CHAPTER 8

Regulatory Change in Oil and Gas Arbitration: The Latin American Experience

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§ 8.01 Introduction

“There is nothing permanent except change”. Heraclitus’ aphorism aptly describes the experience of oil and gas investors in several Latin American jurisdictions. While reliance upon the stability of laws and regulations is inevitably a gamble for foreign investors everywhere, in no other industry are the stakes as high.

The oil and gas industry is one of the most heavily regulated industries in the world. Investments in the sector are characterized by significant upfront investments that may bear large rewards or incur huge losses. Investments that have borne fruit are vulnerable to regulatory change and other forms of political risk (lawful and unlawful), particularly at times of rising energy prices as states seek to claw back a greater share of the spoils than they originally negotiated or legislated.

The decision to invest in an oil or gas project is premised on a careful calculation of risk and return based on the regulatory and contractual framework governing the investment. These frameworks include rules governing the applicable royalties, taxes, and environmental standards. The stability of those frameworks is key to both attracting investments and ensuring they remain viable. Regulatory changes can transform viable investments into losing propositions. When changes occur after the investment costs have been incurred but before they have been recouped, investors can sustain sizeable losses.

For these reasons, state commitments to maintain the stability of regulatory and fiscal frameworks are typically made or required at the time that investments are made. If these commitments are broken by changes to the regulatory frameworks during the life of the investment, investors may seek redress through claims against the host state of the investment either under contract or under investment treaties, where available. We have seen such claims emerge from a series of regulatory changes made in four Latin American jurisdictions – Bolivia, Venezuela, Ecuador and Argentina. Before turning to those case studies, however, we first describe the strategies that can be employed to mitigate the risks posed by potential regulatory changes at the outset of an investment.

§ 8.02 Mitigating the risks posed by regulatory change

There are several ways to mitigate the risks associated with regulatory change at the outset of an investment. Political risk insurance is an obvious option but because of its cost and
coverage limitations, it is often considered a last resort for investors, particularly for international oil and gas companies whose diversified exploration and production projects serve as an in-built political risk diversification strategy.

A more common means of mitigating risk is to seek commitments from states and state-owned enterprises as to the stability of the contractual and regulatory frameworks governing the investment. These commitments are often set out in contractual provisions entered into by states or state-owned companies with investors, such as stabilization clauses. These clauses can take several forms. There is a common misconception that states bind themselves not to change the regulatory framework through stabilization clauses, which thus act as a restraint on the sovereign’s power to legislate. However, in the vast majority of cases, stabilization clauses simply guarantee to the investor that any such changes will be “neutralized” from an economic perspective. For instance, the clauses established in some Ecuadorian Production Sharing Contracts provide that in the event that a change in the applicable fiscal regime were to affect the economics of the project, the economic equilibrium of the project would be restored by a corresponding increase in the production share. Less common in Latin America are clauses freezing existing regulations in time, incorporating them by reference into the contract and specifying that any regulatory changes adversely affecting the project will not affect the contractor’s rights.

Stabilization commitments can also be contained in the regulatory framework enacted by the state, as was the case in the Argentine gas sector where the applicable regulations provided that tariffs would be set at a level sufficient to cover the costs and earn a reasonable rate of return, and would be regularly reviewed to ensure their sufficiency.

Successfully enforcing such stabilization commitments under contract or under domestic law will depend on the dispute resolution mechanisms available. Seeking remedies in the courts of a host state for regulatory changes the state has enacted can raise multiple challenges; commercial arbitration in a neutral venue is usually preferred by investors, though not always available.

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Where the impact of the regulatory change is to effectively destroy the stabilization protection, a treaty claim may be possible. Treaties permit investors to seek compensation for regulatory changes that effectively nullify their contractual commitments or their legitimate expectations, or are expropriatory in nature by depriving the investment of its value. Remedies such as specific performance through the reversal of regulatory changes are highly unlikely to be obtained and would in any event be effectively unenforceable. Nevertheless, in urgent circumstances where regulatory changes pose a risk of irreparable harm, investors can seek interim or provisional measures. In one example, the investor City Oriente was successful in obtaining interim measures against Ecuador that prevented it from enforcing a new “extraordinary revenues” measure that required additional payments to be made to the state.

Treaty structuring for the purpose of gaining access to investment treaty arbitration is considered legitimate, although it should be completed before the relevant regulatory changes take place. For example, the restructuring by ExxonMobil of its investments in Venezuela through a Dutch subsidiary to gain the protection of the Netherlands-Venezuela bilateral investment treaty (“BIT”) was legitimate in relation to measures that occurred after the restructuring, but jurisdiction was denied in relation to certain fiscal changes enacted before such restructuring took place.

Even where a treaty is in place before the measures occur, it should be reviewed for any exception that may carve out taxation measures from some of its protective standards. A typical tax exception provision will carve out taxation measures for most protections except expropriation. The interpretation of tax exceptions by tribunals has varied greatly. However,

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10 The Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Aug. 27, 1993, U.S. TREATY DOC. NO. 103-15 (entered into force May 11, 1997) (the “US-Ecuador BIT”), provides at Article X that: “1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party. 2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article III; (b) transfers, pursuant to Article IV; or (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a
states may seek to “disguise” adverse measures against foreign investors as tax measures in order to seek to benefit from the carve-out. Tribunals have tended to look beyond the mere labeling of measures in order to assess whether they are real taxation measures. A tax law has been defined by one tribunal as one that imposes a liability on defined classes of persons to pay money to the state for public purposes.\(^\text{11}\)

Regulatory changes can give rise to several compensable treaty breaches, principally breaches of provisions regarding expropriation, fair and equitable treatment, as well as the observance of obligations relating to investments.

Establishing that regulatory changes have resulted in an expropriation (usually a constructive or indirect expropriation) can be a difficult proposition given the high threshold tests adopted by tribunals. An investor will need to show that the regulatory change has resulted in a substantial deprivation of the value of its investment, such that the investment has become unviable or worthless, or a loss of control and enjoyment of the investment has occurred.\(^\text{12}\)

The difficulty of establishing an expropriation as a result of regulatory change where the title remains with the investor is illustrated by the case of CMS v. Argentina where the tribunal found that no expropriation had taken place even though regulatory changes affecting the gas transportation sector resulted in a near total loss in value of the investment.\(^\text{13}\) Short of a direct seizure of an investment or destruction of contractual rights – as happened in Venezuela, Bolivia and Ecuador in the mid-2000s when oil investments were expropriated or in 2012 when Argentina directly seized control over YPF – tribunals are reluctant to conclude that there has been an expropriation and have tended to prefer a finding of a breach of the fair and equitable treatment standard.

In that context, several tribunals have found that regulatory changes have given rise to breaches of investment treaties’ fair and equitable treatment provisions where it has been established that the changes frustrated the legitimate investment-backed expectations of the investor, or were unreasonable and discriminatory in their application. Contractual commitments are typically heavily relied upon in this regard, as is domestic legislation where it can be shown that it was designed to attract the investment and was subsequently dismantled.\(^\text{14}\) Tribunals have generally found that in the absence of specific promises to the foreign investor, changes to general legislation which was not designed specifically to attract the investment reflect a

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\(^\text{11}\) See EnCana Corporation v. Ecuador, LCIA Case No. UN3481, Award, ¶¶142-143, 147, 152 (Feb. 3, 2006).

