricity that is no longer needed. Similarly, the impact on oil prices will likely lead to the shelving of high-cost projects (particularly nonconventional projects) with possible arbitration ensuing. On the investment arbitration front, investors have been rightly cautious about challenging genuine public health measures. However, several governments in the region have sought to advance pre-existing policies under cover of the crisis. We have seen this in the attempted restructuring of the electricity sector in Mexico, where early measures were justified on alleged security of supply concerns linked to Covid. Similarly, Covid has been invoked with regard to possible pension reform in Colombia, Peru and Chile. In other cases, governments facing dwindling tax income—such as Argentina—are seeking to revert subsidized investment programs (for nonconventional projects) or to increase fiscal pressure on existing investors with long-term sunk investments. These kinds of measures, if adopted or applied arbitrarily, may give rise to violations of international treaties which were designed, precisely, to protect investors against this type of opportunistic behavior on the part of states."

A **Christina P. Maccio, partner, first-chair trial lawyer and leading litigator and leading disputes lawyer for the energy sector at Orrick, Herrington & Sutcliffe LLP:** "Without doubt, 2020 presented unprecedented challenges for the energy sector. Prior to lockdowns, the industry was experiencing an oversupply of oil. With the lockdowns, demand collapsed, projects were halted or rolled back, and disputes lawyers around the world saw the proverbial writing on the wall. While many international arbitration institutions, such as ICSID, the ICC and the LCIA reported record years of new case filings in 2020, those filings appear to be related to disputes that arose before the pandemic. It may be too early to say definitively whether there will be a notable increase of cases triggered by Covid-19-related business and economic interruptions. That said, 2021 promises to be an active year for investor disputes arising out of Latin America. In Mexico, President López Obra-

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"2021 promises to be an active year for investor disputes arising out of Latin America."
— Christina P. Maccio

RENEWABLES NEWS

Several Firms to Launch Solar Power Program in Colombia

Two different sets of companies have been selected to help the city of Barranquilla, in Colombia's Atlántico department, implement a three-phase solar energy program that will power public entities and services as part of a broader sustainability initiative called Biodivercity, Renewables Now reported Monday. The first set, consisting of Chicago-based Hecate Energy LLC and Sweden's ReCap Solar Colombia, will develop, finance, build and operate a solar power plant of as much as approximately 150 megawatts, the Barranquilla city council said, Renewables Now reported. The second set, including Singapore-based Entoria Energy Colombia and Colombia's Empresa Energía de Pereira, will focus on more small-scale projects, such as installing rooftop solar power systems on hospitals, schools and sports venues. Phase one of the solar energy program includes hooking up the city hall and all other public buildings to solar self-generation systems, while phases two and three involve generating electricity and selling it to the country's National Interconnected System. The Biodivercity initiative aims to integrate Colombia's natural resources into the urban sector, as well as promote conservation and restoration efforts of the country's ecosystems, among other goals. [Editor's note: See related Q&A in the Dec. 4 issue of the Energy Advisor.]

Honeywell to Provide Tech to Biofuels Refinery in Paraguay

U.S.-based Honeywell announced Monday that Brazil's ECB Group will use its "UOP ecofining" technology to process vegetable oils and inedible animal fats into renewable diesel and aviation jet fuel at its Omega Green production center near Asunción, in Paraguay. This is the first advanced biofuels project in Paraguay, in addition to being the biggest private investment in the country's history, according to the report. Honeywell UOP will provide technology and engineering services for the refining project. The aim of the project is to minimize fossil carbon dioxide emissions by using renewable liquefied natural gas and naphtha produced in the UOP Ecofining unit to self-sustain the process in energy and hydrogen, the statement added. The Omega Green project is expected to produce as many as 20,000 barrels per day of renewable diesel and jet fuel once it begins operations, and it is expected to create more than 3,000 jobs during construction and another 2,400 direct and indirect jobs when operational. "As demand for diesel and jet fuel continues to grow globally, it is a major milestone to have the first biorefinery in South America which can help meet this demand with renewable domestic resources," said Ben Owens, vice president and general manager of Honeywell Sustainable Technology Solutions. "Our renewable fuels technologies are a proven solution to that, helping Paraguay become a leading supplier of biofuels." Latin America can play central in the production of biofuels, including sustainable aviation fuels, "given the region's vast agricultural resources and efforts to-date to develop the industry," Cecilia Aguillón, director of the energy transition initiative at the Institute of the Americas, told the Energy Advisor in a Q&A published Nov. 6. "However, a concerted effort from governments, investors and oil companies would be needed to accelerate production and reduce costs," she added. Among countries with potential in the sustainable aviation fuel market are countries with national oil companies that could use their refineries to produce fuels, Aguillón said.

> **"As demand for diesel and jet fuel continues to grow globally, it is a major milestone to have the first biorefinery in South America..."**
>
> **— Ben Owens**

ADVISOR Q&A

Is Chile's Piñera Doing Enough to Defeat Covid-19?

