2021
Volume 3, Issue 2

Institute for Transnational Arbitration
ITA IN REVIEW

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The Journal of the Institute for Transnational Arbitration

ITA IN REVIEW

VOL. 3 **2021** **NO. 2**

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ITA in Review
is
a Publication of the
Institute for Transnational Arbitration
a Division of the
Center for American and International Law
5201 Democracy Drive
Plano, TX 75024-3561

BOOK REVIEW:
INTERNATIONAL ARBITRATION IN LATIN AMERICA: ENERGY AND NATURAL RESOURCES DISPUTES
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Reviewed by Prof. Julián Cárdenas

I. INTRODUCTION

International Arbitration in Latin America: Energy and Natural Resources Disputes, is a remarkable effort in compiling experts' views over the last two decades of transnational energy-related arbitration cases and regulation throughout Latin America.

The decision to focus on Latin America was not a coincidence. Latin America's economic growth still relies mostly on the development of its massive natural resource reserves, many of them used for the generation of different types of energies produced from hydrocarbons, mining, and renewables. To improve investment conditions and attract foreign investment for the development of these resources, Latin American nations have integrated the transnational law system that governs transnational dispute resolution, including substantive rules such as investment treaties and the major international arbitration conventions such as the New York Convention of 1958, the ICSID Convention of 1965, and the Panama Convention of 1975.

This law, a bit dormant until the end of the last century, has not been without use in the last 20 years. According to ICSID's caseload report of 2010, which covers only investor-state arbitrations, at the end of the first decade of the 21st century, Latin America led the number of known arbitrations with approximately 30% of cases.[1] This was particularly boosted by cases arising from economic crisis and the resource

[1] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, THE ICSID CASE LOAD–STATISTICS (ISSUE 2010-2) 12 (2010), https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/ICSID%20Statistics%202010-2%20English%20Final .pdf.

nationalism of Argentina, Ecuador, and Venezuela. Today, the region is second to only Eastern Europe & Central Asia with approximately 22% of the ISDS market.[2] Notably, energy-related disputes comprise 46% of ICSID's cases.[3]

Likewise, according to the 2020 ICC arbitration case report, Latin America is second with approximately 15% of commercial cases, mainly led by the frequent use of arbitration by Brazilian and Mexican parties.[4] This reflects the parties' preferences in the region for resolving disputes via arbitration in lieu of national legal systems. Also, the trend repeats and the highest demand for arbitration services at the ICC arose from the construction and energy sectors, comprising 38% of all cases.[5]

The high number of Latin American cases contributes to arbitration jurisprudence that will be widely used by arbitrators, and practitioners representing individuals, corporations, and governments. This is at the core of the contribution that the book provides.

II. ROADMAP

The book is presented in seven parts, with 21 chapters by 39 contributors. It analyzes substantive and procedural arbitration issues, and in particular, standard clauses and practices involving cases related to energy generation from different sources, including hydrocarbons and renewables. It further references the more recent trends on climate change, corruption, and environmental protection. The authors succeeded in documenting current trends starting from the more general topics to the more particular and specific cases providing lessons for the transnational dispute resolution community.

Parts I, II, and III analyze issues on the integration of Latin America to the transnational arbitration system (including commercial and investment arbitration law), issues on the arbitrability and admissibility of disputes, and the problems arising

[2] *Id.* at 11.

[3] *Id.* at 12. Energy-related disputes refer to Oil, Gas and Mining sectors (26%), as well as Electric Power & Other Energy (13%), and Construction (7%).

[4] INTERNATIONAL CHAMBER OF COMMERCE, ICC DISPUTE RESOLUTION 2020 STATISTICS 10 (2020), https://iccwbo.org/ publication/icc-dispute-resolution-statistics-2020/.

[5] *Id.*

from enforcing arbitration awards dealing with issues of public policy. Although chapter 2 highlights an arbitrator's risk in rendering decisions based on sound commercial judgments that could create conflicts with national court systems,[6] it is also true that depending on the facts of the case, the New York Convention and the Washington Convention offer a multi-jurisdictional enforcement system. This concept can be found in the post-award enforcement actions in the case *Pemex v. Commisa*, which the book addresses.[7]

Part II of the book provides studies from different energy sectors, showing their similarities and specificities. As the standardization of petroleum contracts and the transnationalization of disputes are consolidated, the concept of a *lex petrolea* appears to overcome past criticism and confirm the common transnational legal practice in the oil industry in the 21st Century. This same approach is applicable to the gas, power, and renewable energy sectors, which also follow specific standard clauses and industry practices adapted to commercial and investment transactions. The approach taken by the editors and authors is useful for those who specialize in any of these sectors.