\(^\text{12}\) For instance, see Total SA v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 195 (Dec. 27, 2010), where the tribunal held that, other than a loss of control over an investment, an indirect expropriation will occur only where there is “a total loss of value of the property such as when the property affected is rendered worthless by the measures, as in the case of direct expropriation, even if formal title continues to be held.”

\(^\text{13}\) CMS Gas Transmission Co. v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, ¶¶ 260-264 (May 12, 2005).

\(^\text{14}\) Id.
legitimate exercise of the host state’s governmental powers, and are not a breach of the fair and equitable treatment standard.

Finally, investors can also seek to enforce contractual commitments, such as stabilization clauses, through treaty clauses requiring host states to observe obligations entered into with respect to investments, commonly known as “umbrella clauses”. This can be an attractive option where enforcing those rights directly under the contract is fraught with difficulty given the dispute resolution options available. The success of an umbrella clause claim will likely depend on the particular language of the clause and there has been reticence to apply the clause where the investor is not a party to the contract it is seeking to enforce, as was the case in the annulment decision in CMS v. Argentina.

The risks posed by regulatory change in the oil and gas industry, and the mitigation strategies and remedies available to investors, are best understood by studying the experiences of investors in Latin American countries that have been rocked by profound political and legislative changes giving rise to multiple investor-state disputes. We turn to these now.

§ 8.03 Case Studies

[1] Countries Analyzed

Four countries in Latin America have been the principal target of international arbitrations arising out of regulatory changes in the oil and gas industry, namely Argentina, Bolivia, Ecuador and Venezuela. The history of regulatory change in the oil and gas industry in these four jurisdictions bear significant similarities, including (1) the adoption of liberalization and privatization policies in the 1990s at a time when they were seeking to stimulate foreign investment in the hydrocarbon sector and (2) the subsequent resurgence of resource nationalism and reassertion of government control over oil and gas resources coinciding with the steep rise in oil prices from 2002 onwards.

We examine the nature and scope of the regulatory changes that took place in each country’s oil and gas sector, and the outcome of the resulting arbitration claims in the sections below.

[2] Venezuela

In 1975, Venezuela nationalized its hydrocarbons sector, terminating oil concessions held by private companies and expropriating their assets. For the next 15 years, the state-owned oil company, Petroleos de Venezuela, S.A. (“PDVSA”), carried out activities in the Venezuelan oil industry without the participation of private companies. By the early 1990s, PDVSA was unable

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15 See, e.g., Total SA v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 164 (Dec. 27, 2010).
16 CMS Gas Transmission Co. v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, ¶ 299-303 (May 12, 2005); and subsequent Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, ¶¶ 89-100 (Sept. 25, 2007).
Effectively to explore new areas and market its reserves because of a lack of technology and financing. Venezuela therefore enacted a series of measures to enable and attract foreign companies to invest in its oil industry and to conclude Association Agreements (amongst other types of contract) with PDVSA’s subsidiaries. This was known as the *Apertura Petrolera*, or “Oil Opening”.

Economic incentives were introduced to attract investment in order to develop Venezuela’s extra-heavy oil reservoirs in the Orinoco Oil Belt and explore new fields containing light and medium crude reserves. Economic incentives were introduced to attract investment in order to develop Venezuela’s extra-heavy oil reservoirs in the Orinoco Oil Belt and explore new fields containing light and medium crude reserves. First, Venezuela amended its Income Tax Law to provide that income arising from new exploitation and refining of heavy and extra heavy crude oil under association agreements would be subject to the general corporate tax rate (then 30%, later increased to 34%) instead of the rate applicable to other oil activities (then 67.7%). Second, Royalty Reduction Agreements were concluded to reduce the royalty rate for heavy crude to 1% for the first nine years of production and 16 2/3% thereafter.

At the same time, Venezuela ratified the ICSID Convention (in 1993) and concluded BITs with several countries including the Netherlands (in 1991), the United Kingdom (in 1995), Spain (in 1995), Germany (in 1996), Canada (in 1996) and France (in 2001), but not with the United States (as discussed further below). Venezuela also enacted an Investment Law in 1999 which set out protections which mirrored those in investment treaties.

PDVSA and its subsidiaries entered into Association Agreements with several major oil companies, maintaining a minority share in each of the joint ventures thus formed. The Association Agreements provided that title to the oil produced vested in the participants at the wellhead, in proportion to their respective interests. They contained clauses providing for compensation in the event that the state enacted discriminatory measures – described as including regulatory changes not generally applicable to other similar projects – and provided for arbitration before the ICC in the event of a dispute.

In the years following the election of President Hugo Chavez, the regulatory framework designed during the Oil Opening was dismantled. A new Hydrocarbons Law was enacted in 2001 reserving oil production activities to the state. Under that law, private parties would only be authorized to participate in new oil production activities through mixed enterprises in which the state held a majority stake. The law also provided that oil produced would have to be sold to PDVSA or another state-owned company, and that the royalty rate would be 30%. While the Chavez government initially gave assurances that Association Agreements pre-existing the new

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20 Decreto con Rango y Fueza de Ley de Promoción y Protección de Inversiones [Investment Law], Oct. 3, 1999 (Venez.).

21 *ConocoPhillips ICSID Decision*, supra note 18, ¶¶ 106-182; Exxon ICSID Award, supra note 9, ¶¶ 46-85.

22 *ConocoPhillips ICSID Decision*, supra note 18, ¶ 188; Exxon ICSID Award, supra note 9, ¶ 88.
Hydrocarbons Law would be respected, these assurances were later withdrawn.\textsuperscript{23} The Royalty Reduction Agreements were unilaterally terminated and an additional royalty in the form of an “extraction tax” was imposed in 2006, increasing the effective royalty rate for extra-heavy oil projects to over 30%.\textsuperscript{24} Moreover, the reduced income tax rate was abrogated in 2006 and the income tax rate for extra-heavy oil projects increased from 34% to 50% effective January 2007.\textsuperscript{25}

Between mid-2005 and late 2006, ExxonMobil and ConocoPhillips restructured their investments in Venezuela through the Netherlands, so as to gain the protection of the Netherlands-Venezuela BIT.\textsuperscript{26}

In January 2007, President Chavez announced that all of the Association Agreements that had been operating outside the framework of the 2001 Hydrocarbons Law would be subjected to it and nationalized. In February 2007, he issued Decree No. 5200 ordering that existing Association Agreements be “migrated” into mixed companies under the 2001 Hydrocarbons Law in which PDVSA or its subsidiaries would hold at least a 60% interest.\textsuperscript{27} Private companies were given four months to negotiate the terms of the nationalization.

After difficult negotiations, several companies agreed to migrate into the new mixed companies, including BP, Chevron, Total, Statoil and Sinop.\textsuperscript{28} Others did not, including ENI, ConocoPhillips and ExxonMobil and launched investment treaty claims before ICSID under the Netherlands-Venezuela BIT in 2007.

In April 2007, just two months after the filing of ENI’s ICSID claim, Venezuela indicated that it would withdraw from the ICSID Convention\textsuperscript{29} (Venezuela ultimately only did so in 2012\textsuperscript{30}). Within a year, Venezuela terminated its BIT with the Netherlands,\textsuperscript{31} which had no

\textsuperscript{23} ConocoPhillips ICSID Decision, supra note 18, ¶ 189; Exxon ICSID Award, supra note 9, ¶ 88.

