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Energy Investment Disputes in Latin America: The Pursuit of Stability

Elisabeth Eljuri* and Clovis Trevino**

ABSTRACT

Sovereign ownership of subsoil resources in Latin America raises important tensions. The State, as owner, may grant property or participation rights to private investors in the energy sector, but it may also revoke them. As contracting party, it may enter into investment contracts (directly or through a State-owned entity), but it may also breach them. And as sovereign, it may offer legal and fiscal stability, but it may also use its regulatory power to alter the economic balance of the contract or even destroy its value. In light of these tensions, the pursuit of stability in energy investments in Latin America presents important challenges. This Article provides an overview of the rise and resolution of energy disputes in Latin America. Following an Introduction, Part I sets out a brief historical overview of energy investment disputes in the region. Next, Part II addresses key substantive issues that have been the subject of litigation in connection with energy investments. Part III discusses whether there is a backlash against international arbitration by host States in the region, followed by an overview in Part IV of some techniques to infuse stability into the energy investment contract.

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INTRODUCTION

In Latin America, unlike in the United States or Western Europe, subsoil resources belong to the State, and only the State can determine if and how private investors participate in resource exploitation. Sovereign ownership of subsoil resources raises some important tensions. The State, as the *owner* of subsoil resources, grants property or participation rights to private investors in the energy sector; as the *contracting party*, it negotiates the terms and performs the investment contract, either directly or through a State-owned entity; and as the *sovereign*, it controls the legal and physical framework in which the contract takes shape.

As a result of this tension, investor-State energy disputes in Latin America have followed a recurrent pattern: in times of need of foreign investment, the *owner* grants property or participation rights to the investor; the *contracting party* makes direct promises to the investor; and the *sovereign* makes express or implied commitments to offer a stable legal framework. However, promises are often broken. The *owner* may revoke or cancel property rights; the *contracting party* may breach the contract; and the *sovereign* may use its regulatory power to alter the economic balance of the contract or even destroy its value. Thus, the pursuit of stability in energy investments in Latin America presents significant challenges.¹

During most of the twentieth century, energy investment disputes between a State and a foreign investor were resolved through diplomatic channels or outright intervention by the investor's home State. The fate of an investor whose home State declined to offer its protection was left to the courts of the *sovereign* host State. The advent of bilateral investment treaties (BITs) during the late 1980s and 1990s revolutionized the paradigm of investor-State dispute settlement by giving investors the possibility of elevating investment disputes to international arbitration tribunals.

States' consent to international arbitration under BITs, however, has not deterred some Latin American countries from directly expropriating or using their regulatory powers to alter the economic balance of energy investments. In response, energy investors have filed arbitration claims against Latin American States, most prominently, before the International Centre for Settlement of Investment Disputes (ICSID).

The elevation of energy investment disputes to international arbitration tribunals has led to the development of a body of customary rules adapted to the industry's nature and specificities—the so-called *lex petrolea*.² However, the line between legitimate State regulation of the oil and gas sector and undue interference with property rights remains fraught. This tension lies at the heart of the pursuit of stability in energy investment disputes in Latin America.

Focusing on recent international arbitration cases involving oil and gas disputes in the region, this Article provides an overview of the rise and

1. See generally Elisabeth Eljuri, *Venezuela's Exercise of Sovereignty over the Hydrocarbon Industry and Preventive Protections to be Considered by Investors*, OIL GAS & ENERGY L. INTELLIGENCE, Apr. 2008.

2. See generally R. Doak Bishop, *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea*, 23 YB. COM. ARB. 1131 (1998); see also Thomas C.C. Childs, *Update on Lex Petrolea: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production*, 4 J. WORLD ENERGY L. BUS. 214 (2011) (highlighting the development of legal rules that reflect the specific characteristics of the international exploration and production industry).

resolution of energy disputes in Latin America. Part I sets out a brief historical overview of energy investment disputes in the region. Next, Part II addresses key substantive issues that have been the subject of litigation in connection with energy investments. Part III discusses whether there is a backlash against international arbitration by host States in the region, followed by an overview, in Part IV, of some techniques to infuse stability into the energy investment contract. Part V provides some concluding remarks.

I.

ENERGY DISPUTES IN LATIN AMERICA: A BRIEF HISTORICAL OVERVIEW

During the nineteenth and early twentieth centuries, investor-State dispute resolution in Latin America was characterized by physical seizure of property, expropriations, and nationalizations by the host State and, in response, armed interventions and embargoes by investors' States demanding redress for claims or unpaid debt.³ This policy—embraced by countries such as the United States, France, Germany, Italy, and Spain—became known as “gunboat diplomacy.”⁴ In this context, Argentine jurist Carlos Calvo proposed the so-called “Calvo doctrine” in the late 1860s, stating that in disputes between aliens and governments, foreign citizens had to submit their claims to the local courts.⁵

The Calvo doctrine rests upon two pillars: sovereign equality and equal treatment of nationals and foreigners.⁶ By application of the Calvo doctrine, investment contracts in the region generally included a Calvo clause specifying that foreign investments were to be governed exclusively by domestic law, that disputes arising from such investments could only be resolved by domestic courts, and that the investor could not request diplomatic protection from its government (at least not until local remedies had been exhausted).⁷ Some Latin American States also incorporated the Calvo doctrine into their domestic law.⁸

3. See Mary H. Mourra, *The Conflicts and Controversies in Latin American Treaty-Based Disputes*, in *LATIN AMERICAN INVESTMENT TREATY ARBITRATION: THE CONTROVERSIES AND CONFLICTS* 7 (Mary H. Mourra & Thomas Carbonneau eds., 2008).

4. *Id.*

5. See Manuel R. Garcia-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 *MARQ. L. REV.* 205, 205–06 (1950).

6. See Guido Tawil, *On the Internationalization of Administrative Contracts, Arbitration and the Calvo Doctrine*, in *ARBITRATION ADVOCACY IN CHANGING TIMES* 329 (Albert Jan van den Berg ed., 2011).

7. See Mourra, *supra* note 3, at 20.

8. See R. Doak Bishop, *The United States' Perspective Toward International Arbitration with Latin American Parties*, 8 *INT'L L. PRACTICUM* 63, 63–64 (1995).

The increasing acceptance of the Calvo doctrine during the twentieth century is evidenced by the adoption of the Convention on Rights and Duties of States, signed by the United States and several Latin American countries in 1933.⁹ This Convention provides that “[n]ationals and foreigners are under the same protection of the law, and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.”¹⁰ The Convention further provides that “[n]o State has the right to intervene in the internal or external affairs of another.”¹¹ However, the Calvo doctrine never gained international customary law status, in part because European States and the United States consistently rejected it.¹²

Bolivia’s expropriation in 1937 of oil concessions, awarded to Standard Oil in the 1920s, tested the nonintervention stance of the United States.¹³ After a period of serious tension, the United States espoused Standard Oil’s claim and entered into diplomatic negotiations with Bolivia. An agreement was reached in 1942, when Bolivia’s foreign minister offered to pay Standard Oil U.S. \$1 million as an “indemnity.”¹⁴ The company asked for U.S. \$3 million and insisted that the settlement be documented as a sale.¹⁵ A compromise was reached whereby the Standard Oil properties were sold to Bolivia for U.S. \$1.5 million. Shortly thereafter, Bolivia received economic development assistance from the United States in the amount of U.S. \$25 million.¹⁶

About a year after Bolivia expropriated the Standard Oil properties, Mexico expropriated the oil holdings of major U.S. and British companies.¹⁷ Following a period of intense social conflict and labor strikes, the Mexican Federal Board of Arbitration and Conciliation ordered oil companies to increase the wages of oil workers. The oil companies failed to comply with the order, and the executive branch issued an expropriation decree in March 1938.¹⁸ The United States insisted that the dispute be submitted to international arbitration, which Mexico refused to do. At last, the two governments agreed to create a joint

9. Convention on the Rights and Duties of States (Inter-American), Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

10. *Id.* at 9.

11. *Id.* at 8.

12. See Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 22 (2005).

13. See Harold Eugene Davis, LATIN AMERICAN DIPLOMATIC HISTORY: AN INTRODUCTION 206 (1977).

14. *Id.* at 210.

15. *Id.*

16. *Id.*

17. *Id.* at 211.

18. *Id.*

commission in order to evaluate the expropriated assets and recommend the amount of compensation due.¹⁹ Mexico agreed to pay the amount determined by the commission, plus interest, over the next seven years.²⁰

A second wave of expropriations—led by Ecuador,²¹ Venezuela,²² Bolivia,²³ and Peru—occurred in the 1960s. Most notably, in October 1968, the government of Peru sent troops to take possession of the *La Brea y Pariñas* oilfield in northern Peru, held since 1924 by the International Petroleum Corporation (IPC).²⁴ In August 1969, Peru expropriated the property but it characterized the taking of subsoil resources as a recovery of oil reserves rightfully belonging to the State.²⁵ The dispute came to an end in 1974, when the United States and Peru negotiated a global settlement for U.S. \$76 million, to be distributed among several U.S. companies affected by Peru's nationalizations.²⁶

Thus, regardless of the almost universal adherence by Latin America to the Calvo doctrine, Latin American States were not able to insulate themselves from the power of foreign countries to intervene diplomatically on behalf of their citizens.²⁷ Not surprisingly, Latin American countries initially responded to international arbitration and, more particularly, to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention),²⁸ with skepticism or outright rejection. In September

19. *Id.* at 214.

20. *Id.*

21. In 1971, Ecuador adopted a new hydrocarbons law, followed by the creation of Corporación Estatal Petrolera Ecuatoriana (CEPE) in 1972. See Supreme Decree No. 1459, Official Register No. 322, Oct. 1, 1971 (Ecuador).

22. In 1975, Venezuela nationalized the oil industry, granting Petróles de Venezuela S.A. a monopoly. See Organic Law that Reserves to the State the Industry and the Trade of Hydrocarbons, Extraordinary Official Gazette No. 1769, Aug. 29, 1975 (Venez.).

23. For instance, in 1969 Bolivia nationalized Bolivian Gulf Oil Company. See Supreme Decree 8981, Official Gazette 477, Nov. 7, 1969 (Bol.).

24. See Dale B. Furnish, *Peruvian Domestic Law Aspects of the La Brea and Pariñas Controversy*, 59 KY. L. J. 351 (1970).

25. *Id.* at 352–53. Supreme Decree No. 014-EM/DGH of Aug. 22, 1969.

26. See generally Victor Arnold and John Hamilton, *The Greene Settlement: A Study of the Resolution of Investment Disputes in Peru*, 13 TEX. INT'L L. J. 263 (1977–1978). Peru also nationalized the interest of several U.S. companies in sugar lands, copper, and iron mines.

27. See Nigel Blackaby, *Energy Investment Disputes in Latin America: A Historical Perspective*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 213 (Arthur W. Rovine ed., 2015).

28. International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States Art. 37(2)(b), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

1964, when the ICSID Convention was submitted for a vote, nineteen Latin American countries voted against its adoption.²⁹

It was not until the late 1980s and 1990s that Latin American States entered into the international system of investment protection by signing and ratifying BITs.³⁰ BITs are similar to each other in their content and structure. Ostensibly, they serve the purpose of promoting and protecting foreign investments made by nationals of one contracting party in the territory of the other contracting party.³¹

BITs generally contain (1) a provision defining investments and investors qualifying for protection; (2) a national treatment provision; (3) a most-favored-nation (MFN) clause; (4) a guarantee of fair and equitable treatment; and (5) a provision for compensation in the event of expropriation or nationalization.³² BITs generally provide access to international arbitration to qualifying investors under the auspices of the ICSID, *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL”), or arbitration under other arbitration rules.³³

The UN Conference on Trade and Development (UNCTAD) statistics show that Latin American States did not execute BITs until the late 1980s.³⁴ But by the end of the 1990s, they had entered into a total of 300 BITs.³⁵ With the exception of Brazil, which did not ratify the BITs it signed during the 1990s,³⁶ Latin American States rapidly built into a growing network of BITs, largely

29. See 2 HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES pt. 1, at 606 (photo. reprint 2001) (1968) [hereinafter ICSID CONVENTION]. The Latin American States that voted ‘no’ were: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

30. U.N. Conference on Trade and Development, *Bilateral Investment Treaties 1959–1999*, U.N. Doc. UNCTAD/ITE/IIA/2 (Dec. 14, 2000) (by Abraham Negash), available at <http://www.unctad.org/en/docs/poiteiid2.en.pdf>.