Q Chilean President Sebastián Piñera on March 22 announced new emergency spending measures worth $6 billion, or about 2 percent of GDP, to respond to the country's most severe wave of Covid-19 infections since the pandemic began. The emergency plan, which would bring the government's total Covid spending to $18 billion, includes additional aid for families under mandated lockdowns, new job subsidies and increased unemployment insurance. Why is Chile seeing a surge in Covid-19 cases despite having the region's most successful vaccination program? How effective have Piñera's actions been in mitigating the pandemic's economic impact so far, and how significant are the latest emergency measures? To what extent is Piñera's response to the pandemic influencing political dynamics in Chile ahead of local elections in May and a presidential vote scheduled for November?

A Michael Albertus, associate professor in the Department of Political Science at the University of Chicago: "Chile's brutal second Covid wave illustrates how no country or region will be entirely out of the woods until herd immunity is close or reached. Despite rapid and laudable progress on vaccination rollout, cases in Chile are on the rise due to factors including summer travel, young people bucking public health guidelines and the spread of more contagious variants. Much of the country is back under strict lockdown as a result. Like all countries in the region, Covid has slammed the Chilean economy, causing a sharp economic contraction. But Chile has not fallen as far as some other countries in the region. Part of this is due to Piñera's fairly robust fiscal interventions to protect many Chileans from the pandemic's worst economic consequences and to stimulate the economy. Another part is due to luck, such as stable metal prices, on which the Chilean economy is relatively dependent. Chile's economy is now predicted to go on a tear in 2021, more than compensating for last year's contraction. The economy will likely lap many of its peers. That outlook is boosted by the rosier long-term picture of a population that is moving toward very high vaccination coverage in the coming months. Recent polls suggest that Piñera's approval ratings are on the rise. This is true across the political spectrum. While his ratings are still dismal overall, this could sap some of the political support from the opposition. If Piñera delivers big on vaccination in the coming months, as anticipated, it could shake up the presidential race, boosting the right."

EDITOR'S NOTE: More commentary on this topic appears in the Q&A of Tuesday's issue of the Latin America Advisor.

NEWS BRIEFS

Piñera Enacts Law to Delay Election Until May

Chilean President Sebastián Piñera on Tuesday enacted a law to delay by five weeks an election to select a commission that will rewrite the country's dictatorship-era constitution, as well as local elections, as Covid-19 cases surge, Agence France-Presse reported. The votes, which were originally scheduled for this Sunday, will now be held on May 15 or 16. Chile has recently seen rising numbers of Covid-19 cases despite having the region's most successful vaccination program. [Editor's note: See related **Q&A** in Tuesday's issue of the daily Latin America Advisor.]

Trinidad & Tobago's Prime Minister Tests Positive for Covid-19

Trinidad and Tobago Prime Minister Keith Rowley's office announced Tuesday that he has tested positive for Covid-19, the Associated Press reported. Rowley had experienced flu-like symptoms the previous day, the statement said. He is currently in isolation and under medical supervision, officials said, without providing further detail. Rowley was scheduled to be vaccinated on Tuesday, the day he tested positive. The Caribbean nation of 1.2 million people has reported more than 8,000 cases and 145 deaths from the novel coronavirus.

Argentina Benefiting From Higher Food Prices: IMF Chief Economist

Argentina's economy is benefiting from higher world prices for food, among its main exports, the International Monetary Fund's chief economist, Gita Gopinath, said Tuesday, Reuters reported. Gopinath added that Mexico and Canada will also benefit from the $1.9 trillion U.S. Covid-19 relief package. [Editor's note: See related **Q&A** in the March 31 issue of the daily Latin America Advisor.]

POLITICAL NEWS

Brazil Replaces Leaders of Federal Police Forces

Brazil's new justice minister, Anderson Torres, on Tuesday replaced the leaders of the federal police force and federal highway police with officials who have the support of President Jair Bolsonaro, Reuters reported. Paulo Maiurino will replace Rolando de Souza as head of the federal police, and Silvinei Vasques will replace Eduardo Aggio as leader of the federal highway police, Torres said on Twitter. Torres, whom Bolsonaro tapped last week as attorney general, was among the most prominent officials in a major cabinet shake-up. He is reportedly close to Bolsonaro's family, and the appointments come as Bolsonaro's critics raise concerns that the president is seeking to control federal police investigations into his family and other supporters, the wire service reported. The president's critics also say Bolsonaro is seeking to increase his support among the state police forces ahead of next years presidential election. "Changes are natural," Bolsonaro said Tuesday at Torres' swearing-in ceremony. "We know that all the changes you will make in your ministry are to better arrange it for its objective. You want the Ministry of Justice as focused as possible for the good of everyone in our country." Bolsonaro has previously been accused of seeking to interfere with federal police investigations. Tuesday's changes came as Brazil recorded its single deadliest day yet during the Covid-19 pandemic as the P.1 variant ravages much of the country. Brazil shattered its one-day record, announcing 4,195 deaths from the disease in the previous 24 hours, according to the Health Ministry, CNN reported. Since the pandemic began, Brazil has recorded more than 13.1 million cases of the disease and more than 340,000 deaths, according to Johns Hopkins University. Only the United States, which has more than 30.9 million recorded cases and more than 559,000 recorded deaths, has more. [Editor's note: See related **Q&A** in Wednesday's issue of the daily Latin America Advisor.]