\textsuperscript{24} ConocoPhillips ICSID Decision, supra note 18, ¶¶ 190-195; Exxon ICSID Award, supra note 9, ¶¶ 90-96.

\textsuperscript{25} ConocoPhillips ICSID Decision, supra note 18, ¶ 196; Exxon ICSID Award, supra note 9, ¶ 98-99.

\textsuperscript{26} Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Venezuela and the Kingdom of the Netherlands, Oct. 22, 1991 (entered into effect on Nov. 1, 1993). The restructuring of ExxonMobil’s investments through a Dutch entity occurred from October 2005 to November 2006, see Exxon ICSID Award, supra note 9, ¶ 186; ConocoPhillips restructured its investments through Dutch entities incorporated in July 2005 and July 2006, see ConocoPhillips ICSID Decision, supra note 18, ¶ 276.

\textsuperscript{27} Decree Law No. 5200, Feb. 26, 2007 (Venez.). ConocoPhillips ICSID Decision, ¶¶ 199-204; Exxon ICSID Award, ¶¶ 106-110.

\textsuperscript{28} See Exxon ICSID Award, supra note 9, ¶ 297.

\textsuperscript{29} This was done during the fifth Summit of ALBA (the “Bolivarian Alliance for the Americas” or “Alianza Bolivariana los para Pueblos de Nuestra America”, previously known as the “Alternativa Bolivariana para los Pueblos de Nuestra America”) in Venezuela on April 29, 2007; ALBA countries (whose principal members are Venezuela, Bolivia, Cuba, Nicaragua and Ecuador) indicated their intention to withdraw from and denounce the ICSID Convention. See ALBA press release, Alternativa Bolivariana [Bolivarian Alternative] (Apr. 30, 2007), http://www.alternativabolivariana.org/ (last visited Jan. 12, 2017).


\textsuperscript{31} Venezuela formally notified the Netherlands of its intention to terminate the treaty as of November 1, 2008 through a formal communication dated April 30, 2008. There is a fifteen year survival clause in relation to pre-existing investments at Art. 14(3). Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Venezuela and the Kingdom of the Netherlands, Venez.-Neth., Oct. 22, 1991 (entered into effect on Nov. 1, 1993).
impact on pending claims (or on subsequent claims relating to pre-existing investments thanks to the BIT’s “sunset clause”\textsuperscript{32}).

ENI settled its claim over the 2006 seizure of its Dacion field in 2008, receiving cash payments of US$700 million as well as a participation in a different project.\textsuperscript{33} ConocoPhillips and ExxonMobil also sought to negotiate with Venezuela – these negotiations were described at length by the ICSID tribunals that considered their investment treaty claims – but were unable to reach a settlement. Both pursued claims not only under the Netherlands-Venezuela BIT, but also under their Association Agreements and the Venezuelan Investment Law.

A subsidiary of ExxonMobil brought an ICC arbitration against PDVSA under the indemnity clause in its Association Agreement, which provided protection against discriminatory measures, including expropriation. The tribunal ordered PDVSA and its subsidiary to pay approximately US$750 million in compensation.\textsuperscript{34} ConocoPhillips also filed a contractual arbitration claim before the ICC in October 2014 seeking compensation relating to the termination of its Association Agreements with PDVSA.\textsuperscript{35}

ConocoPhillips and ExxonMobil also successfully pursued treaty claims before ICSID. Both tribunals held that the restructuring of their investments in order to gain access to ICSID arbitration through a BIT was “perfectly legitimate” and did not deprive the tribunals of jurisdiction over disputes post-dating the restructuring.\textsuperscript{36}

Neither ConocoPhillips nor ExxonMobil was able to obtain treaty remedies for the fiscal measures implemented by Venezuela prior to the nationalization. In the case of ExxonMobil, the restructuring of its investment after the enactment of Venezuela’s initial fiscal measures deprived the tribunal of jurisdiction over its claims.\textsuperscript{37} All remaining fiscal claims by ExxonMobil (and ConocoPhillips) failed either because: (a) the fiscal measures were carved out of the Netherlands-Venezuela BIT’s fair and equitable treatment clause;\textsuperscript{38} or (b) the fiscal measures were held not to be expropriatory in nature as they destroyed only some but not all of the rights

\textsuperscript{32} Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Venezuela and the Kingdom of the Netherlands, Oct. 22, 1991 (entered into effect on Nov. 1, 1993), Article 14(3): “In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date.”

\textsuperscript{33} Mobil Cerro Negro, Ltd. v. Pétroleos de Venezuela, S.A. and PDVSA Cerro Negro, S.A., ICC Case No. ARB/15416/JRF, Award, Dec. 23, 2011. The ICC award became public when it was filed in support of an enforcement action before federal courts in the United States.

\textsuperscript{34} Conoco files for ICC arbitration against Venezuela’s PDVSA, REUTERS, Oct. 10, 2014.

\textsuperscript{35} ConocoPhillips ICSID Decision, supra note 7, ¶ 204-205.

\textsuperscript{36} Exxon ICSID Jurisdictional Decision, supra note 7, ¶¶ 204-205.

\textsuperscript{37} Id., ¶¶ 204-209, Exxon ICSID Award, supra note 9, ¶¶ 195-213.

\textsuperscript{38} This was not the result of an explicit tax exception clause. Rather the tribunals held that the structure of the Netherlands-Venezuela BIT led to the conclusion that “matters of taxation, fees, charges and fiscal deductions and exemptions” were subject only to the specific non-discrimination obligations set out in Art. 4 of the BIT, and were therefore carved out of the more generally worded fair and equitable treatment clause in Art. 3. Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Venezuela and the Kingdom of the Netherlands, Venez.-Neth., Oct. 22, 1991 (entered into effect on Nov. 1, 1993), ConocoPhillips ICSID Decision, supra note 18, ¶ 315; Exxon ICSID Award, supra note 9, ¶ 247.
that constituted the investment. Finally, both tribunals held that Venezuela had expropriated ConocoPhillips’ and ExxonMobil’s investments, although only the ConocoPhillips tribunal confirmed that the expropriation was unlawful.

In the ExxonMobil case, the tribunal’s finding of lawfulness resulted in the calculation of damages as of the date of the expropriation, i.e., June 2007, and not the later date of the award when oil prices were significantly higher. ExxonMobil was awarded US$1.6 billion, from which it had to deduct approximately US$750 million on account of compensation already paid by Venezuela as a result of its prior ICC arbitration.

The claims under Venezuela’s Investment Law were dismissed as the tribunals held that the Law did not establish Venezuela’s consent to ICSID arbitration separately from underlying treaties and could therefore not be relied upon by the American parent companies (who did not have the benefit of BIT protection) to gain access to ICSID arbitration.

[3] Bolivia

Until the 1990s, Bolivia’s oil and gas sector was principally under the control of the state-owned hydrocarbons company, Yacimientos Petroliferos Fiscales Bolivianos or “YPFB”. As a result of the collapse of Bolivia’s mining industry (specifically, the tin industry which saw prices fall heavily in the late 1980s), and falling hydrocarbon production levels, Bolivia undertook reforms to remedy its balance of payments deficit and stimulate economic growth. Amongst these reforms was a new policy to develop the oil and gas sector that lacked capital and technical know-how.

At the same time, new markets were opening up for Bolivian oil and gas. In particular, Brazil sought to import large quantities of gas from Bolivia to begin in the late 1990s. To take advantage of this opportunity, Bolivia needed to significantly increase its gas production.