31. See generally Andrew Newcombe and Lluía Paradell, HISTORICAL DEVELOPMENT OF INVESTMENT TREATY LAW, Standards of Treatment 1-2 (2008), available at <http://www.italaw.com/documents/NewcombeandParadellLawandPracticeofInvestmentTreaties-Chapter1.pdf>.

32. *Id.* at 65.

33. *Id.* at 70–73.

34. U.N. Conference on Trade and Development, *supra* note 30, at 15..

35. *Id.*

36. *Id.* According to UNCTAD database, Brazil signed BITs with Belgium-Luxembourg (1999), Chile (1994), Cuba (1997), Denmark (1995), Finland (1995), France (1995), Germany (1995), Italy (1995), Korea (1995), Netherlands (1998), Portugal (1994), Switzerland (1994), United Kingdom (1994), and Venezuela (1995).

deactivating the Calvo doctrine. Most Latin American countries—with the notable exception of Mexico and Brazil—also ratified the ICSID Convention, which provided an international platform for the arbitration of investor-State disputes.

Today BITs, in conjunction with the ICSID Convention, are the most important source of legal protection of foreign investments in Latin America.³⁷ Despite the threat of international arbitration under BITs, some Latin American States, most notably, Venezuela, Argentina, Ecuador and Bolivia, have undertaken measures to re-calibrate the economic balance of energy investments and increase their control over energy resources. The next Part discusses key substantive areas of recent investor-State disputes.

II.

ENERGY INVESTMENT DISPUTES IN LATIN AMERICA: SUBSTANTIVE ISSUES OF DISPUTE

In the last decade, Latin American countries have faced a steadily increasing number of arbitrations filed by foreign investors before international tribunals. According to a recent UNCTAD report, “Recent Developments in Investor-State Dispute Settlement (ISDS),” as of 2013, Argentina, Venezuela, Ecuador, and Mexico were among the top ten most frequent respondents in investor-State arbitration.³⁸ Moreover, ICSID statistics show that twenty-six percent of all cases registered at ICSID as of December 31, 2014 arose in the oil, gas, and mining sectors—the biggest proportion among all economic sectors.³⁹

Although complete statistics about energy disputes in Latin America are not readily available, a survey of relevant cases reveals that investors often sue States over measures affecting control or title over their investments, or investment value and profitability,⁴⁰ including, but not limited to, direct expropriation or nationalization, indirect expropriation, as well as fiscal or regulatory measures such as the imposition of windfall profit taxes or export taxes. These measures are discussed next.

37. See generally Rudolf Dolzer and Margrete Stevens, *BILATERAL INVESTMENT TREATIES* (1995).

38. See Recent Developments in Investor-State Dispute Settlement (ISDS), at 8 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf.

39. See ICSID, *The ICSID Caseload — Statistics*, Issue 2015-1, at 12, available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20%28English%29%20%282%29_Redacted.pdf.

40. See generally Thomas Wälde, *Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law*, 1 J. WORLD ENERGY L. BUS. 55 (2008).

A. Direct Expropriation

Direct expropriation entails a mandatory legal transfer of title to property from the private investor to the host State or the outright physical seizure of property. In cases of direct expropriation, the host State openly, deliberately, and unequivocally deprives the owner of its property through the transfer of title, as reflected in a formal law or decree, or outright physical seizure.⁴¹

For instance, in July 2012, the Argentine legislature passed a law expropriating fifty-one percent of the shares of Argentina's oldest oil company, YPF S.A.,⁴² held until then by Repsol, S.A.⁴³ In response to the expropriation of YPF, Repsol filed an arbitration claim before ICSID pursuant to the Argentina-Spain BIT.⁴⁴ After protracted litigation on multiple fronts, Repsol entered into a settlement agreement with Argentina, and the ICSID arbitration proceeding was discontinued.⁴⁵

Another prominent example is the 2007 nationalization of Venezuela's heavy oil projects in the Orinoco oil belt. In February 2007, the Venezuelan government passed a decree ordering that the existing oil contracts between PDVSA and foreign oil companies (i.e., four association agreements, and thirty-two exploration at risk and profit sharing agreements) be converted into mixed companies, with *Petróleos de Venezuela S.A. (PDVSA)* (Venezuela's national oil company) or a PDVSA affiliate, holding a controlling interest (of at least a sixty percent).⁴⁶ The decree afforded foreign investors four months to agree to the terms of the new mixed company contracts or face a takeover of operations by the State.⁴⁷

41. See U.N. Conference on Trade and Development, *Expropriation: UNCTAD Series on Issues in International Investment Agreements II*, at 7, U.N. Doc. UNCTAD/DIAE/IA/2011/7 (2012), available at http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf.

42. "YPF S.A." (acronym for *Yacimientos Petrolíferos Fiscales S.A.*) is an Argentine oil company engaged in the exploration and production of hydrocarbons and the refining and distribution of chemical and petrochemical products.

43. Law No. 26.741, July 5, 2012, B.O., art. 7 (Arg.).

44. *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38.

45. *Convenio de Solucion Amigable y Avenimiento de Expropiacion*, dated Feb. 27, 2014, available at http://www.repsol.com/imagenes/es_es/Acuerdo_con_Argentina_tcm7-673555.pdf.

46. See *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, ¶ 203 (Sept. 3, 2013), available at <http://www.italaw.com/sites/default/files/case-documents/italaw1569.pdf> [hereinafter *ConocoPhillips v. Venezuela*].

47. *Id.* ¶ 204; see Decreto No. 5.200, con Rango, Valor y Fuerza de Ley de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco; así como de los Convenios de Exploración a Riesgo y Ganancias Compartidas [Decreto No. 5.200 Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Risk and

Venezuela's measures affected several projects held by foreign energy companies, including Total, Statoil, BP, Chevron, ExxonMobil, Opic Karimun, and ConocoPhillips. These companies had contracts with PDVSA providing for international arbitration under the auspices of the International Chamber of Commerce (ICC),⁴⁸ and several of them had the option of resorting to international arbitration under applicable BITs. Faced with the prospect of a forced exit from the country followed by prolonged international arbitration, a number of foreign oil companies accepted revised contract terms and migrated into "mixed companies" with a PDVSA affiliate as majority shareholder.⁴⁹ But at least three international oil companies, ConocoPhillips, ExxonMobil, and Opic Karimun, rejected Venezuela's terms, opting instead for ICC arbitration,⁵⁰ as well as BIT arbitration.⁵¹

In the case of *ConocoPhillips*, in May 2007, a PDVSA affiliate took physical control of the operations of the company's Petrozuata, Hamaca, and Corocoro projects. Thereafter, in October 2007, the Venezuelan National Assembly ratified a law⁵² providing that the oil contracts would be "extinguished" as of the date of the publication of the law or as of the date of the issuance of a transfer decree, depending on the case.⁵³ Article 2 of the law

Profit Sharing Exploration Agreements], Feb. 26, 2007, GACETA OFICIAL No. 38.632 (Venez.), arts. 4–5.

48. See, e.g., Association Agreement Among Lagoven Cerro Negro, S.A., Mobil Producción e Industrialización de Venezuela Inc. and Veba Oel Venezuela Orinoco GmbH dated 28 October 1997, Section 15 (providing for ICC arbitration seated in New York) (on file with authors); Association Agreement between Maraven, S.A. and Conoco Orinoco Inc., as modified 18 June 1997 (providing for ICC arbitration in 13.16) (on file with authors).

49. See Elisabeth Eljuri and Clovis Trevino, *Venezuela: On the Path to Complete 'Oil Sovereignty,' or the Beginning of a New Era of Investment?*, 2 J. WORLD ENERGY L. & BUS. 259 (2009).

50. See, e.g., *Mobil Cerro Negro, Ltd. v. Pétroleos de Venezuela, S.A. and PDVSA Cerro Negro, S.A.*, ICC Case No. ARB/15416/JRF, award dated Dec. 23, 2011; see also "Conoco files for ICC arbitration against Venezuela's PDVSA," Reuters, 10 Oct. 2014, available at <http://www.reuters.com/article/2014/10/10/us-conocophillips-pdvs-a-arbitration-idUSKCN0HZ1IY20141010>.

51. See *ConocoPhillips v. Venezuela*, *supra* note 46; *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27 [hereinafter *ExxonMobil v. Venezuela*]; *OPIC Karimun Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, available at <http://www.italaw.com/sites/default/files/case-documents/italaw3013.pdf>.

52. National Assembly Decree: Law on the Effects of the Process of Migration into Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Exploration at Risk and Profit Sharing Agreements, Oct. 8 2007, GACETA OFICIAL No. 38.785 (Venez.).

53. *Id.* at 1.

transferred the equity interests of the foreign partners to the newly-created mixed companies.

ConocoPhillips brought an ICSID arbitration claim against Venezuela, asking the tribunal to find that Venezuela had breached Venezuela's investment protection law⁵⁴ and the Netherlands-Venezuela BIT.⁵⁵ The alleged breach included unlawfully expropriating ConocoPhillips's investment, failing to accord fair and equitable treatment and full protection and security, and taking arbitrary and discriminatory measures impairing the use and enjoyment of ConocoPhillips's investments in Venezuela.⁵⁶

In a decision on jurisdiction and merits, a tribunal affirmed jurisdiction under the Netherlands-Venezuela BIT over three Dutch-based entities—ConocoPhillips Petrozuata (CPZ), ConocoPhillips Hamaca (CPH), and ConocoPhillips Gulf Of Paria (CGP)—through which ConocoPhillips held its interests in Petrozuata, Hamaca, and Corocoro.⁵⁷ But the tribunal sided with Venezuela by rejecting ConocoPhillips's attempt to ground jurisdiction in Article 22 of Venezuela's investment law.⁵⁸

Translated into English, Article 22 of Venezuela's Investment Law *could* read as follows:

Disputes arising between an international investor whose country of origin has in effect a treaty or agreement for the promotion and protection of investments with Venezuela, or any disputes which apply the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) or the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), shall be submitted to international arbitration under the terms provided for in the respective treaty or agreement, should it so provide, without prejudice to the possibility of using, when applicable, the systems of litigation provided for in the Venezuelan laws in force.⁵⁹

54. Decree No. 356 Having the Rank and Force of Law on Promotion and Protection of Investments, Oct. 22, 1999, GACETA OFICIAL EXTRAORDINARIO No. 5.390 (Venez.) [hereinafter Venezuela's Investment Law].

55. Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela, *Neth.-Venez.*, Oct. 22, 1991, *available at* http://www.sice.oas.org/Investment/BITSbyCountry/BITS/VEN_Netherlands.pdf [hereinafter Netherlands-Venezuela BIT].

56. *See* ConocoPhillips v. Venezuela, *supra* note 46, ¶ 212.

57. *Id.* ¶ 290(b).

58. *Id.* ¶ 290(a).

59. Venezuela's Investment Law, *supra* note 54, art. 22, as translated by the Claimants in ConocoPhillips v. Venezuela, *supra* note 46, ¶ 225. Although the Respondent proposed a different translation, *see* para. 225, the tribunal found that "[w]hile there are small differences between those translations the Parties do not see them as significant. Nor does the Tribunal." *Id.* (internal citations omitted).

The crucial issue before the tribunal was whether the words “should it so provide” meant that Venezuela had consented to submit to international arbitration if the applicable treaty or agreement, in this case, the ICSID Convention, so provided (the interpretation favored by the investors), or that consent to international arbitration must be expressly provided in a further treaty or agreement (the interpretation favored by Venezuela). After extensive analysis, the *ConocoPhillips* tribunal sided with Venezuela in finding that it lacked jurisdiction under Article 22 of the investment law.⁶⁰ This conclusion was consistent with prior decisions on jurisdiction in *Mobil v. Venezuela* and *Cemex v. Venezuela*, rejecting the investors’ claims that Article 22 contained Venezuela’s consent to ICSID jurisdiction.⁶¹

As to the merits, the tribunal rejected ConocoPhillips’s claims of denial of fair and equitable treatment, particularly in relation to certain tax measures. However, a majority of the tribunal found Venezuela liable for unlawful expropriation. The majority held that Venezuela had breached its obligation to negotiate in good faith over fair market value compensation for its taking of ConocoPhillips’s interests in the three projects,⁶² insisting instead in compensation based on book value.⁶³ The calculation of damages was reserved for a second phase, and is still ongoing as of the time of writing.