Arauz Would Renegotiate IMF Deal if Elected in Ecuador

Leftist presidential candidate Andrés Arauz said he would renegotiate Ecuador's agreement with the International Monetary Fund if elected on Sunday, when he is to face conservative banker Guillermo Lasso in the country's runoff vote, Agence France-Presse reported Thursday. Arauz, 36, told AFP that he wants to renegotiate the country's $6.5 billion debt with the IMF, as well as modify anti-narcotics agreements Ecuador has with the United States. However, he added, "we're not going to declare a moratorium against the IMF." In potential renegotiations, Arauz said he would seek a slower reduction in public spending and insist on the maintenance of the U.S. dollar as Ecuador's currency "so there's greater economic activity." The anti-drug agreements he cited allow the United States to conduct operations against drug trafficking and illegal fishing in Ecuadorean territory. The latest polls show Arauz and Lasso neck-and-neck ahead of Sunday's runoff, with Lasso edging closer to reduce Arauz's initial lead, El País reported. [Editor's note: See related **Q&A** in the Feb. 9 issue of the daily Latin America Advisor.]

ECONOMIC NEWS

Colombia Needs Tax Reform For Fiscal Sustainability: Gov't

Colombia will not be fiscally sustainable in the medium term without a government-backed tax reform, Finance Minister Alberto Carrasquilla said on Wednesday, Reuters reported. The government's plan, which it submitted to Congress, aims to raise the equivalent of 2.2 percent of GDP, or about $7.1 billion, Carrasquilla said. The country's fiscal deficit surged to 7.8 percent of GDP last year given increases in expenditure to fight the Covid-19 pandemic.

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dor's determination to fundamentally change the laws governing the energy industry—reforms that his predecessor advanced to spur private investment in the country—has many investors concerned. Peru is involved in at least 15 cases before ICSID, including a recent claim filed by Spain's Telefónica over tax treatment. Argentina's electricity market administrator, Compañía Administradora del Mercado Mayorista Eléctrico (Cammesa), is now embroiled in its third arbitration before the Permanent Court of Arbitration, in a case brought by a renewables investor. This is but a small sampling of infrastructure- and energy-related disputes on the horizon for the region. Last year, to manage the logistical realities imposed by the pandemic, arbitration institutions adopted new technologies, including electronic filing systems and remote hearings, as well as new rules to build efficiencies into proceedings. This framework should serve parties well in what is shaping up to be a very busy year for international arbitration."

A **María Teresa Borja, director of litigation and international arbitration at Robalino Law:** "The situation has not been as serious as forecasted. There are more arbitrations than in past years. However, it is impossible to define whether this increase responds directly to the pandemic's effects or whether it is consistent with the growing trend in arbitration cases in the past. In fact, energy- and construction-related cases accounted for 40 percent of the ICC's cases, a trend that is likely to continue, as well as an increase in cases involving states, as has already been happening. Additionally, commenting on the effects of the pandemic in arbitration is premature, as the full consequences will not be known until next year for at least these reasons: 1.) investors have been skeptical of suing the state during a health crisis of this magnitude, 2.) the effect of force majeure amid the pandemic is not clear, which has made it difficult to build a litigious strategy and 3.) if there are disputes as a result of the pandemic, it is too early to know whether a case will actually take place (that is, many may still be in the process of cooling off or in negotiations), among others. Likewise, the pandemic has highlighted existing problems in Latin America: economic crises, socioeconomic problems and lack of institutionalization. Thus, arbitrations will not necessarily come from the effects of the pandemic, but rather from the region's established political and economic problems. Still, it is undeniable, and it can already be evidenced though not so much in the energy sector, that there will be two major types of disputes: those initiated by investors as a result of government decisions taken to face the pandemic, and breaches of contracts. In both cases, the main issue will be reduced to weighing rights against force majeure. What is revolutionizing the arbitration world is the application of technology in arbitration processes as a result of the pandemic. This will likely make arbitrations a better option, economically, which will undoubtedly increase access to them."

> **"What is revolutionizing the arbitration world is the application of technology..."**
> **— María Teresa Borja**

The Advisor welcomes comments on its Q&A section. Readers can write editor Gene Kuleta at **gkuleta@thedialogue.org**.

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Subscription inquiries are welcomed at
ebrand@thedialogue.org