Bolivia opened up the oil and gas sector, and the state-owned YPFB, to private investment through the Capitalization Law of 1994. Three new companies were created out of YPFB, namely Empresa Petrolera Chaco S.A.M (“Chaco”) and Empresa Petrolera Andina S.A.M (“Andina”), both exploration and production companies, and Transportadora de...
Hidrocarburos S.A.M. (known as “Transredes”) which was to develop Bolivia’s gas pipelines. Half of the shares of those companies were to be offered to investors through a public bidding process while the remaining half would be held by employees and pension funds.\textsuperscript{47}

In order to encourage foreign oil companies to invest in Bolivia,\textsuperscript{48} the government created a new regulatory framework. The cornerstone of this framework was the Hydrocarbons Law of 1996\textsuperscript{49} which: (a) established the right of ownership over extracted hydrocarbons at the wellhead; (b) established the freedom to import, export and market hydrocarbons and their derivatives;\textsuperscript{50} (c) established a stable 18% royalty on oil and gas produced by new fields to remain in force throughout the duration of the relevant contracts;\textsuperscript{51} and (d) sought to shift the risks of oil and gas exploration to private investors by eliminating operation and association contracts, and replacing them with “shared risk contracts”.\textsuperscript{52}

Several major oil companies successfully bid for a stake in the capitalized companies, including Enron and Shell (which invested in Transredes), Amoco (which invested in Chaco) and YPF, Perez Companc, and Pluspetrol (which invested in Andina).\textsuperscript{53}

Chaco and Andina signed a series of “shared risk” exploration and production contracts with the state-owned YPFB which repeated the principles set out in the Hydrocarbons Law, including royalty stabilization clauses guaranteeing an 18% royalty rate throughout the 30 to 40 year duration of the contracts.

At the same time, in line with commitments made in its Investment Law of 1990,\textsuperscript{54} Bolivia concluded a network of BITs,\textsuperscript{55} and ratified the ICSID Convention.\textsuperscript{56} In the years that followed, between 1997 and 2000, more than US$2 billion in investment was made in the oil and gas sector in Bolivia.\textsuperscript{57}

As oil prices began to rise considerably from 2003, the Bolivian government began to dismantle the regulatory framework. These regulatory changes were enacted amidst protests against plans to export Bolivian gas and calls for the nationalization of the oil and gas sector.

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\textsuperscript{47} Id.
\textsuperscript{48} Country Profile: Bolivia 1987-88, Economist Intelligence Unit (September 1987).
\textsuperscript{49} Law No. 1689 [Hydrocarbons Law], Apr. 30, 1996 (Bol.).
\textsuperscript{50} Id. arts. 5 and 24. The law provided for limited exceptions with respect to natural gas, requiring that local demand and existing export obligations be satisfied in order to freely commercialize production.
\textsuperscript{51} Law No. 1689 [Hydrocarbons Law], Apr. 30, 1996, arts. 50 & 72 (Bol.).
\textsuperscript{52} Law No. 1,689 [Hydrocarbons Law], Apr. 30, 1996, arts. 14 & 17 (Bol.). See also Ministry of Capitalization, supra note 43, at 19-20.
\textsuperscript{54} Law No. 1,182 [Investment Law], Sept. 17, 1990, art.7 (Bol.).
\textsuperscript{55} Bolivia has signed investment agreements with 22 countries. See UNCTAD INTERNATIONAL INVESTMENT AGREEMENT COMPENDIUM, http://investmentpolicyhub.unctad.org/ (last visited Jan. 12, 2017).
\textsuperscript{56} Bolivia ratified the ICSID Convention on July 23, 1995.
\textsuperscript{57} H. Campodónico, Gestión mixta y privada en la industria de hidrocarburos [Joint and private management in the hydrocarbon Industry], CEPAL (Apr. 2007) (Bol.).
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In 2003 and 2004, regulations were put in place requiring crude producers to sell to local refineries, and refineries to sell their production, at regulated prices significantly below international market prices.\(^{58}\) The government further conditioned the granting of export licenses for liquid hydrocarbons (including crude and liquefied petroleum gas or LPG) on satisfaction of local demand.\(^{59}\) This effectively abolished the freedom to export and market hydrocarbons set out in the 1996 Hydrocarbons Law, resulting in a significant reduction in export volumes and revenues to producers.

In July 2004, a referendum was held. Amongst the questions that were answered affirmatively were whether: (a) the 1996 Hydrocarbons law should be repealed; (b) YPFB should be re-established and regain control over the privatized oil and gas companies; and (c) the government should recover ownership over all hydrocarbons at the wellhead. Over the next five years, under the leadership of Evo Morales (who was elected President in 2005) the results of the referendum were implemented.

A new Hydrocarbons Law was enacted in 2005\(^{60}\) which repealed the commitments set out in the 1996 law. Specifically, the law provided for the state’s recovery of ownership over hydrocarbons at the wellhead; it required all shared risk contracts to be renegotiated within 180 days; and it increased royalties on new fields to 50% (up from 18%) through the imposition of a tax that would be measured and paid “like royalties”.\(^{61}\)

Then on May 1, 2006, the Bolivian Government enacted a “nationalization” decree that provided that the Government would recover control over its oil and gas resources.\(^{62}\) The decree required oil companies to sell extracted hydrocarbons to YPFB and gave them a further 180 days to renegotiate their contracts or risk expropriation. It also provided for the transfer of a controlling stake in each of the capitalized companies to YPFB.\(^{63}\) The latter was to be implemented through the transfer of the 50% shareholding held by employees and pension funds, as well as sufficient additional shares held by the foreign investors to ensure YPFB held a controlling stake. That same day, President Morales ordered the occupation of Bolivia’s gas fields.\(^{64}\) The decree also effectively raised the royalty rate on Bolivia’s two most productive oil and gas fields to 82% through the imposition of an additional 32% “participation” for YPFB (on top of the existing 50% royalty rate).\(^{65}\)

Within 180 days of the Nationalization Decree, YPFB successfully renegotiated all of its “shared risk” oil and gas contracts, transforming them into service contracts in compliance with the new regulatory framework. This included the contracts entered into with Total, BG, Repsol,


\(^{59}\) Supreme Decree 27493, May 14, 2004, art.7, (Bol.); Supreme Decree No. 27,574, June 21, 2004, (Bol.).

\(^{60}\) Law No. 3058 [Hydrocarbons Law], May 17, 2005 (Bol.).

\(^{61}\) Id., art. 53 (Bol.).

\(^{62}\) Supreme Decree 28701, May 1, 2006, (Bol.).

\(^{63}\) Id.

\(^{64}\) Paulo Prada, Bolivian Nationalizes the Oil and Gas Sector, N.Y. TIMES, May 2, 2006.

\(^{65}\) Supreme Decree 28701, May 1, 2006, art. 4 (Bol.).
Petrobras and Pluspetrol. Bolivia managed to re-write its oil and gas contracts under the Nationalization Decree without the filing of a single arbitration. Nevertheless, a few months later in May 2007, Bolivia announced its withdrawal from the ICSID Convention.