In contrast with the *ConocoPhillips* tribunal, the tribunal in *ExxonMobil v. Venezuela* accepted Venezuela’s argument that “mere lack of agreement on compensation does not render an expropriation unlawful.”⁶⁴ The tribunal found that Venezuela had participated in months of negotiations with ExxonMobil, and that the evidence submitted by ExxonMobil did not demonstrate that the proposals made by Venezuela were incompatible with the requirement of ‘just’ compensation required by the BIT.⁶⁵ Accordingly, the tribunal rejected the claim that the expropriation was unlawful.⁶⁶

60. *ConocoPhillips v. Venezuela*, *supra* note 46, ¶ 262.

61. *See ExxonMobil v. Venezuela*, *supra* note 51, Decision on Jurisdiction (June 10, 2010), ¶ 209, available at <http://www.italaw.com/sites/default/files/case-documents/ita0538.pdf>; *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction (Dec. 30, 2010), ¶ 160, available at <http://www.italaw.com/sites/default/files/case-documents/ita0142.pdf>.

62. *ConocoPhillips v. Venezuela*, *supra* note 46, ¶ 404.

63. *Id.*, *supra* note 46, ¶ 393. Following the *ConocoPhillips* decision on jurisdiction and the merits, Venezuela submitted a request for reconsideration but the majority of the tribunal found that it had no power to reconsider its earlier ruling. *See Id.*, Decision on Respondent’s Request for Reconsideration, Mar. 10, 2014.

64. *ExxonMobil v. Venezuela*, *supra* note 51, Award, Oct. 9, 2014, ¶ 144 (internal citations omitted).

65. *Id.* ¶ 305. Article 6(c) of the Netherlands-Venezuela BIT provides that compensation for expropriation or nationalization, or measures having an effect equivalent to nationalisation or

The distinction between “unlawful expropriation,” as found by the *ConocoPhillips* tribunal, and “lawful expropriation,” as found by the *ExxonMobil* tribunal, may be crucial, as a finding of unlawful expropriation could open the door for the arbitrators to depart from the BIT’s fair market value compensation standard (calculated immediately before the expropriatory measure was taken or became public knowledge) and look to customary international law for the standard of full reparation.⁶⁷ For instance, in *ConocoPhillips*, the tribunal found that the expropriation had been unlawful and it set the date of valuation of the expropriated assets as of the date of the award.⁶⁸

In contrast, the *ExxonMobil* tribunal held that the compensation due to *ExxonMobil* for the lawful expropriation of its assets must be calculated in conformity with the fair market value standard set out in Article 6(c) of the BIT,⁶⁹ However, the *ExxonMobil* tribunal left open the question of whether the standard for compensation in cases of unlawful expropriation would differ from the standard for compensation to be paid in cases of lawful expropriation.⁷⁰

B. Indirect Expropriation

The vast majority of BITs refer to both direct and indirect expropriation. Indirect expropriation may result from measures by the host State that substantially deprive the foreign investor of the profitability of its investment without affecting legal title. For instance, Article 3(1) of the U.S.-Ecuador BIT provides that:

“Investments shall not be expropriated or nationalized either directly or indirectly through *measures tantamount to expropriation* or nationalization (expropriation) except: for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due

expropriation

“shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier, it shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.”

66. *Id.* ¶ 306.

67. *ConocoPhillips v. Venezuela*, *supra* note 46, ¶ 337.

68. *Id.*

69. *ExxonMobil v. Venezuela*, *supra* note 51, ¶ 306.

70. *Id.*

process of law”⁷¹

A recent case arising out of a measure “tantamount to an expropriation” is *Occidental Petroleum Corporation et al. v. Republic of Ecuador*.⁷² Occidental was Ecuador’s largest investor, responsible for roughly twenty percent of Ecuador’s total oil production.⁷³ Occidental, Ecuador, and Empresa Estatal Petróleos del Ecuador (PetroEcuador) were parties to a participation agreement whereby Occidental would receive a share of oil production in exchange for undertaking the obligation to explore, develop and exploit an oil block.⁷⁴

In May 2006, the Ecuadorian Minister of Energy and Mines declared the participation contract expired.⁷⁵ Shortly thereafter, the government seized Occidental’s oil fields, including wells, drills, storage facilities, and other oil exploration and production assets.⁷⁶ Ecuador characterized the measure as a “bona fide administrative sanction”⁷⁷ in response to Occidental’s conveyance of a forty percent operational working interest in the oil block to another company, in breach of transfer restrictions contained in the participation contract.⁷⁸ In response, Occidental filed an arbitration claim against Ecuador at ICSID under the U.S.-Ecuador BIT.⁷⁹

A majority of the tribunal found that Occidental had breached the participation agreement by failing to secure the required ministerial authorization for the transfer of rights.⁸⁰ In spite of the investor’s breach, the tribunal held that, “the [expiration] Decree was not a proportionate response in the particular circumstances”⁸¹ and was issued in breach of Ecuadorian law and customary international law.⁸² The majority ultimately found Ecuador liable for

71. Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Ecuador, art. 3(1), Aug. 27, 1993, S. TREATY DOC. NO. 103–15 (1993) (emphasis added).

72. See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5 2012), available at <http://italaw.com/sites/default/files/case-documents/italaw1094.pdf> [hereinafter *Occidental v. Ecuador*].

73. *Ecuador Cancels an Oil Deal with Occidental Petroleum*, N.Y. TIMES, May 17, 2006, available at <http://www.nytimes.com/2006/05/17/business/worldbusiness/17oil.html>.

74. *Occidental v. Ecuador*, *supra* note 72, ¶¶ 115–116.

75. *Id.* ¶ 105.

76. *Id.* ¶ 200.

77. *Id.* ¶ 277(1).

78. *Id.* ¶ 244.

79. *Id.*

80. *Id.* ¶ 876(iv).

81. *Id.* ¶ 452.

82. *Id.* ¶ 876(i–iii).

failure to provide fair and equitable treatment and for indirectly expropriating Occidental's investment.⁸³

In the majority's view, Ecuador's taking of Occidental's investment by means of an administrative sanction was a measure 'tantamount to expropriation.'⁸⁴ In relation to the meaning of "tantamount to expropriation," the tribunal cited to *Metalclad v. Mexico*, where the tribunal said:

"Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."⁸⁵

The tribunal reduced the damages awarded to Occidental by a factor of twenty-five percent to account for the investor's breach of the participation agreement by improperly transferring a forty percent operational interest in the oil block.⁸⁶ One of the arbitrators dissented, emphasizing that liability should have been apportioned equally between Ecuador and Occidental.⁸⁷ The dissenter also noted that Occidental's transfer of a forty percent operational interest in the oil block had been valid (until declared invalid by a competent judge), and that therefore Occidental should only have received sixty percent of the total damages.⁸⁸ Ecuador filed an application for annulment; pending at the time of writing.

C. Fiscal or Regulatory Measures

A host State may also diminish the value or return of an investment by taking measures that modify the legal and economic equilibrium of the oil project, such as: an increase in the applicable tax rate, an imposition of windfall profit taxes or export taxes, or a failure to reimburse value added tax ("VAT"). These measures can also amount to an indirect expropriation in violation of an applicable BIT. However, the line between indirect expropriation and legitimate

83. *Id.*

84. *Id.* ¶ 455.

85. *Id.* (citing to *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 30, 2000), available at <http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf>).

86. *Id.* ¶ 876(iv).

87. See *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶ 8 (Sept. 20, 2012) (Prof. Brigitte Stern dissenting opinion), available at <http://italaw.com/sites/default/files/case-documents/italaw1096.pdf>.

88. *Id.* ¶¶ 152–159.

governmental regulatory or tax measures is not clearly drawn and will depend on the specific facts and circumstances of the case.

1. *Windfall Profit Taxes*

In response to the oil-price spike that began in 2002, in April 2006 Ecuador enacted Law 42, which required oil companies to pay at least a fifty percent share of “extraordinary income” (the difference between the market price of Ecuadorian oil actually sold and the average market price of oil at the time the contracts were executed, multiplied by the number of barrels produced).⁸⁹ The implementing decree initially set the share of “extraordinary income” payable to the State at fifty percent.⁹⁰ Thereafter, in October 2007, Ecuador issued another decree increasing the government take from fifty to ninety-nine percent.⁹¹

At least four oil companies brought arbitration claims against Ecuador challenging the legality of “extraordinary income” or windfall profit tax under their contracts, Ecuadorian law, and/or a BIT.⁹² For instance, Burlington Resources Inc. (“Burlington”) brought a claim before ICSID under the U.S.-Ecuador BIT arguing that Law 42 was “a measure tantamount to expropriation,” which had a “destructive impact on Burlington’s investment”⁹³ in two participation agreements for Blocks 7 and 21, solely operated by Burlington’s French partner, Perenco Ecuador Ltd. (“Perenco”). Tensions over the collection of the windfall profit tax ultimately led to a declaration of expiration of the participation agreements for Blocks 7 and 21, and to the physical takeover of the oil fields.⁹⁴

89. Ley No. 2006-42 Ley Reformatoria a la ley de Hidrocarburos [Law No. 2006-42 Hydrocarbons Reform Law], Apr. 20, 2006, REGISTRO OFICIAL No. 257, art. 2 (Ecuador).

90. See Executive Decree 1672, July 13, 2006, REGISTRO OFICIAL No. 312 (Ecuador).

91. See Executive Decree 662, Oct. 18, 2007, REGISTRO OFICIAL No. 193 (Ecuador).

92. See, e.g., *City Oriente Limited v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (May 13, 2008), available at <http://www.italaw.com/documents/CityOrienteProvisional-En.pdf>; *Perenco Ecuador Ltd v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (May 8, 2009), available at <http://www.italaw.com/sites/default/files/case-documents/ita0623.pdf>; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, available at http://www.italaw.com/sites/default/files/case-documents/italaw1094_0.pdf [hereinafter *Burlington v. Ecuador*]; *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4; *Total SA v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (Dec. 27, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0868.pdf>.

93. *Burlington v. Ecuador*, *supra* note 92, ¶ 109.

94. *Id.* ¶ 123.

The *Burlington* tribunal noted that, “the expropriation analysis must be on the investment as a whole, and not on discrete parts of the investment.”⁹⁵ According to the tribunal

“[b]y definition, [the Law 42] tax would appear not to have an impact upon the investment as a whole, but only on a portion of the profits. On the assumption that its effects are in line with its name, a windfall profits tax is unlikely to result in the expropriation of an investment.”⁹⁶

The majority of the tribunal found that Burlington had failed to substantiate the allegation that its investment had been expropriated or rendered worthless. Instead, the evidence showed that the investment was capable of generating a commercial return in spite of the enactment of Law 42 at fifty percent or ninety-nine percent.⁹⁷ While the windfall tax did not amount to an expropriation, the physical takeover of Blocks 7 and 21 to enforce Law 42 did.⁹⁸

Perenco brought a parallel claim against Ecuador under the Ecuador-France BIT based on the same operative facts as *Burlington v. Ecuador*, namely that Law 42 at fifty percent and ninety-nine percent, Ecuador’s declaration of expiration of the participation agreements, and the ensuing physical taking of Blocks 7 and 21 constituted an expropriation.⁹⁹ The *Perenco* tribunal agreed with the *Burlington* tribunal that Law 42 did not amount to an indirect expropriation.¹⁰⁰ The *Perenco* tribunal added that:

“Given the oil industry’s typically expected returns and its experience with governmental responses to market changes, it would be unsurprising to an experienced oil company that given its access to the State’s exhaustible natural resources, with the substantial increase in world oil prices, there was a chance that the State would wish to revisit the economic bargain underlying the contracts.”¹⁰¹

The *Perenco* tribunal did find that Law 42 at ninety-nine percent constituted a breach of contract.¹⁰² In the tribunal’s view, “Law 42 at ninety-

95. *Id.* ¶ 257.

96. *Id.* ¶ 404.

97. *Id.* ¶ 456.

98. *Id.* ¶ 123 (“Ecuador’s physical takeover of Blocks 7 and 21 was a complete and direct expropriation of Burlington’s investment.”).

99. *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, ¶¶ 85–215 (Sept. 12, 2014), available at <http://www.italaw.com/sites/default/files/case-documents/italaw4003.pdf> [hereinafter *Perenco v. Ecuador*].

100. *Id.* ¶¶ 671, 680 (Perenco “did not press the point that at 50% Law 42 was itself an expropriation”).

101. *Id.* ¶ 588 (internal citations omitted).

102. *Id.* ¶ 407. Note that, whereas in *Burlington v. Ecuador*, the claimant’s subsidiaries, not the claimant itself, were party to the relevant participation agreements, Perenco was party to the participation contracts for Blocks 7 and 21, which contained provisions providing for ICSID arbitration. Therefore, Perenco, unlike Burlington, advanced its contract claims alongside its treaty

nine percent unilaterally converted the Participation Contracts into *de facto* service contracts while the State developed a new model of such contracts which it demanded the contractor to sign.”¹⁰³ The tribunal also found that Ecuador’s declaration that the contracts had expired on July 20, 2010 amounted to an expropriation of Perenco’s contractual rights.¹⁰⁴

2. Export Taxes

The imposition of export withholding taxes on hydrocarbons may also frustrate the expectations of an oil investor. In 2002, Argentina imposed export taxes on crude oil, natural gas, and liquefied petroleum gas (LPG).¹⁰⁵ In 2004 and 2007, Argentina again increased the export taxes on crude oil and fuel. These taxes, borne by the exporter, were designed to prevent producers from receiving more than forty-two U.S. dollars per barrel of oil produced.¹⁰⁶ At least five companies brought arbitration claims alleging that the export taxes violated their BIT rights.¹⁰⁷

French-based Total S.A. brought a claim before ICSID under the Argentina-France BIT arguing that Argentina’s imposition of export taxes on crude oil, natural gas and LPG as of 2002 breached the fair and equitable treatment standard contained in the BIT.¹⁰⁸ In particular, the company complained that the export taxes violated the guarantees contained in a series of decrees adopted by Argentina in 1989, which provided that producers would have the right to receive compensation if the government imposed restrictions on the export of crude oil and its derivatives or on the free availability of natural gas.¹⁰⁹

claims.

103. *Id.* ¶ 409.

104. *Id.* ¶ 710.

105. Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability (Dec. 27, 2010) ¶¶ 370–376, available at <http://italaw.com/sites/default/files/case-documents/ita0868.pdf> [hereinafter Total S.A. v. Argentine Republic].

106. *Id.* ¶ 380. Any excess amounts were to be retained by Argentina.

107. See El Paso Energy Int’l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), available at http://www.italaw.com/documents/El_Paso_v._Argentina_Award_ENG.pdf; Pan Am. Energy LLC v. Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (July 27, 2006), available at <http://www.italaw.com/sites/default/files/case-documents/ita0616.pdf>; BP Am. Prod. Co. v. Argentine Republic, ICSID Case No. ARB/04/8; Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008), available at <http://www.italaw.com/sites/default/files/case-documents/ita0907.pdf>; Total S.A. v. Argentine Republic, *supra* note 105.

108. Total S.A. v. Argentine Republic, *supra* note 105, ¶ 381.

109. *Id.* ¶¶ 352–354.

The tribunal rejected Total S.A.'s claim that the export taxes had restricted its exports in violation of the BIT.¹¹⁰ In the tribunal's view, the export taxes constituted "fiscal measures (to which oil producing and exporting countries normally have recourse) generally addressed to the exporters of crude oil and their derivatives (not specifically to Total)."¹¹¹ These export taxes, the tribunal added, are part of the general fiscal legislation to which Total S.A. is subject.¹¹² Moreover, the concession did not promise "fiscal stability" or an exemption from potential government intervention.¹¹³

3. Value-added Tax (VAT) Reimbursement

As a way to attract foreign capital, host States have traditionally reimbursed to foreign investors the VAT these investors had paid on purchases of goods and services required for exploration and production activities in the host State. States' refusal to reimburse VAT in such cases may give rise to energy-related disputes. For instance, in November 2013, Occidental Exploration and Production Company (Occidental E&P) initiated an arbitration claim against Ecuador arguing that Ecuador's denial of its application for VAT refunds violated the U.S.-Ecuador BIT's guarantees of fair and equitable treatment and national treatment, and its protection against expropriation without compensation.¹¹⁴

Under the 1999 participation agreement between Occidental E&P and Petroecuador, Occidental E&P was entitled to a participation formula expressed as a percentage of oil production.¹¹⁵ Occidental E&P argued that under the tax regime, it was entitled to reimbursement of VAT paid as a result of importation or local acquisition of goods and services used for the production of oil.¹¹⁶ In turn, Ecuador claimed that the tribunal lacked jurisdiction over Occidental E&P's claims because the BIT excluded matters of taxation from the scope of its application.¹¹⁷

The tribunal rejected Ecuador's jurisdictional objection on the basis that what was really in dispute was not a tax matter (as the tax was "unchallengedly

110. *Id.* ¶ 470.

111. *Id.*

112. *Id.* ¶ 470.

113. *Id.* ¶ 435.

114. Occidental Exploration and Prod. Co. v. Republic of Ecuador, Case No. UN 3467, Final Award, ¶¶ 1–4 (London Ct. of Int'l Arb. 2004), available at <http://www.italaw.com/sites/default/files/case-documents/ita0571.pdf>.

115. *Id.* ¶ 28.

116. *Id.* ¶ 30.

117. *Id.* ¶ 64.

due and owing and in fact paid”¹¹⁸), but whether the VAT refund had been secured under Occidental E&P’s participation share, as claimed by Ecuador, or whether, as argued by the claimant, it should be recognized as a right under Ecuadorian tax law.¹¹⁹ On the merits, the tribunal sided with Occidental E&P, finding that: (1) the contract did not contemplate that VAT would be reimbursed through the participation percentage that Ecuador received under the participation agreement;¹²⁰ and (2) Occidental E&P was entitled to reimbursement under Ecuador’s tax laws.¹²¹

The tribunal upheld Occidental E&P’s claims under the BIT’s fair and equitable treatment standard on the basis that Ecuador’s denial of Occidental E&P’s VAT reimbursement applications significantly changed the framework under which its investment had been made.¹²² The tribunal also upheld Occidental E&P’s claim under the national treatment clause of the BIT because Ecuadorian companies that exported non-petroleum products continued to receive VAT refunds.¹²³ However, the tribunal rejected Occidental E&P’s expropriation claim on the grounds that Ecuador’s denial of VAT reimbursement did not amount to deprivation of the use or reasonably expected economic benefit of the investment.¹²⁴

EnCana Corporation filed similar claims against Ecuador under the Canada-Ecuador BIT.¹²⁵ In 1995, two of EnCana’s subsidiaries entered into participation agreements with Petroecuador entitling them to receive a percentage of the production.¹²⁶ Starting in 2001, Ecuador’s tax authorities denied the subsidiaries’ claims for VAT refunds.¹²⁷ In August 2004, following the ruling in favor of Occidental E&P, Ecuador enacted an interpretive law providing that Article 69A of the Tax Law is interpreted to mean that VAT is not applicable to petroleum activity because petroleum is not manufactured but is instead extracted from deposits.¹²⁸

118. *Id.* ¶ 74.

119. *Id.*

120. *Id.* ¶ 110.

121. *Id.* ¶ 143.

122. *Id.* ¶ 190.

123. *Id.* ¶ 177.

124. *Id.* ¶ 89.

125. *EnCana Corporation v. Republic of Ecuador*, Case No. UN 3481, Award, (London Ct. of Int’l Arb. 2006), available at http://www.italaw.com/sites/default/files/case-documents/ita0285_0.pdf [hereinafter *EnCana v. Ecuador*].

126. *Id.* ¶ 31.

127. *Id.* ¶ 73. Ecuador’s internal revenue service is known as *Servicio de Rentas Internas* (SRI).

128. *Id.* ¶ 95.

At issue in *EnCana* were VAT refunds to which the Claimant was allegedly entitled under Ecuadorian laws and regulations. Departing from the Occidental E&P award, the EnCana tribunal held that it had jurisdiction over EnCana's expropriation claims but not over its other claims under the Canada-Ecuador BIT.¹²⁹ Article XII of the BIT excluded claims related to "taxation measures" from the scope of the treaty, except for a claim that a taxation measure was "in breach of an agreement between the central government authorities of a Contracting Party and the investor" and for an expropriation claim.¹³⁰

The first exception was inapplicable because EnCana did not claim a "breach" of the participation contracts. In any event, there was "no relevant agreement between EnCana and the central government authorities of Ecuador" because the participation contracts were concluded by EnCana subsidiaries, which did not qualify as investors under the BIT.¹³¹ Although the tribunal assumed jurisdiction over EnCana's expropriation claims under the second exception, it rejected EnCana's claim that Ecuador's denial of VAT constituted a direct or an indirect expropriation of its investments.¹³²

As to the direct expropriation claim, the tribunal first found that a claim concerning the retrospective cancellation of the State's liability to pay money on account of tax refunds due could, in principle, qualify as an "investment" under the BIT.¹³³ However, the tribunal noted that, after the passage of the interpretive law, oil companies had no right to VAT refunds.¹³⁴ Even if they had such right, the tax authorities' policy on oil refunds did not rise to the level of repudiation of a legal right so as to amount to a direct or indirect expropriation of accrued rights to VAT refunds.¹³⁵

The tribunal rejected the indirect expropriation claim on the grounds that nothing in the record showed that "the change in VAT laws or their interpretation brought the companies to a standstill or rendered the value to be derived from their activities so marginal or unprofitable as effectively to deprive them of their character as investments."¹³⁶ Moreover, the tribunal noted that "[i]n the absence of a specific commitment from the host State, the foreign investor has neither the right nor any legitimate expectation that the tax regime

129. *Id.* ¶¶ 112–168.

130. *Id.* ¶ 109.

131. *Id.* ¶¶ 171–172, 179–182.

132. *Id.*

133. *Id.* ¶ 183.

134. *Id.* ¶ 187.

135. *Id.* ¶ 197.

136. *Id.* ¶ 174.

will not change, perhaps to its disadvantage, during the period of the investment.”¹³⁷

III.

A BACKLASH AGAINST INTERNATIONAL ARBITRATION?

The increasing number of investment arbitration claims (and awards) against Latin American States has brought about a debate about the appropriateness and fairness of the current investor-State dispute settlement system.¹³⁸ The debate has translated into action as some Latin American countries have taken steps to insulate themselves from the system.¹³⁹ These steps include: the termination, renegotiation or non-renewal of BITs, denunciation of the ICSID Convention, the adoption of domestic legislation adverse to international arbitration, the exclusion of ICSID in new BITs, contractual waivers of international arbitration, and proposals for the creation of a regional arbitration center as an alternative to ICSID.¹⁴⁰

Two caveats must be made. First, these steps have been taken by a limited number of Latin American countries. Therefore, the so-called Latin American “backlash” against international investment arbitration may be an overstatement. Second, as far as arbitrations involving private commercial parties are concerned, Latin American States progressively accepted arbitration as an adequate and effective means of dispute resolution. The more apparent setbacks are related to arbitrations involving State parties and foreign investors under BITs.

A. Termination, Renegotiation or Nonrenewal of BITs

The host State may denounce BITs, which generally provide access to international arbitration to qualifying investors under the auspices of the ICSID, ad hoc arbitration under UNCITRAL rules, or arbitration under other arbitration rules. For instance, in April 2008, Venezuela sent a formal communication to the Netherlands indicating Venezuela’s intention not to renew the Netherlands-Venezuela BIT.¹⁴¹ The Venezuelan Minister of Energy and Petroleum explained

137. *Id.* ¶ 173.

138. *See, e.g.*, Bernardo M. Cremades, *The Resurgence of the Calvo Doctrine in Latin America*, 7 *BUS. L. INT’L* 53 (2006).

139. *See generally* Katia Fach Gomez, *Latin America and ICSID: David versus Goliath*, 17 *L. & Bus. Rev. Am.* 195 (2011).