Bolivia also fulfilled its goal to take control of the three capitalized oil and gas companies. In May 2008, Bolivia reached an agreement with Repsol – the then-majority shareholder in Andina – to acquire sufficient shares to take control of Andina. While Bolivia was initially unable to reach an agreement on the acquisition of a controlling stake in Transredes, in June 2008, it enacted a decree nationalizing the totality of its shares. Bolivia did, however, ultimately reach an agreement on the compensation to be paid to Transredes’ former shareholders – Shell and Ashmore – just a few months later. Bolivia similarly took-over the totality of the shares in Chaco in January 2009 after failed negotiations to acquire a controlling stake in the company.

That same year, Bolivia adopted a new constitution providing that oil and gas companies operating in the country would be subject to the sovereignty and laws of the state and could not resort to international arbitration or foreign jurisdictions. In the years that followed, Bolivia unilaterally denounced its BITs with several capital-exporting countries including the Netherlands (in 2009), the United States (in 2012), Spain (in 2012), Germany (in 2013) and Sweden (in 2013). These measures, in addition to the withdrawal from the ICSID Convention,

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67 Denunciation of the ICSID Convention, ICSID News Release (May 16, 2007). Bolivia’s withdrawal was followed by Ecuador’s withdrawal in 2009 and Venezuela’s withdrawal in 2012.


71 Constitución política del Estado Plurinacional de Bolivia [Constitution], Feb. 7, 2009, art. 366 (Bol.). It provides in Spanish: “Todas las empresas extranjeras que realicen actividades en la cadena productiva hidrocarburífera en nombre y representación del Estado estarán sometidas a la soberanía del Estado, a la dependencia de las leyes y de las autoridades del Estado. No se reconocerá en ningún caso tribunal ni jurisdicción extranjera y no podrán invocar situación excepcional alguna de arbitraje internacional, ni recurrir a reclamaciones diplomáticas.”

72 UNCTAD INTERNATIONAL INVESTMENT AGREEMENT COMPENDIUM, http://investmentpolicyhub.unctad.org/ (last visited Jan. 12, 2017). This was done pursuant to the ninth transitory provision of Bolivia’s new Constitution of
however, have had a limited impact. A state may not rely on its domestic law, including its constitution, to avoid its international obligations such as commitments to resort to international arbitration in BITs.\textsuperscript{73} Moreover, a withdrawal from the ICSID Convention may have no legal impact on the ability of investors to resort to ICSID arbitration unless and until separate instruments containing Bolivia’s consent (such as BITs) are terminated,\textsuperscript{74} and the termination of BITs takes many years to take effect as a result of “sunset clauses”.\textsuperscript{75} Furthermore, treaties often provide investors with the right to resort to non-ICSID arbitration, including arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).

When negotiations over the compensation for Chaco’s shares stalled in 2010, Pan American Energy (Amoco’s successor and 50\% owner of Chaco) initiated ICSID arbitration proceedings against Bolivia under Bolivia’s BIT with the United States.\textsuperscript{76} Bolivia ultimately settled that claim, negotiating a US$357 million payout for the nationalization of its stake in Chaco in December 2014.\textsuperscript{77}

The story of regulatory change in Bolivia’s oil and gas sector, like Venezuela’s, is one that goes full circle with the oil and gas sector now firmly under the control of the Bolivian Government, much as it was prior to the reforms of the 1990s. The legislative and regulatory changes enacted by the Government benefited the state significantly. It is estimated that Bolivia benefited from a ten-fold increase in its revenues from the sector in the years following the nationalization of the oil and gas sector.\textsuperscript{78}

\textbf{[4] Ecuador}

Like Bolivia, Ecuador reformed its hydrocarbons regulatory framework in the 1990s in order to attract much needed investment to its stagnant oil industry, only to dismantle the new framework a decade later when oil prices began to rise and political circumstances changed.

\textsuperscript{73} Vienna Convention on the Law of Treaties art. 27, May 23, 1969.

\textsuperscript{74} See, e.g., Nigel Blackaby, \textit{ICSID Withdrawal: A Storm in a Teacup?}, CAHIERS DE L’ARBITRAGE (2010); Oscar M. Garibaldi, On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction and the Limits of the Contract Analogy, 6 TDM ISSUE 1, Mar. 2009.

\textsuperscript{75} Investment treaties typically provide that their protections survive the termination of a treaty for a period of ten to 15 years with respect to investments existing at the date of termination. For instance, the US-Bolivia BIT provides that: “For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination […]” See Treaty between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment art. XVI, April 17, 1998.

\textsuperscript{76} E.g., Pan American Energy LLC v. Plurinational State of Bolivia, ICSID Case No. ARB/10/8.


In the 1980s, Ecuador’s oil resources were developed under service contracts pursuant to which only the government owned and could sell the oil produced. Service providers were entitled to the reimbursement of their investment costs and a fee if they discovered oil reserves. Not only was this model disadvantageous to Ecuador – as it frequently incurred losses on oil producing blocks as a result of spiraling costs in a low oil price environment – but it was unattractive to oil investors as it involved fixed margins and gave them no production flow of their own. By 1993, no new service contracts had been entered into for a period of five years. As the Ecuadorian President explained, “the [service contract model] has exhausted its possibilities of attracting foreign capital”.79

Consequently, in 1993, Ecuador overhauled its Hydrocarbons Law and related regulations in order to create a new contract model for the exploration and production of hydrocarbons, namely Production Sharing Contracts (“PSCs”). Under these new contracts, oil companies would assume the risk and cost of oil exploration and production in exchange for a share of the oil produced. These contracts were advantageous to the state, as they shifted the risks to the contractors while guaranteeing that the state would profit from its share of the oil (given that it bore no costs). The contractors on the other hand were entitled to freely dispose of and enjoy the revenues from the disposal of their share of the oil produced. Ecuador opened bidding rounds aimed at promoting foreign investment and concluded several PSCs with private oil companies.80

At the same time as it was overhauling its hydrocarbons regulatory framework, Ecuador also took steps to create a legal environment conducive to attracting foreign investment in the hydrocarbons sector, enacting, for instance, a “Law on Promotion and Guarantee of Investments” and amendments to its constitution guaranteeing that foreign investments would be afforded the same rights and treatment as domestic investments.81 Ecuador also concluded several BITs with capital-exporting countries including the United States (in 1993), the United Kingdom (in 1994) and France (in 1994).82 These BITs provided Ecuador’s consent to resolve investment disputes through ICSID arbitration,83 the same dispute settlement mechanism set out in Ecuador’s PSCs.

Then, in 2002, oil prices began their steady rise. By 2005, with prices nearly double what they had been at the time that the PSCs had been executed, the Ecuadorian government sought to renegotiate the PSCs to increase its share of production. When these negotiations failed, Ecuador passed Law No. 42, which mandated a 50% “state participation” on “extraordinary income”, calculated as the difference between the income earned at the price of oil at the time the PSCs

80 Burlington Liability Decision, supra note 3, ¶ 13.
81 See Perenco Liability Decision, supra note 3, ¶ 60.
were executed and income earned at current oil prices. Most investors paid this tax under protest. Then, in late 2007, with foreign investors still refusing to negotiate away their rights under the PSCs, newly elected President Correa almost doubled the “state participation” to 99%.85

In early 2008, the President announced that the PSCs would have to be renegotiated into service contracts (which, incidentally, would not contain ICSID arbitration clauses86) as a means of reasserting Ecuador’s sovereignty over its oil reserves. Ecuadorian authorities subsequently seized various oil fields and enacted decrees terminating a number of PSCs.

In sum, through these escalating measures, the government had unilaterally reduced the investors’ share in oil production and destroyed their right to enjoy the revenues that they reaped from the disposal of their share of the oil. Meanwhile, the government was forcing investors to revert to a services contract after they had borne all of the risks and costs of developing their oil fields, or otherwise face the cancellation of their contracts.

These events propelled several investors to initiate ICSID arbitrations against Ecuador. In 2008, several investors filed arbitration claims for losses suffered as a result of Law 42, amongst other measures, including: Burlington Resources Inc., under the US-Ecuador BIT;87 Perenco Ecuador Limited, under the France-Ecuador BIT;88 Occidental Petroleum Corporation, under the US-Ecuador BIT;89 Repsol, under the Spain-Ecuador BIT;90 Murphy Exploration and Production Company, under the US-Ecuador BIT;91 and City Oriente, under its PSC.92

These developments prompted Ecuador to reconsider its various investment treaties. After Ecuador’s adoption of a new constitution in September 2008 precluding the conclusion of treaties or international agreements ceding jurisdiction to international arbitration tribunals,93

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85 This was effected through Executive Decree 662, Oct. 18, 2007 (Ecuador). See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 35 (Dec. 14, 2012).
87 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5.
88 *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6.
89 *Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11.
92 *City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/06/21.
93 See *Constitución de la República del Ecuador [Constitution]*, Oct. 20, 2008, Official Registry No. 449, art. 422 (Ecuador). The constitution contained an exception for treaties or agreements for the settlement of disputes between Latin American states and their nationals through regional arbitration institutions.
Ecuador denounced several investment treaties. In July 2009, Ecuador denounced the ICSID Convention, then only the second state to have done so (after Bolivia). Ecuador also denounced ten of its 26 BITs, including eight with fellow Latin American states, and sought Congress’ approval to terminate its remaining BITs. 

These denunciations, however, had no impact on pending arbitrations (and a limited impact on future claims, as discussed above). The first step that several of the tribunals undertook was the issuance of provisional measures orders so as to preserve the investors’ contractual rights in the face of Law 42, pursuant to Article 47 of the ICSID Convention. The Burlington, Perenco and City Oriente tribunals ordered Ecuador to refrain from seizing the companies’ oil production to cover any amounts allegedly due under Law 42 and discontinue any legal proceedings pending against the companies and their employees. The Burlington tribunal additionally recommended the establishment of an escrow account into which Burlington would pay the alleged amounts and from which the funds would be released in accordance with a final award or settlement agreement between the parties. However, Ecuador failed to abide by any of these orders.

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96 In October 2009, the President sought the approval of Congress to denounce its remaining BITs with 13 countries.

97 See supra note 75.

98 Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1, ¶¶ 7-8 (June 29, 2009); Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶ 62 (May 8, 2009); City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador), ICSID Case No. ARB/06/21, Decision on Provisional Measures, § IV.1 (Nov. 19, 2007).

99 Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1, ¶ 2-3 (June 29, 2009).

100 Burlington Liability Decision, supra note 3, ¶¶ 58-59 (noting that its provisional order notwithstanding, Ecuador auctioned off seized crude from Burlington to the state oil company, PetroEcuador, which appeared as the sole bidder in the auction); Perenco Liability Decision, supra note 3, ¶ 177 (citing Ecuador’s letter to the tribunal informing the country’s decision to enforce Law 42 in contravention of the tribunal’s order); Damon Vis-Dunbar, Ecuador defies provisional measures in dispute with French oil company, Int’l Inst. For Sustainable Dev. (June 5, 2009), http://www.isisd.org/itn/2009/06/05/ecuador-defies-provisional-measures-in-dispute-with-french-oil-company/ (last visited Jan. 12, 2017) (noting that not only did Ecuador fail to abide by the Perenco tribunal’s order on provisional measures, it also violated the order by the City Oriente tribunal by seeking to arrest the latter’s employees in Quito).
Several of the arbitral claims were later settled (such as those of City Orient \(^{101}\) and Repsol \(^{102}\)) or dismissed (Murphy’s claim was dismissed on jurisdictional grounds \(^{103}\)). Those claims that were pursued have led to positive outcomes for the investors.

Perenco and Occidental both brought claims directly under the PSCs that they themselves had signed. In *Perenco*, the tribunal found that the 99% tax was an unreasonable and impermissible modification to the terms of the PSC, and consequently constituted a breach of the PSC. \(^{104}\) The tribunal also held that Ecuador’s termination of the PSC constituted a breach of contract. \(^{105}\) In *Occidental*, the tribunal considered that Ecuador’s termination of Occidental’s PSC was not a proportionate response to Occidental’s breach of the contract (for failing to seek authorization for the transfer of rights under its PSC), and was therefore in breach of Ecuadorian law. \(^{106}\)

With respect to treaty-based claims, the tribunals in *Burlington, Perenco* and *Occidental* held that Ecuador was liable for breaching its treaty obligations. The *Occidental* tribunal held that Ecuador’s termination of its PSC was unreasonable and disproportionate and constituted a violation of Ecuador’s obligation to accord fair and equitable treatment as well as an indirect expropriation. \(^{107}\) While Occidental did not bring a claim in relation to the effects of Law 42 *per se* given that Ecuador terminated its PSC just weeks after the introduction of the law, in addressing the compensation to be paid for the expropriation of its investment, the tribunal disregarded the effects of Law 42 on the basis that it constituted a unilateral and substantial modification of the PSC in breach of Ecuador’s fair and equitable treatment obligations under the US BIT. \(^{108}\) The tribunal went on to confer the then-largest award in ICSID’s history of US$2.3 billion (including interest).

As for the *Burlington* and *Perenco* tribunals, both held Ecuador internationally liable for its conduct though the tribunals have yet to calculate the damages payable by Ecuador. Neither the *Burlington* nor the *Perenco* tribunals found that Ecuador’s 99% “tax” constituted an expropriation in itself. The *Burlington* tribunal recognized, however, that the right under the PSC to tax stabilization was “part and parcel” of Burlington’s investment, \(^{109}\) which was effectively

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103 The majority held that the claimant had failed to comply with a mandatory 6-month negotiation period under the US-Ecuador BIT. Murphy Exploration and Production Co. Int’l v. Republic of Ecuador, ICSID Case No. ARB/08/4, Award on Jurisdiction (Dec. 15, 2010). The company is now pursuing an UNCITRAL arbitration against Ecuador.

104 *Perenco Liability Decision*, supra note 3, ¶¶ 407-411, & 443.

105 Id., ¶ 442.

106 Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Final Award, ¶¶ 381, 452 (Oct. 5, 2012).

107 Id., ¶¶ 452-455.

108 Id., ¶¶ 525-527.

109 *Burlington Liability Decision*, supra note 3, ¶ 405.
nullified by Ecuador’s sovereign action. In other words, it was not the tax per se that was an expropriation (since Burlington had the right to have its production share adjusted to neutralize the effect of the tax) but rather the destruction of that right to stabilization, which occurred when Ecuador seized the blocks.

Ultimately, both tribunals held that Ecuador had expropriated their investments, in Burlington through the effective destruction of the investor’s rights through the physical seizure of the blocks and in Perenco through the termination of the investor’s PSC.