140. *Id.*

141. *See* Luke Eric Peterson, *Venezuela surprises The Netherlands with termination notice for BIT; treaty has been used by many investors to ‘route’ investments into Venezuela*, *INV. ARB. REP.*

that the decision was adopted because certain companies had abused corporate nationality. The Minister explained, “CNPC registers as Dutch, Eni registers as Dutch, ExxonMobil turned out to be Dutch as well. There is clearly an abuse of the treaty and we are going to denounce it.”¹⁴²

Similarly, on January 6, 2010, the President of Ecuador requested that the Ecuadorian Constitutional Court issue a decision denouncing thirteen BITs, including those between Ecuador and Argentina, Canada, Chile, China, Finland, France, Germany, Sweden, Switzerland, Netherlands, United Kingdom and Ireland, United States of America, and Venezuela.¹⁴³ Ecuador’s Constitutional Court concluded that the clauses concerning investor-State arbitration in certain BITs are contrary to the Constitution of Ecuador.¹⁴⁴ Bolivia has also announced that it will revisit its BITs.¹⁴⁵

The immediate legal effects of denunciation or non-renewal of BITs are limited because the protections offered by these treaties generally survive for a period of five to fifteen years after termination, expiration, or non-renewal.¹⁴⁶ Therefore, even if the State is not obligated to offer treaty protection to

(May 16, 2008), available at http://www.iareporter.com/articles/20091001_93.

142. *Venezuela Denunciará Acuerdo en Holanda Por “Abuso” de Exxon y Otras Empresas, [Venezuela Will Denounce Agreement with the Netherlands for Abuse of Exxon and Other Businesses]*, EL ECONOMISTA (Apr. 21, 2008), available at <http://www.economista.es/empresas-finanzas/noticias/489075/04/08/Venezuela-denunciara-acuerdo-en-Holanda-por-abuso-de-Exxon-y-otras-empresas.html>. (However, the reference to “denunciation” is not correct because the treaty was simply not renewed by Venezuela.)

143. See Letter Number T.4766-SNJ-10-21 from President Correa to the President of the Constitutional Court, dated Jan. 6, 2010 (contending that the U.S. and other BITs “contain clauses that contradict the Constitution” and requesting “a favorable opinion to denounce the Bilateral Investment Treaties”).

144. See, e.g., Constitutional Court of Ecuador, Resolution No. 043-10-DTI-CC, Case No. 0013-10-TI, Nov. 25, 2010 (Ecuador-United States BIT), available at <http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/7633e338-42eb-4e06-9cb8-f427e6125f7c/0013-10-TI-res.pdf?guest=true>; see also Constitutional Court of Ecuador, Resolution No. 035-10-DTI-CC, Case No. 0003-10-TI, Oct. 7, 2010 (Canada-Ecuador BIT), available at <http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/29148308-43b1-4dcc-a71d-00bf6ba3f70b/0003-10-TI-res.pdf?guest=true>.

145. Damon Vis-Dunbar et al., *Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions*, INV. TREATY NEWS (ITN) (May 9, 2007), http://www.iisd.org/pdf/2007/itm_may9_2007.pdf.

146. The scope of the survival clause is also subject to some level of interpretation. See generally Elisabeth Eljuri & Pedro J. Saghy, *BIT Termination and the Survival Clause. What Does the Concept of Protection of Investments Made Prior to Termination of the BIT Actually Cover?*, IBA Conference Material, 2008.

investments made after termination of the BIT, investments undertaken prior to termination benefit from the BIT's survival clause.¹⁴⁷

B. Denunciation of the ICSID Convention

A host State may also denounce the ICSID Convention. Article 71 of the ICSID Convention provides that any contracting State may denounce the Convention by written notice to the Convention depositary.¹⁴⁸ Under Article 71, denunciation takes effect six months after the Convention depositary receives notice.¹⁴⁹

Thus far three Latin American countries—Bolivia, Ecuador and Venezuela—have withdrawn from the ICSID Convention. Bolivia became the first State in the history of the ICSID Convention to denounce it in May 2007,¹⁵⁰ followed by Ecuador in July 2009,¹⁵¹ and next by Venezuela in January 2012.¹⁵²

Other countries declared their intention to denounce the ICSID Convention during the Fifth Summit of the Member States of the Bolivarian Alliance for the Americas (ALBA), but these countries have yet to act on their threats.¹⁵³ More recently, public statements by Argentina's Chief Legal Advisor to the Treasury and a draft bill from March 2012 triggered speculation about Argentina's potential denunciation of the ICSID Convention, but Argentina has yet to withdraw from ICSID.¹⁵⁴

147. See, e.g., Netherlands-Venezuela BIT, *supra* note 55, art. 14(3) provides: "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."

148. ICSID CONVENTION, *supra* note 28, art. 71.

149. *Id.* ("Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.")

150. Press Release, ICSID, Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007).

151. Press Release, ICSID, Ecuador Submits a Notice Under Article 71 of the ICSID Convention (July 9, 2009).

152. Press Release, ICSID, Venezuela Submits a Notice Under Article 71 of the ICSID Convention (Jan. 26, 2012).

153. See Emmanuel Gaillard, *Anti-Arbitration Trends in Latin America*, N.Y. L.J. (June 5, 2008), available at http://www.shearman.com/~media/Files/NewsInsights/Publications/2008/07/AntiArbitration-Trends-in-Latin-America/Files/View-Full-Text/FileAttachment/IA_070208_03.pdf.

154. See Docket No. 1311-D-2012, Derogación de la ley 24353 de Adhesión de la República Argentina al Convenio Sobre Arreglos de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados adoptado en Washington—Estados Unidos de América—el 18 de marzo de 1965 [Repeal of the Act of Accession 24353 Argentina to the Convention on the

The effect of denouncing the ICSID Convention has been the subject of much debate. Article 72 provides that notice of denunciation “shall not affect the rights or obligations . . . of that State . . . or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.”¹⁵⁵ ICSID tribunals must determine whether an investor may “consent” to ICSID jurisdiction within the six-month period contemplated by Article 71, or after denunciation takes effect.

In any event, a BIT dispute resolution clause may well provide for alternative dispute resolution options under ICSID. Ad hoc arbitration under UNCITRAL Rules and institutional arbitration under the auspices of the Stockholm Chamber of Commerce or the ICC are possible alternatives.

C. Article 25(4) Notice of Class of Disputes Not To Be Submitted to ICSID Jurisdiction

Article 25(4) of the ICSID Convention allows a contracting State to notify the Centre of the class or classes of disputes that the State would or would not consider submitting to the jurisdiction of the Centre.¹⁵⁶ Thus, if a State is a signatory to the ICSID Convention, that State could serve notice to ICSID that it will no longer consent to ICSID jurisdiction as a forum to resolve energy-related disputes with foreign investors.

For instance, prior to denouncing the ICSID Convention, Ecuador had notified ICSID, in accordance with Article 25(4), that “it will not accept to submit to the jurisdiction of the Centre disputes related to the management of its non-renewable natural resources, understanding as such (but not limited to) mining resources and hydrocarbons.”¹⁵⁷ The legal effect of Ecuador’s Article

Settlement of Investment Disputes Between States and Nationals of Other States Adopted in Washington—United States—Mar. 18, 1965], Mar. 21, 2012, <http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=1311-D-2012> (Arg.).

155. ICSID CONVENTION, *supra* note 28, art. 72 (“Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.”).

156. *Id.* art. 25(4) (“Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).”).

157. Press Release, ICSID, Ecuador’s Notification Under Article 25(4) of the ICSID Convention (Dec. 5, 2007).

25(4) notification is controversial but moot in light of Ecuador's subsequent denunciation of the ICSID Convention altogether.¹⁵⁸

D. Domestic Legislation Limiting Access to International Arbitration

The host State could enact legislation or constitutional amendments seeking to shield the State from international arbitration. Recently, some Latin American countries have adopted new constitutions or have interpreted their existing constitutions to limit access to international arbitration. For instance, Article 320 of the 2009 Bolivian Constitution provides that "foreign investment shall submit to Bolivian jurisdiction, laws and authorities." Article 366 expressly excludes international arbitration for the resolution of disputes in the hydrocarbons productive chain:

Every foreign enterprise that conducts activities in the hydrocarbons production chain in the name and representation of the State shall be subject to the sovereignty of the State, and to the laws and authority of the State. No foreign court or foreign jurisdiction shall be recognized, and foreign investors may not invoke any exceptional situation for international arbitration, nor resort to diplomatic claims. (Authors' translation.)¹⁵⁹

Similarly, Article 422 of the 2008 Ecuadorian Constitution prohibits the State from concluding treaties or international instruments in which Ecuador would cede sovereign jurisdiction to international arbitration tribunals in contractual or commercial disputes between the State and physical or juridical persons.¹⁶⁰ On the basis of Article 422, the Constitutional Court of Ecuador declared several BITs unconstitutional in July 2010.¹⁶¹

Article 422, however, provides for an important exception: The prohibition shall not apply to "the international treaties and instruments providing for the resolution of disputes between States and citizens of Latin America by regional arbitral instances or by jurisdictional organs designated by the contracting States." In short, Article 422 of the Constitution of Ecuador rejects the current

158. For a discussion of the legal effects of a notification under Article 25(4) of the ICSID Convention, see PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction, ¶ 144 et seq. (June 4, 2004) <http://italaw.com/documents/PSEGGlobal-Turkey-Award.pdf>.

159. CONSTITUCIÓN POLÍTICA DEL ESTADO PLURINACIONAL DE BOLIVIA [Political Constitution of the Plurinational State of Bolivia], art. 366, 25 de enero de 2009 (Bol.) (translated by the authors).

160. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [Constitution of the Republic of Ecuador], art. 422, REGISTRO OFICIAL 449, 20 de octubre de 2008 (Ecuador).

161. Eric Gillman, *The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008*, 19 AM. REV. INT'L ARB. 269, 269 (2008).

investor-State arbitration system but appears to contemplate the creation of regional arbitration mechanisms.¹⁶²

In a similar vein, Mexico's new hydrocarbons law provides that dispute resolution mechanisms may be used for the resolution of disputes related to exploration and production contracts, including arbitration agreements in the terms of the Mexican Commercial Code and international treaties to which Mexico is party.¹⁶³ However, the law provides that disputes arising out of the unilateral administrative rescission of an exploration and production contract are nonarbitrable.¹⁶⁴ The potential overlap between contractual disputes and disputes arising out of unilateral administrative terminations of exploration and production contracts could give rise to interesting arbitrability challenges.

Moreover, under Mexican law, an arbitration proceeding in connection with exploration and production contracts is subject to the following conditions: (1) the applicable laws must be Mexican Federal Laws; (2) the arbitration must be conducted in Spanish; and (3) the award must be strictly in accordance with the law and binding and final for both parties.¹⁶⁵ The interaction between the choice-of-law provision of Mexico's new hydrocarbons law and the choice-of-law clauses of many of Mexico's BITs raises interesting issues. For instance, Article 27 of the China-Mexico BIT provides that "[an investor-State] tribunal established under this Section [entitled 'Constitution of the Arbitral Tribunal'] shall decide the issues in dispute in accordance with this Agreement and with the applicable rules and principles of international law."¹⁶⁶

162. *Id.* at 269.

163. Decreto por el que se Expide la Ley de Hidrocarburos y se Reforman Diversas Disposiciones de la Ley de Inversión Extranjera: Ley Minera, y Ley de Asociaciones Público Privadas [Decree Whereby the Hydrocarbon Law is Issued and Reforms Various Provisions of the Law of Foreign Investment: Mining Law, and Law on Public-Private Partnerships], Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.). Art. 21 provides (in Spanish):

"Tratándose de controversias referidas a los Contratos para la Exploración y Extracción, con excepción de lo mencionado en el artículo anterior [regulando la rescisión administrativa], se podrán prever mecanismos alternativos para su solución, incluyendo acuerdos arbitrales en términos de lo dispuesto en el Título Cuarto del Libro Quinto del Código de Comercio y los tratados internacionales en materia de arbitraje y solución de controversias de los que México sea parte. La Comisión Nacional de Hidrocarburos y los Contratistas no se someterán, en ningún caso, a leyes extranjeras. El procedimiento arbitral en todo caso, se ajustará a lo siguiente: (i) Las leyes aplicables serán las Leyes Federales Mexicanas; (ii) Se realizará en idioma español, y (iii) El laudo será dictado en estricto derecho y será obligatorio y firme para ambas partes."