Both Burlington and Perenco claimed that Ecuador’s measures breached the treaties’ fair and equitable treatment obligation. Ultimately, that claim was only considered by the Perenco tribunal as the Burlington tribunal held that it had no jurisdiction over that claim as it was carved out under the US-Ecuador’s BIT’s tax exception. The Perenco tribunal held that the 99% tax was a fundamental change to the legal framework for Perenco’s investment in that, by taking all of the upside under the contract, Ecuador effectively unilaterally transformed Perenco’s PSC into a service contract contrary to Perenco’s expectations. It therefore violated the fair and equitable treatment standard in the treaty.

[5] Argentina

In the early 1990s Argentina undertook a program for the privatization of its state-owned utilities, services and infrastructure, and sought to attract foreign investors. In this context, Argentina executed 54 BITs. To combat hyperinflation and guarantee economic stability, Argentina pegged its currency to the US dollar, at a 1 to 1 rate under the Convertibility Law.

The energy sector was liberalized, and the state-owned exploration and production company Yacimientos Petrolíferos Fiscales or “YPF”, as well as the state-owned gas distribution company, were privatized. Argentina introduced competitive pricing in the upstream market, in order to incentivize oil and gas exploration and develop reserves. It guaranteed the right of free disposition of hydrocarbons produced, and deregulated their price, establishing the free negotiation of prices at the wellhead. In the gas transportation and distribution sector, Argentina committed to calculate tariffs in US dollars and to adjust them periodically based on international price indices. This commitment, set out in the public service contracts and the regulatory framework for the gas sector, provided a form of stabilization independent from the currency board. The regulatory framework also guaranteed a reasonable rate of return after the recovery of costs, and the holding of periodic tariff reviews to ensure this remained the case – thus providing further economic stability to investments. These public contracts provided for local court remedies in the event of a dispute.

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110 Id. ¶ 405-419.
111 Id.
112 Perenco Liability Decision, supra note 3, ¶ 442.
113 US-Ecuador BIT, supra note 10, Article X. See Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5) Decision on Jurisdiction, ¶ 208 (June 2, 2010).
114 Perenco Liability Decision, supra note 3, ¶ 606.
115 Id. ¶ 560-568.
By the end of 2001, however, Argentina’s economy was in a state of crisis, and the state froze bank deposits and introduced foreign exchange controls. It quickly abolished the parity between the US dollar and the peso, and converted US dollar obligations into pesos at an artificial rate of 1 to 1, notwithstanding that the peso had devalued to a rate of 4 to 1 (which later stabilized at a level of 3 to 1).

In the gas sector, dollar-denominated tariffs were also artificially “pesified” at a rate of one dollar to one peso, and then-frozen at those levels with no further indexation adjustments or tariff reviews. Utilities were required to continue performing their contracts despite these reduced and frozen tariffs which rendered them effectively insolvent due to dollar-based cost structures.

Export withholdings were imposed, affecting hydrocarbons sales abroad and depressing domestic prices as a result of the increased local supply. Restrictions on the export of hydrocarbons were also imposed, particularly when depressed domestic prices generated an increase in demand that ultimately led to energy shortages.

The hydrocarbon sector was also affected by the “pesification” of all existing dollar-denominated obligations and claims at the rate of 1 to 1, negatively impacting on dollar-denominated crude oil sales and purchase contracts. Argentina instructed producers and refiners to enter into special sales agreements. The reference sales price from producers to refiners was significantly lower than the barrel price of crude oil in the world market.

Investors quickly began to consider potential remedies for the government’s measures. Local remedies were not an appealing option to investors affected by these measures. Concession contracts did not generally contain arbitration clauses, and in most cases the agreed remedy was recourse to local administrative courts which would apply the very same Argentine legislation that had caused the losses.

Therefore, many foreign investors with interests in gas transportation and distribution companies,\(^\text{116}\) or who held hydrocarbon production concessions,\(^\text{117}\) resorted to the dispute resolution mechanisms in BITs. Several investors subsequently reached agreements with the government, and temporarily suspended\(^\text{118}\) or withdrew their arbitration claims.\(^\text{119}\)

\(^{118}\) E.g., Camuzzi Int’l S.A. v. The Argentine Republic, ICSID Case No. ARB/03/2, was suspended by agreement of the parties on June 21, 2007; Gas Natural SDG, S.A. v. The Argentine Republic, ICSID Case No. ARB/03/10, was suspended by agreement of the parties on Nov. 11, 2005.  
\(^{119}\) E.g., in BP America Production Co., Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. The Argentine Republic, ICSID Case No. ARB/04/8, the proceedings discontinued at the request of the parties on June 18, 2008; in Pan American Energy LLC and BP Argentina Exploration Co. v. The Argentine Republic (ICSID Case No. ARB/03/13) the proceedings discontinued at the request of the parties on Aug. 20, 2008; and in Pioneer Natural Resources Co., Pioneer Natural Resources (Arg.) S.A. and Pioneer Natural Resources v. The Argentine Republic (Tierra del Fuego) S.A., ICSID Case No. ARB/03/12, the proceedings discontinued at the request of the parties on June 23, 2005.
Those cases that proceeded to a final award generally had positive outcomes. Most survived complex jurisdictional phases,\textsuperscript{120} and obtained favorable decisions on the merits.\textsuperscript{121}

In the gas transportation sector, tribunals generally held that investors had a right to tariffs calculated in dollars and converted into pesos at the time of billing, and to the adjustment of tariffs in accordance with US PPI,\textsuperscript{122} as these commitments were incorporated into the terms of the public contracts as well as the regulatory framework.\textsuperscript{123} Tribunals held that the artificial pesification and freezing of tariffs had destroyed the stabilization envisaged in the transportation licenses and regulatory framework, and thus violated the fair and equitable treatment standard. The tribunal in \textit{CMS v. Argentina} held that: “It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made.”\textsuperscript{124} The tribunals also noted that Argentina’s fictitious renegotiation process had failed to lead to the adjustment of tariffs, and licensees who sought relief in international fora were excluded from the process. These measures were also held to be in violation of Argentina’s BITs’ fair and equitable treatment standard.\textsuperscript{125}

The tribunal in the \textit{Total v. Argentina} case, however, took a different approach. It held that no specific stabilization promises had been made by Argentina to investors in gas transportation licenses.\textsuperscript{126} It therefore concluded that the “pesification” and freezing of tariffs did not violate the treaty. However, it held that Argentina’s subsequent failure to readjust tariffs in

\textsuperscript{120} The exception is Wintershall Aktiengesellschaft v. Arg. Republic, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008), under the Arg.-Ger. BIT, where the tribunal found that the investor had not complied with resorting to local remedies for a period of 18 months prior to commencing arbitration, and rejected jurisdiction to hear the claim.

\textsuperscript{121} \textit{E.g.}, CMS Gas Transmission Co. v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005), BG Group Plc. v. The Republic of Argentina, UNCITRAL, Award (Dec. 24, 2007), El Paso Energy Int’l Co. v. The Argentine Republic, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), and Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Award (Nov. 27, 2013).


\textsuperscript{124} CMS Gas Transmission Co. v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, ¶ 277 (May 12, 2005).