164. *Id.*

165. *Id.*

166. Agreement Between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, Mex.-

E. Exclusion of ICSID in New BITs

Recently, Venezuela has entered into BITs with Cuba, Iran, Belarus and Russia. These BITs include dispute resolution provisions that exclude ICSID as a dispute resolution option.¹⁶⁷ For instance, the BITs between Venezuela and Cuba, and between Venezuela and Belarus offer the option of resorting to arbitration under UNCITRAL Rules.¹⁶⁸ The BIT between Venezuela and Russia provides, in addition to UNCITRAL arbitration, the option of resorting to the Stockholm Chamber of Commerce.¹⁶⁹

This trend to exclude ICSID as a dispute resolution option may be limited to a minority of countries. Several other BITs recently entered into by other Latin American countries contemplate the option of resorting to ICSID arbitration under the ICSID Convention or the ICSID Additional Facility Rules.¹⁷⁰ For instance, the BIT between Chile and Iceland, signed in 2006, provides for ICSID arbitration, *ad hoc* arbitration under UNCITRAL Rules, and ICC arbitration.¹⁷¹ Similarly, the BIT between Nicaragua and Belgium-Luxembourg, signed in 2005, provides for ICSID arbitration, *ad hoc* arbitration under UNCITRAL Rules, and ICC arbitration.¹⁷² In addition, The BIT between

China, at. 27, Nov. 7, 2008, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/759>.

167. See Ley Aprobatoria del “Acuerdo Entre el Gobierno de la República de Venezuela y el Gobierno de la República de Cuba para la Promoción y Protección Recíproca de Inversiones [Investment Treaty Between Venezuela and Cuba] art. 9, Cuba-Venez., Dec. 11, 1996, GACETA OFICIAL No. 37.913 (Venez.) [hereinafter Cuba-Venezuela BIT (1996)]; Iran-Venezuela BIT (2006); Ley Aprobatoria del Acuerdo Entre la República de Venezuela y el Gobierno de la República de Belarús Sobre Promoción y Protección Recíproca de Inversiones [Bilateral Investment Treaty Between Venezuela and Belarus] art. 8, Belr.-Venez., Dec. 6, 2007, GACETA OFICIAL No. 38.894 (Venez.) [hereinafter Belarus-Venezuela BIT (2008)]; Ley Aprobatoria del Acuerdo Entre el Gobierno de la República Bolivariana de Venezuela y el Gobierno de la Federación de Rusia Sobre la Promoción y Protección Recíproca de Inversiones, [Bilateral Investment Treaty Between Venezuela and Russia] art. 8, Russ.-Venez., Nov. 7, 2008, GACETA OFICIAL No. 39.191 (Venez.) [hereinafter Russian Federation-Venezuela BIT (2008)].

168. See Cuba-Venezuela BIT (1996), *supra* note 167, at. 9; Belarus-Venezuela BIT (2008), *supra* note 167, at. 8.

169. See Russian Federation-Venezuela BIT (2008), *supra* note 167, at. 9.

170. See, e.g., Convenio Entre El Gobierno de la República de Chile y El Gobierno de la República de Islandia Para la Promoción y Protección Recíproca de las Inversiones [Bilateral Investment Treaty Between Chile and Iceland] art. 8, Chile-Ice., June 26, 2003, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/685> [hereinafter Chile-Iceland BIT (2003)]; Agreement Between the Belgo-Luxembourg Economic Union, on the One Hand, and the Republic of Nicaragua, on the Other Hand, on Reciprocal Promotion and Protection of Investments art. 12, BLEU (Belg.-Lux. Econ. Union)-Nicar., May 27, 2005, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/394> [hereinafter Belgo-Luxembourg Economic Union-Nicaragua BIT (2005)].

171. See Chile-Iceland BIT (2003), *supra* note 170, art. 8.

172. See Belgo-Luxembourg Economic Union-Nicaragua BIT (2005), *supra* note 170, at 12.

Colombia and Spain, signed in 2007, offers the option of resorting to domestic tribunals, to *ad hoc* arbitration under UNCITRAL Rules, to ICSID, or the ICSID Additional Facility.¹⁷³

F. *Express Waiver of International Arbitration*

The host State may use its soft power to restrict or reduce access to international arbitration. For instance, the State, State agency, or State-owned entity may demand an explicit waiver of the right to resort to international arbitration as a pre-requisite to entering into a contract or, if there is a contract in place, as a condition to continue operating in the country. It is unclear how often States attempt to impose waivers of investment arbitration in contracts between the State and an individual investor, although some reports suggest that it is “a frequent problem.”¹⁷⁴ For instance, the Colombian model concession agreement, originally contained a provision stating that

[t]he Parties agree not to resort to investment arbitration contemplated in any Bilateral Investment Treaty or other international treaty that may contain the aforementioned protection and that may come to be applicable, when a controversy has arisen between the Parties relating to the initiation, execution or termination of the present Contract, in which case the parties should resort to the dispute resolution mechanisms referred to in the present Contract to resolve such controversies.¹⁷⁵

Contractual waivers of investment arbitration raise a large number of vexing questions, including questions as to applicable law, jurisdiction and admissibility, as well as policy considerations.¹⁷⁶ Moreover, there is limited authority available concerning the effectiveness of contractual waivers of investment treaty arbitration.¹⁷⁷

The State could also threaten to cancel the contract or to exclude from future contracts any company that resorts to international arbitration against the

173. See Acuerdo Entre la República de Colombia y el Reino de España para la Promoción y Protección Recíproca de Inversiones [Bilateral Investment Treaty Between Colombia and Spain], Colom.-Spain, at. 10, Mar. 31, 2005, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/801>.

174. See S.I. Strong, *Contractual Waivers of Investment Arbitration: Wa(i)ve of the Future?*, 29 ICSID REV.-FOR. INV. L. J 2 (2014) (citing to Sebastian Perry, *Colombia Asks Investors to Waive Treaty Rights*, GLOBAL ARB. REV. (Nov. 21, 2013)).

175. See República de Colombia, Ministerio de Transporte, Agencia Nacional de Infraestructura, Contrato de Concesión Bajo el Esquema de APP No. [*] de [*], available at http://www.globalarbitrationreview.com/cdn/files/gar/articles/PPP_Model_Contract.pdf. The model concession contract no longer contains this clause.

176. See generally Strong, *supra* note 174.

177. *Id.*; see also Ole Spiermann, *Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction Under Bilateral Investment Treaties*, 20 ARB. INT'L 179, 183 (2004).

State.¹⁷⁸ Reportedly, in 2008, Ecuador announced that it would “consider contracts with oil companies terminated unless they remove the International Centre for Settlement of Investment Dispute (ICSID) as the venue of arbitration.”¹⁷⁹ Venezuela also excluded certain oil companies from prequalification processes for future rounds if they had pending litigation (including arbitration) against the State.

G. Forum-Selection and Arbitration Clauses

The host State or contracting State entity may refuse to agree to international arbitration agreement in energy investment agreements. It is no secret that host States typically provide a model contract with boilerplate terms to the participants of a bidding round. The leverage of the oil investor in negotiating more preferable bargaining outcomes will depend on several factors, such as the attractiveness and potential profitability of the project, oil prices, the number of bids received, the State’s need for capital investment, the strategic relation between the host State and the home State of an oil investor (if any), and the negotiation strategy followed by the investor.¹⁸⁰ In times of high oil prices, the bargaining power of the investor will tend to be lower, and vice-versa.

For instance, the model mixed company contract between Corporación Venezolana del Petróleo S.A. (CVP) and private entities for the undertaking of primary hydrocarbons activities provides that, “[t]he disputes and controversies arising out of a breach of the conditions, terms, procedures and actions that constitute the object of the contract or derive from it, shall be resolved in accordance with the legislation of the Bolivarian Republic of Venezuela and before its jurisdictional organs.”¹⁸¹ The authors are not aware of any instances in which foreign companies have successfully negotiated the inclusion of an international arbitration clause in a mixed company contract with CVP.

178. See, e.g., Fernando Cabrera Diaz, *Ecuador Threatens Cancellation of Oil Contracts Unless ICSID Nixed as Arbitration Forum*, INVESTMENT TREATY NEWS, Aug. 29, 2009, available at <http://www.iisd.org/itn/2008/08/29/ecuador-threatens-cancellation-of-oil-contracts-unless-icsid-nixed-as-arbitration-forum/>.

179. *Id.*

180. For a discussion of the dynamics of the host State-international oil company (IOC) bargaining relationship, see Vlado Vivoda, *International Oil Companies and Host States: A New Bargaining Model*, OIL GAS & ENERGY L. INTELLIGENCE, Oct. 2011, at 1.

181. See, e.g., Agreement whereby the Constitution of a Mixed Company between Corporación Venezolana del Petróleo (CVP) and the Company GAZPOMBANK Latin America Ventures B.V. (GAZPROMBANK) or its Respective Affiliates, is Approved by the National Assembly, Official Gazette No. 39,859, Feb. 7, 2012 Art. 12 provides (in Spanish): “Las diferencias y controversias que deriven del incumplimiento de las condiciones, pautas, procedimientos y actuaciones que constituyen el objeto del presente documento o deriven del mismo, serán dilucidadas de acuerdo con la legislación de la República Bolivariana de Venezuela y ante sus organismos jurisdiccionales.”

However, such clauses have been included in financing agreements in connection with oil and gas projects or in non upstream-related contracts.

Ecuador's 2012 model exploration and production services contract provides for *ad hoc* arbitration under the 1976 UNCITRAL Rules for the resolution of disputes "relating to the application, interpretation, performance, breach, as well as the effects of early termination or violation of the Applicable Law or other circumstances related to this Contract."¹⁸² The clause further provides that if the amount in dispute is unknown or exceeds U.S. \$10 million, the arbitration shall be administered by the Permanent Court of Arbitration (PCA) in The Hague. All other cases will be administered by the Arbitration and Mediation Center of the Quito Chamber of Commerce.¹⁸³ However, clause 31.7 of the Model Contract excludes from arbitral jurisdiction all controversies arising out of a declaration of expiration, which shall be resolved exclusively by competent Ecuadorian tribunals.¹⁸⁴

In contrast, the Brazilian 2013 model production-sharing contract for exploration and production of oil and natural gas also contains an international arbitration clause providing for *ad hoc* arbitration under UNCITRAL Rules, seated in the city of Rio de Janeiro, and conducted in Portuguese.¹⁸⁵ The model contract also provides that "the arbitrators shall decide on the basis of the Brazilian substantive laws."¹⁸⁶ The model contract, however, leaves open the possibility that the parties, by common agreement, may choose ICC arbitration "or another Arbitration Chamber notoriously recognized and of unblemished reputation."¹⁸⁷

182. See Contrato de Prestación de Servicios para la Exploración y Explotación de Hidrocarburos (Petróleo Crudo), En el Bloque . . . De La Región Amazónica Ecuatoriana [Contract for the Provision of Services for the Exploration and Exploitation of Hydrocarbons (Crude Oil), in the Block. . . The Amazon Region of Ecuador] (on file with authors) (translated by authors).

183. *Id.*

184. *Id.* cl. 31.7.

185. See Brazilian Production Sharing Contract for Exploration and Production of Oil and Natural Gas (on file with authors). Clause 36.4 provides:

If, at any moment, one of the Parties considers that there are no conditions for an amicable settlement of the dispute or controversy referred to in paragraph, such matter or controversy should be submitted to arbitration *ad hoc*, using as parameter the rules laid down in the Regulation of Arbitration (Arbitration Rules) of the United Nations Commission on International Trade Law - UNCITRAL and in line with the following precepts: (a) The choice of arbitrators shall follow the standard established in the Arbitration Rules of UNCITRAL. . . . The city of Rio de Janeiro, Brazil, will be the seat of arbitration and the place of delivery of the arbitral award. The language to be used in the arbitration proceeding shall be the Portuguese. . . .

186. *Id.* cl. 36.4(f).

187. *Id.* cl. 36.5.

H. UNASUR: A Regional Alternative to ICSID?

A number of Latin American States have proposed the creation of a regional arbitration center as a response to their dissatisfaction with the current system of international investor-State arbitration.¹⁸⁸ In April 2013, the First Ministerial Conference of Latin American States Affected by Transnational Interests convened in Ecuador. It brought together ALBA member States and representatives from Mexico, Honduras, El Salvador, Guatemala and Argentina. The conference resulted in the adoption of a declaration and an agreement by the signatory parties: “[t]o support the constitution and implementation of regional organs for settling investment disputes to ensure fair and balanced rules when settling disputes between corporations and States.”¹⁸⁹

The South American Union of Nations (UNASUR)¹⁹⁰ was formed in 2008. It is currently composed of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela. UNASUR serves as the negotiation forum for a regional dispute settlement body not yet constituted as of this Article’s writing but expected to be running in 2015.¹⁹¹

IV.

THE PURSUIT OF STABILITY IN ENERGY INVESTMENT CONTRACTS

The relationship between a foreign investor and the host State is infused with at least three tensions: the State, as *owner* of the oil resources, determines the scope of property rights or participation that the foreign investor may acquire in the energy sector. The State, as *contracting party*, makes direct promises to the foreign investor (and vice-versa). And the State, as *sovereign*, controls the legal and physical framework in which the contract takes shape.

188. See Silvia Karina Fiezzoni, *UNASUR Arbitration Centre: The Present Situation and the Principal Characteristics of Ecuador’s Proposal*, INV. TREATY NEWS (Jan. 12, 2012), <http://www.iisd.org/itn/2012/01/12/unasur/>.

189. Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests, signed by representatives from Bolivia, Cuba, Ecuador, Nicaragua, Dominican Republic, St. Vincent and Grenadine, and Venezuela in the city of Guayaquil, Ecuador (Apr. 22, 2013), http://cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_eng.pdf.

190. South American Union of Nations Constitutive Treaty, May 23, 2008, <http://www.unasursg.org/images/descargas/DOCUMENTOS%20CONSTITUTIVOS%20DE%20UNASUR/Tratado-UNASUR-solo.pdf>.

191. See *La Unasur Tendrá Su Centro de Arbitraje en el 2015* [*The Unasur Will Have Its Center of Arbitration in 2015*], EL CIUDADANO (Oct. 2, 2014), <http://www.elciudadano.gob.ec/la-unasur-tendra-su-centro-de-arbitraje-en-el-2015/>.

As recent experience shows, the *owner* may revoke or cancel property or participation rights; the *contracting party* may breach the investment contract; and the *sovereign* may use its regulatory powers to modify the economic balance of the investment contract. Moreover, the State may denounce or terminate its treaty commitments (as provided in the treaty itself) or may resort to other measures to exact waivers of international arbitration. Stabilization techniques, therefore, must take into account the multiple dimensions and inherent tensions in the investor-State relation.

A. *Gaining Access to International Arbitration*

First and foremost, any expectation or promise of stability must be given effect by giving investors access to a judge detached from the jurisdictional power of the host State. Submission to arbitration in an oil contract is “an essential tool in the stabilization of the legal framework surrounding oil operations”. First, such a clause neutralizes the host State’s jurisdictional power, and second, it determines the law applicable to the contract.¹⁹²

Consent to international arbitration may be provided in the contract itself, in an applicable BIT or, less commonly, in a domestic investment law.¹⁹³ Investment-treaty planning can significantly reduce an investor’s risk in the face of State exercise of sovereign power. In *ConocoPhillips v. Venezuela*, an ICSID tribunal affirmed jurisdiction under the Netherlands-Venezuela BIT over three Dutch entities: ConocoPhillips Petrozuata (CPZ), ConocoPhillips Hamaca (CPH), and ConocoPhillips Gulf of Paria (CGP) – through which the U.S. company ConocoPhillips Company held its interests in three major oil investment projects in Venezuela.¹⁹⁴

Venezuela argued that the Dutch claimants were inserted into the ownership chain for the sole purpose of gaining BIT protection, and that jurisdiction should be denied on the basis that the corporate restructuring was “an abuse of the corporate form and blatant treaty shopping.”¹⁹⁵ The claimants countered that they had restructured “before the dispute arose.”¹⁹⁶ The

192. Bertrand Montebault, *The Stabilisation of State Contracts Using the Example of Oil Contracts—A Return of the Gods of Olympia*, 6 INT’L BUS. L.J. 593, 603 (2003).

193. For a discussion of consent to ICSID arbitration in domestic investment laws, see generally Michele Potestà, *The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws*, 27 ARB. INT’L 149 (2011).

194. See Luke Eric Peterson, *Conoco’s Restructuring of Venezuela Assets for BIT Protection is OK: Legally ‘Decisive’ Date of Income Tax Hikes is its Entry Into Force, not Date of Enactment*, INV. ARB. REP. (Sept. 5, 2013), available at http://www.iareporter.com/articles/20130905_1.

195. *ConocoPhillips v. Venezuela*, *supra* note 46, at 268.

196. *Id.* at 269.

tribunal—acknowledging that tensions between Venezuela and foreign oil companies were on the rise from at least 2004—placed weight on the fact that there were no “claims” afoot at the time of the restructuring, during 2005 and 2006.¹⁹⁷

The *Conoco* holding may be contrasted with the claim brought by Dutch affiliates of Exxon Mobil Corporation against Venezuela under the same BIT.¹⁹⁸ In *ExxonMobil*, arbitrators declined jurisdiction over the company’s tax and royalty claims, stressing that ExxonMobil had sent Venezuela various notices and demand letters prior to its restructuring to add Dutch entities into the corporate ownership chain.¹⁹⁹ With respect to “pre-existing disputes,” the tribunal found that “to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute . . . an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.”²⁰⁰ The timing of the restructuring, therefore, may be crucial.²⁰¹

B. Stability Commitments in National Legislation

The State, acting as *sovereign*, may undertake stability commitments in its national legislation. In order to attract foreign investment, several countries have enacted specific stability laws or have included a provision for stability in general hydrocarbon laws or tax codes.²⁰² For example, the Peruvian Organic Law on Hydrocarbons provides tax stability guarantees establishing that “[t]he State guarantees the Contractors that the tax and exchange systems in force at the time the Contract is entered into, shall remain unchanged during the life thereof.”²⁰³

In addition, the stability laws of several countries authorize the State to enter into a special stability agreement with a foreign investor for fiscal guarantees. For instance, the 2005 Bolivian Hydrocarbons Law provides in

197. *Id.* at 278–81.

198. *ExxonMobil v. Venezuela*, *supra* note 51, ¶ 24.

199. *Id.* ¶¶ 200–206.

200. *Id.* ¶ 205 (internal citations omitted).

201. *Id.*

202. *See generally* A.F.M. Maniruzzaman, *National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective*, 8 J. WORLD INV. & TRADE 233 (2007).

203. *See* Regulation of the Guarantee of Tax Stability and the Tax Regulations of the Law N° 26221, Organic Law of Hydrocarbons, approved by Supreme Decree N° 32-95-EF, in the Law that regulates Stability Contracts with the State under Sectorial Laws – Law N° 27343” as appropriate and in the Amendment Law in Hydrocarbons – Law N° 27377.

Article 63 (entitled “Tax Stability Agreements for Promoting Industrialization”) that:

The Ministry of State Assets and the Ministry of Hydrocarbons, in a joint manner and in representation of the State, may establish with the investors, prior to the making of the investment and the corresponding registration, tax stability agreements of the tax regime in effect at the time of the execution of the agreements, for a period of no more than ten (10) years without extension; these agreements shall be approved by the National Congress.²⁰⁴

A mere legislative promise for stabilization will not prevent the State from exercising its sovereign authority. However, such an express commitment may bolster an investor’s claim of breach of its legitimate expectations. As Professor Wälde and Ndi have observed, “a stabilization promise made only in legislation is not sufficient to assume an explicit, formal, and binding stabilization agreement.”²⁰⁵ Nonetheless, a subsequent breach by the State of a stabilization commitment, whether contained in legislation or in a contract, could be a factor in ascertaining whether compensation is due and in determining the quantum of compensation.

C. Contractual Stability Commitments

As *contracting party*, the State, or State-owned enterprise may agree to include a provision purporting to insulate the contractual relationship from any subsequent governmental legislative or tax measures that may have the effect of altering such relationship. As noted in *Total S.A. v. Argentine Republic*

Stabilisation clauses are clauses, which are inserted in State contracts concluded between foreign investors and host states with the intended effect of freezing a specific host State’s legal framework at a certain date, such that the adoption of any changes in the legal regulatory framework of the investment concerned (even by law of general application and without any discriminatory intent by the host State) would be illegal.²⁰⁶

The inclusion of a stabilization clause in a State contract will not preclude the *sovereign* from modifying the legal regulatory framework of the investment concerned. However, a tribunal “would have little difficulty holding that a fully stabilised contract that did not admit of any future legislative or other change cannot be changed unilaterally.”²⁰⁷

204. Ley No. 3058, Ley de Hidrocarburos [Law of Hydrocarbons], art. 63, OFICIAL GAZETTE, May 18, 2005 (Bol.), <http://www.ine.gob.bo/indicadoresddhh/archivos/alimentacion/nal/Ley%20N%C2%BA%203058.pdf> (Bol.) (translated by the authors).

205. Thomas W. Wälde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT’L. L.J. 215, 240 (1996).

206. *Total S.A. v. Argentine Republic*, *supra* note 105, ¶ 101.

207. *Perenco v. Ecuador*, *supra* note 99, ¶ 593.

In turn, the absence of a stabilization clause may bear on the investor's legitimate expectations of stability. As noted in *Perenco v. Ecuador*, "it is well recognized in investment treaty arbitration that States retain flexibility to respond to changing circumstances unless they have stabilised their relationship with an investor."²⁰⁸ The ultimate question is whether the investor assumed the risk of regulatory change or whether the State, as *sovereign* and/or as *contracting party*, undertook to provide a stable legal framework.

Stability commitments by the host State may take different forms. The State may undertake to provide stability in a specific regulatory area, such as taxation. For instance, Peru's Model License Contract for the Exploration and Exploitation of Hydrocarbons provides that "[t]he State, through the Ministry of Economy and Finance, warrants the Contractor, the benefit of tax stability during the Term of the Contract, which shall be subject, only, to the tax regime prevailing at the date of Subscription."²⁰⁹

The question arises whether a tax (or other) stabilization commitment pertains only to the text of the law or regulation or whether the commitment also covers the law's application or interpretation. This issue arose in *Duke Energy v. Peru*,²¹⁰ where an ICSID tribunal composed of Guido Tawil, Petro Nikken, and L. Yves Fortier (presiding) found Peru liable for breach of a contractual tax stabilization commitment *vis-à-vis* a Bermudan subsidiary of Duke Energy when it levied taxes in response to a corporate restructuring undertaken by Duke.²¹¹

The *Duke Energy v. Peru* tribunal first noted that in order to demonstrate a breach of a stabilization clause, an investor would need to prove "(i) the existence of a pre-existing law or regulation (or absence thereof) at the time the tax stability guarantee was granted, and (ii) a law or regulation passed or issued after the [legal stability agreement] that changed the pre-existing regime."²¹² With respect to a change in the interpretation or application of a law, the tribunal

208. *Id.* ¶ 586.

209. See *Modelo de Contrato de Licencia para la Exploración y Explotación de Hidrocarburos Entre Perupetro S.A. y Empresa Petrolera* [Model of License Agreement for the Exploration and Exploitation of Hydrocarbons Between Perupetro S.A. and Oil Company], <http://www.perupetro.com.pe/wps/wcm/connect/3e502458-feb7-435d-a9da-4db307e97412/ModeloContrato.pdf?MOD=AJPERES> (translated by the authors).

210. *Duke Energy Int'l Peru Inv. No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award (July 25, 2008), http://www.italaw.com/documents/DukeEnergyPeruAward_000.pdf [hereinafter *Duke Energy v. Peru*].

211. For a discussion of the *Duke Energy v. Peru* dispute, see Luke Eric Peterson, *ICSID Tribunal Awards \$18.4 Million to Duke Energy for Breach of Tax Stability Pledges by Peru; Other Claims Rejected*, INVESTMENT ARB. REP. (Aug. 26, 2008), http://www.iareporter.com/articles/20091001_42.