\textsuperscript{126} Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 165 (Dec. 27, 2010).
order to restore the economic equilibrium of the contracts (such that license holders could cover costs and obtain a reasonable rate of return) was unfair and breached the treaty.\textsuperscript{127}

As some of Argentina’s BITs had tax carve-outs,\textsuperscript{128} some foreign investors were unable to claim for the imposition of export taxes.\textsuperscript{129} In cases where no such restriction to the jurisdiction of the tribunal existed, the tribunals nonetheless considered that the imposition of export taxes was within the state’s regulatory discretion and, in any event, investors could still sell their production abroad.\textsuperscript{130} However, certain producers who held concessions in the Province of Tierra del Fuego, where a general law granted them an express tax exemption, were able to obtain compensation for the retroactive imposition of export duties against specific commitments to investors.\textsuperscript{131}

In the absence of specific state commitments to dollar-based prices (independent of the currency board), the artificial “pesification” of dollar-denominated oil and gas sales contracts was considered a measure of general application that was justified in the context of the economic crisis.\textsuperscript{132} Therefore, its impact on hydrocarbon sales was not considered a treaty breach.

Imposition of export restrictions to remedy domestic shortages was considered a breach of the treaty’s fair and equitable treatment clause,\textsuperscript{133} since it interfered with export contracts that had previously been duly authorized by the government according to the applicable legal regime.

Unlike other countries in the region (like Ecuador, Bolivia and Venezuela), Argentina did not attempt to denounce the ICSID Convention or any of its BITs. It has, however, systematically requested the annulment of any and all unfavorable decisions rendered against it, even challenging one award rendered in respect of a gas distribution license all the way to the US Supreme Court.\textsuperscript{134} Moreover, Argentina has denied having an obligation to voluntarily pay ICSID awards, despite the clear language in the Convention\textsuperscript{135} and holdings of investment treaty tribunals.\textsuperscript{136} Consequently, for years, Argentina resisted paying outstanding ICSID awards.

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\begin{enumerate}
\item \textsuperscript{127} \textit{Id.}, ¶ 175.
\item \textsuperscript{129} \textit{E.g.}, El Paso Energy Int’l Co. v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 449 (Oct. 31, 2011).
\item \textsuperscript{130} Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 441 (Dec. 27, 2010).
\item \textsuperscript{131} \textit{E.g.}, Total S.A. v. The Argentine Republic, for its investments in Tierra del Fuego.
\item \textsuperscript{132} El Paso Energy Int’l Co. v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 458 (Oct. 31, 2011); Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 447 (Dec. 27, 2010).
\item \textsuperscript{133} Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 460 (Dec. 27, 2010).
\item \textsuperscript{134} BG Group plc v. Republic of Argentina, 134 S. Ct. 1198 (2014).
\item \textsuperscript{135} Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 53 & 54, Aug. 27, 1965, 17 U.S.T. 1270.
\item \textsuperscript{136} Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II), ICSID Case No. ARB/97/3, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (ICSID Rule 54) (Nov. 4, 2008); Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case
\end{enumerate}
\end{footnotesize}
Finally, in 2013, Argentina agreed to settle five investment treaty arbitration awards, one of which related to the gas transportation sector.

As the wave of investment arbitrations arising from Argentina’s measures in response to its 2001-2002 economic crisis was coming to an end, Argentina embarked on another assault on investment in the oil and gas sector. In April 2012, the government announced its decision to nationalize Repsol’s 51% stake in YPF, the former state oil company, in an effort to control the company’s large shale gas reserves in the Vaca Muerta deposit. Repsol took the controversy to ICSID arbitration under the Spain-Argentina BIT when it became apparent that the expropriation was not going to be followed with adequate, prompt or effective compensation. Argentina eventually reached a settlement with Repsol, agreeing to pay US$5 billion in government bonds, and the claim was withdrawn.

§ 8.04 Conclusion

The case studies of Argentina, Bolivia, Ecuador and Venezuela provide a cautionary tale of how regulatory change, whether as a result of changing political circumstances (as in Bolivia, Ecuador and Venezuela) or in reaction to economic shocks (as in Argentina), can affect investments in the oil and gas sector. The case studies demonstrate the vital importance of investment treaty protections in such circumstances, as they often provide investors their sole source of leverage with the government at a time of significant vulnerability (e.g., after capital investments are made). There is no doubt that it was this leverage that enabled so many investors in the oil and gas sector in these countries to come to negotiated settlements.

All four countries have reacted against the wave of investment treaty cases filed (or threatened) against them by denouncing BITs and the ICSID Convention or, in the case of Argentina, by delaying compliance with investment treaty awards. It would be wrong to interpret these developments as a precursor to the abandonment of the investment treaty system by these four countries, or Latin America as a whole, or as a major obstacle to investor claims in the future. The small number of denounced BITs since 2007 is dwarfed by the number of new

\[\text{\footnotesize No. ARB/01/3, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (ICSID Rule 54) (Oct. 7, 2008); Sempra Energy Int’l v. The Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (ICSID Rule 54) (Mar. 5, 2009).} \]

\[\text{\footnotesize 137 E.g., CMS Gas Transmission Co. v. The Argentine Republic, ICSID Case No. ARB/01/8; Azurix Corp. v. the Argentine Republic, ICSID Case No. ARB/01/12; Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3; Continental Casualty Co. v. The Argentine Republic, ICSID Case No. ARB/03/9; National Grid plc v. Argentine Republic (UNCITRAL).} \]

\[\text{\footnotesize 138 E.g., CMS Gas Transmission Co. v. the Argentine Republic (ICSID Case No. ARB/01/8).} \]


\[\text{\footnotesize 140 Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic, ICSID Case No. ARB/12/38.} \]

\[\text{\footnotesize 141 Tobias Buck & Benedict Mander, Repsol draws line under Argentina dispute, FINANCIAL TIMES (Feb. 26, 2014), http://www.ft.com/intl/cms/s/0/b89c5516-9efc-11e3-8663-00144feab7de.html#slide0 (last visited Jan. 12, 2017).} \]
investment treaties signed in the region during that same period. Even Venezuela has recently signed three new investment treaties providing for investor-state arbitration. No other Latin American country is threatening to withdraw from ICSID. Furthermore, unless and until BITs are denounced and their protections cease to apply to existing investments following the expiration of their (long-lasting) sunset clauses, investors will retain their treaty protection. There are also compelling legal arguments that these treaty protections can continue to be enforced through ICSID arbitration insofar as the state has consented to ICSID’s jurisdiction in a BIT, and such consent remains valid under the terms of that BIT.

Many investors will also find that they have the option to enforce treaty protections effectively through international arbitration under alternative routes under an applicable BIT such as the ICSID Additional Facility or UNCITRAL Rules. Finally, even those states that criticize the current investment treaty arbitration system, such as Ecuador, propose, as an alternative, a regional investment arbitration center which essentially mirrors the current system. Investment treaty protection thus remains at the heart of major energy investment in the region notwithstanding the major political changes of the last decade.

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142 For instance, since 2007, Venezuela has signed three BITs (infra note 143, below); Colombia has signed nine BITs (with the Belgium-Luxembourg Economic Union, China, France, India, Japan, Singapore, Peru, Turkey and the United Kingdom); Peru has signed two BITs (with Colombia and Japan); Chile has signed one BIT (with Uruguay); Uruguay has signed four BITs (with Chile, India, Korea and Vietnam) and Mexico has signed five BITs (with Belarus, China, India, Kuwait and Slovakia). See UNCTAD INTERNATIONAL INVESTMENT AGREEMENT COMPENDIUM, http://investmentpolicyhub.unctad.org/IIA/ (last visited Jan. 12, 2017).


144 See supra note 74.