212. *Duke Energy v. Peru*, *supra* note 210, ¶ 217.

considered that an investor would need to prove that a stable interpretation or application of the law when the tax stability guarantee was granted has been modified.²¹³ Such a showing—the tribunal noted—requires “compelling evidence.”²¹⁴

Last, where a stable interpretation or application of the law has yet to develop, the tribunal manifested some restraint with respect to assessing the correctness of Peruvian tax rulings, concluding that “absent a demonstrable change of law or a change to a stable prior interpretation or application, that the application of the law to [the investor] was patently unreasonable or arbitrary.”²¹⁵

Under the reasoning of the *Duke Energy v. Peru* tribunal, absent a demonstrable change in the law or in a prior interpretation or application of the law, the State may interpret or apply its law provided that such application or interpretation is not “patently unreasonable or arbitrary.”²¹⁶ One of the arbitrators dissented on this issue, noting that the tribunal, must evaluate the actions of the Peruvian tax authorities and the tax court subsequent to the execution of the tax stability agreement, against its “own determination of the meaning and scope of the stabilized regime at the relevant time.”²¹⁷

D. Economic Equilibrium Clauses

The State or State entity may also undertake the obligation to compensate the service contractor for economic prejudice suffered as a result of new laws or regulations affecting the economic balance of the contract.²¹⁸ Such “economic equilibrium clauses” may protect against adverse financial effects of changes in the law. As an example of this approach, the Strategic Association Agreements for development and production in the Orinoco Belt entered into between PDVSA and major international oil companies during the 1990s provided that PDVSA itself would compensate the companies “for adverse economic situations resulting from adoption of governmental decisions or changes in the legislation which causes a discriminatory treatment of the [association agreement] or PDVSA’s partner.”²¹⁹

213. *Id.* ¶ 218.

214. *Id.* ¶ 220.

215. *Id.* ¶ 226.

216. *Id.*

217. *Id.*, Partial Dissenting Opinion of Guido Tawil, 15 July 2008, ¶ 8.

218. Maniruzzaman, *supra* note 202, at 124.

219. See Brandon Marsh, *Preventing the Inevitable: The Benefits of Contractual Risk Engineering in Light of Venezuela’s Recent Oil Field Nationalization*, 13 STAN. J. L. BUS. & FIN. 453, 465 (2008).

Nonetheless, the inclusion of an economic equilibrium clause in a State contract could be regarded as an acknowledgement by the investor that laws or regulations *can* change, thus undercutting any claim by the investor that it had a legitimate expectation of stability in the existing legal and regulatory framework. For instance, in *Ulysseas, Inc. v. Ecuador*, U.S. claimant Ulysseas brought a claim against Ecuador under the U.S.-Ecuador BIT alleging that Ecuador had breached its promise of maintaining a stable legal and regulatory framework²²⁰ in connection with claimant's contract with State-owned electricity regulatory agency CONELEC for the operation of a power-generating barge.²²¹

In support of its claim, Ulysseas argued that its expectation of stability in the Ecuadorian power sector regulatory framework was reasonable in light of promises contained or expectations engendered by an economic equilibrium clause contained in Article 24 of the relevant contract, setting forth in relevant part that “[i]f laws or standards are enacted which prejudice the investor or change the contract clauses, the State will pay the investor the respective compensation for damages caused by those situations.”²²²

The tribunal concluded that Article 24 of the contract, did not support Ulysseas' “claim that it had a legitimate expectation that no prejudicial changes would be made to the electricity regulatory system,” but constituted, in effect, an acknowledgement by the claimant that “changes might be introduced to laws ‘or other provisions of any nature’ which ‘would prejudice the investor’ and that, should this occur, compensation would be paid for damages so caused to it.”²²³ The economic equilibrium clause led the tribunal to conclude that the claimant had no legitimate expectation of a stable legal framework.²²⁴

220. *Duke Energy v. Peru*, *supra* note 210, ¶ 204.

221. *Ulysseas, Inc. v. Republic of Ecuador*, Final Award, ¶ 94 (Perm. Ct. Arb. June 12, 2012), <http://www.italaw.com/sites/default/files/case-documents/ita1019.pdf>.

222. *Id.* ¶ 216. The tribunal quoted Article 24's complete text:

TWENTY-FOUR: INDEMNIFICATION PAID TO THE PERMIT HOLDER.

Article two hundred seventy-one of the Constitution of the Republic of Ecuador stipulates that the State, through the GRANTOR, may establish special guarantees and security assurances to the investor to ensure that the agreements will not be modified by laws or other provisions of any type which have an impact on their clauses. If laws or standards are enacted which prejudice the investor or change the contract clauses, the State will pay the investor the respective compensation for damages caused by those situations, in such a way as to at all times restore and maintain the economic and financial stability which would have been in effect if the acts or decisions had not occurred. *Id.* ¶ 229 (bold in original).

223. *Id.* ¶ 258.

224. *Id.* ¶ 259.

E. Renegotiation Clauses

Another stabilization technique is to include a renegotiation clause requiring the parties to amend the contract in response to new laws or circumstances with a material effect on the contract in order to reestablish the lost economic balance.²²⁵ For instance, the participation agreements at issue in *EnCana v. Ecuador* required the renegotiation of the percentage of production corresponding to the investor in the event that any modification to the Ecuadorian tax regime in effect on the date of the execution of the contract, affected the contract's economy.²²⁶

The EnCana tribunal noted, in dictum, that it could well be a breach of the fair and equitable treatment clause of the BIT “for a State entity such as Petroecuador, having negotiated the terms of an investment agreement on a certain basis, subsequently to deny the other party the right to renegotiate in accordance with the agreement.”²²⁷ However, the tribunal did not address this question because the claim was not raised by EnCana, which never requested renegotiation of the participation contracts in accordance with the renegotiation clause of the participation agreements.²²⁸

Similarly, the participation contracts for two exploratory oil properties (i.e., Block 7 and Block 21), at issue in *Perenco v. Ecuador*, included a tax modification clause requiring the application of a “correction factor” to absorb any increase or decrease in the tax burden resulting from changes to the tax regime, the creation or elimination of new taxes, or their interpretation. Clause 11.12 of the Block 7 Contract (Clause 11.7 of the Block 21 Contract) provided:

11.12. Modification to the tax regime. In the event of a modification to the tax regime or the creation or elimination of new taxes not foreseen in this Contract . . . on the signature date of this Contract and as described in this Clause, or their interpretation, which have consequences for the economy of this Contract, a correction factor shall be included in the participation percentages, which absorbs the increase or decrease in the tax burden . . . This correction factor shall be calculated between the Parties and following the procedure set forth in Article thirty-one (31) of the Regulations for Application of the Law Amending the Hydrocarbons Law.²²⁹

225. See Marsh, *supra* note 219.

226. *EnCana v. Ecuador*, *supra* note 125, ¶ 34 (In case of any amendment to the tax regime or labor participation effective at the date of execution of this Contract as described in this Clause, or its interpretation, or creation of new taxes or liens not provided for in this Contract, which may affect this Contract's economy, a correction factor in the participation percentages shall be included to absorb the increase or decrease of a tax charge or labor participation aforementioned.).

227. *Id.* ¶ 158.

228. *Id.*

229. *Perenco v. Ecuador*, *supra* note 99, ¶ 361.

While noting that these clauses were “clearly designed to protect the contractual bargain,” the *Perenco* tribunal affirmed that “they do not constitute stabilisation clauses *per se*.”²³⁰ Clauses 11.12 and 11.17 “plainly did not purport to freeze Ecuadorian law as at the time of their signing and prohibit the State from modifying the tax regime.”²³¹ By their own terms, clauses 11.12 and 11.17 “did not preclude the State from introducing new taxes or modifying existing ones.” In the tribunal’s view, “[t]he process envisaged was one of the negotiation in good faith of a mutually agreeable offset that would result in an amended contract.”²³²

Perenco, therefore, “was entitled to require Petroecuador to engage in negotiations to determine Law 42’s effect on the economy of the Contracts and to arrive at a consequent correction factor (in the event the parties agreed that the tax affected the economy of the Contract).”²³³ In order to establish a breach of Clause 11.7 or Clause 11.12, *Perenco* was required to: (i) show that it had pressed for negotiations or, in the alternative, that negotiations would have been futile; or (ii) if such negotiations occurred, show that the State refused to engage in good faith adjustment of the contracts.

The tribunal concluded that *Perenco* did not do enough, “preferring instead to adopt a ‘wait and see’ approach.”²³⁴ This finding underscores the importance of actively seeking to press for negotiations (unless futile) and to document all efforts made to reach an agreement.

F. *De Facto Stability*

Another strategy to infuse a degree of stability into the energy investment project is to seek financing for the project from other governments or from multilateral financing organizations or development agencies, such as the International Finance Corporation (IFC). A complementary risk-mitigation strategy is to pledge the project’s movable assets or property to project lenders as security. The underlying rationale is that a host State may be more reluctant to nationalize a project or project assets in which an agency such as the IFC or a foreign government has a stake. Moreover, the multilateral status of such an agency puts it in a strong position to negotiate or act as mediator between the host State and the affected investors if a dispute arises.²³⁵

230. *Id.* ¶ 366.

231. *Id.*

232. *Id.* ¶ 365.

233. *Id.* ¶ 378.

234. *Id.* ¶ 400.

235. *Id.*

Legitimacy in the host State may also be enhanced if the foreign investor develops partnerships with local firms and institutions, as well as good social performance so as to be perceived as “domestic”.²³⁶ Another stability strategy may be to seek a strategic partner with close political, economic or military ties to the host State. For example, partnering with a national oil company from a country with close ties to the host State may provide an added layer of protection against State intervention.

CONCLUSION

This Article argues that the relationship between a foreign oil investor and the host State is infused with at least three fundamental tensions: the State, as the *owner* of subsoil resources, determines the scope of participation or property rights that a foreign investor may acquire in its energy sector. The State, as the *contracting party*, makes direct undertakings to the foreign investor (and vice-versa) in the oil contract. And the State, as the *sovereign*, controls the legal and physical framework in which the contract takes shape.

Host States may break these promises. Prior to the emergence of the international investor-State dispute settlement system, the investor’s home State enforced broken promises (if at all) through diplomatic channels. The advent of BITs gave foreign investors the right to elevate broken promises to the international level by suing the *sovereign* outside its own courts.

A review of recent energy-related arbitral disputes reveals that investors often bring claims against States for damages suffered as a result of direct expropriation or nationalization, or as a result of regulatory measures that may amount to indirect expropriation and/or other BIT violations. Although the disputes discussed represent a small fraction of the universe of energy-related awards, they underscore the increasingly sophisticated tools that States may use to tilt in their favor the economic balance of energy investments.

In response to the proliferation of arbitration claims (and awards) against States, some Latin American States have taken steps to insulate themselves from the system, leaving investors looking for other means to ensure the stability and value of their investments. These steps underscore an additional tension in the investor-State relation: the State as *sovereign* may denounce the commitments they made—through BITs, the ICSID Convention and other treaties—to afford substantive and procedural protection to foreign investments. In addition, the State may undertake subsequent international treaty commitments that *could* conflict with, or supersede, BIT obligations.

236. See Vivoda, *supra* note 180, at 7.

In view of the multiple dimensions and inherent tensions in the investor-State relation, this Article provided an overview of techniques—beyond BITs—to infuse stability into the energy investment contract. Stabilization clauses are one mechanism by which investors and host States may bolster the credibility of their commitments.²³⁷ Economic equilibrium clauses may also infuse stability into the investor-host State relation by protecting the contractual balance against the adverse financial effects of changes in the host State’s law. In turn, renegotiation clauses may allow the parties to respond to changed circumstances and re-establish the contract’s economic equilibrium.

Ultimately, infusing stability into the energy investment contract requires the parties to allocate effectively not only the risk of loss arising out of changes in the legal framework, but also whether the economic balance of the contract should be recalibrated in response to other unforeseen events, such as an unprecedented rise in international oil prices. Both foreign investors and States stand to gain from more coherence, predictability, and legal security in their relation. And such stability starts at the contract-drafting level.

As some Latin American states modify the legal framework for foreign private participation in the energy sector, new contractual arrangements and disputes are likely to arise. Stabilization techniques must evolve accordingly. The incorporation of stabilization techniques, if properly done, should reduce the potential for disputes between States and foreign investors. But the pursuit of stability in the midst of changing rules, both domestically and internationally, will remain the biggest challenge.

237. See Gaetan Verhoosel, Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking a “Reasonable” Balance between Stability and Change, 29 *LAW & POL’Y INT’L BUS.* 451, 453 (1998).