Part III expands on corruption cases and concerns affecting international arbitration. As the sector evolves, targeting corruption is crucial because the system relies on the parties' belief, including corporations and governments, that the system does not contribute to or legitimize sophisticated corruption practices. Therefore, chapter 8 refers to relevant questions faced by tribunals when deciding the legitimacy of transactions in the energy sector when corruption allegations are present.

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[6] An arbitrator's power to decide cases based on trade usages is one of the common standards of applicable law that the transitional community recognizes arbitrators as having and is codified in Article 21.2 of the ICC Arbitration Rules, Article 35.3 of the UNCITRAL Arbitration rules, and any other modern set of rules that has incorporated this time-honored rule. Also on this issue, see Charles Jarrosson, *L'acceptabilité de la sentence*, 4 REV. ARB. 793, 804 (2012) ("En définitive, rendre une sentence acceptable est plus qu'une mission juridique, c'est tout un art qui requiert de l'arbitre non seulement des connaissances et un bon raisonnement juridiques, mais aussi de la psychologie, un sens des réalités pratiques, une bonne anticipation de l'effet concret de sa décision au moment où elle sera reçue et devra être exécutée: la somme de tous ces éléments pourrait bien s'appeler expérience.").

[7] *See Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración y Producción*, 832 F.3d 92 (2d Cir. 2016).

On a different issue, damages also create concerns in the arbitration community given that it is the most common remedy provided by arbitral tribunals in energy-related disputes.[8] The material differences among methodologies and parameters make clear that we are far from standardizing the awarding of compensation in the energy sector. These sophisticated practices continue to evolve as more detailed and specialized cases reach final decisions and a new generation of practitioners contribute with solutions. In the end, the acceptability of the arbitration award and the perception of fairness should remain at the core of these calculations to meet the legitimate expectations of both states and investors towards the certainty of the rule of law.

Finally, chapter 10 illustrates the multi-jurisdictional enforcement regulations provided by the New York Convention, the Washington Convention, and the Panama Convention, and the challenges that can be exercised against an arbitration award. The chapter also highlights the risks faced by governments deciding to ignore compliance with arbitral awards. Such risks include deterring new investment and inhibiting access to international funding. The chapter further explores the litigation saga countries can face, for instance, in the case of an Argentinean warship ARA Libertad detained in Ghana,[9] or the Crystallex case against Venezuela.[10]

Parts IV, V, VI, and VII focus on specific cases, starting with a chapter discussing the Brazilian experience with energy arbitration disputes and regulation (Chapters 11 to 13). Part IV provides specific references on the electricity market and gas supply contracts in Brazil. Part V analyzes social justice issues in natural resources disputes, stabilization clauses in the context of human rights, local communities' participation in investment projects and the disputes that can arise from their intervention over extractive industry projects, and the expansion of sustainable development clauses

[8] Given the impossibility of the challenges to award remedies based on *restitutio in integrum*.

[9] Sam Jones & Jude Webber, *Argentine navy ship seized in asset fight*, FINANCIAL TIMES (Oct. 3, 2021), https://www.ft.com/content/edb12a4e-0d92-11e2-97a1-00144feabdc0.

[10] Caroline Simson, *Crystallex Pushes to Keep Citgo Sale Moving Ahead*, LAW360 (March 1, 2021), https://www.law360.com/articles/1359975/crystallex-pushes-to-keep-citgo-sale-moving-ahead.

included in transnational investment law regulation, particularly in bilateral and multilateral investment treaties.

This section also includes chapter 14, which focuses on relevant issues arising from ISDS litigation against Venezuela. These issues include the admissibility of claims by dual nationals and the effects of the denunciation of the Washington Convention for investment disputes. This chapter also discusses recent challenges related to the Venezuelan government's representation given the dispute between competing state representation before arbitral tribunals, and how ICSID and ICSID tribunals have dealt with this question.

The relevance of energy transition and climate change developments are explored in Part VI, highlighting future trends in transnational litigation and arbitration practice in the energy sector.

The final chapter is on mediation in the energy sector. Mediation could reduce the number of claims that reach arbitration. As such, it would serve as a filter to the best interest of the parties and the arbitration community.

III. CONCLUSION

International Arbitration in Latin America: Energy and Natural Resources Disputes is a useful and practical resource that provides readers an overview of transnational arbitration practice in Latin America. Moreover, the importance of all major case studies highlighted by the authors rely on the fact that those cases can contribute to create arbitration practices or become arbitration precedent which can be argued or applied by practitioners and arbitrators in other regions of the world, particularly dealing, but not limited, to energy-related arbitration cases. Based on the major investment required by upstream and downstream energy projects, and the importance of the commercialization of its products, energy-related cases will continue to provide the lessons over complex disputes and transactions, that will contribute with the construction of the law that governs transnational investment projects and commercial transactions. Undoubtedly, this book provides a contribution towards that aim.

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Professor Cardenas is a researcher affiliated with the Environment, Energy and Natural Resources Center of UH and coordinator of the program "Inter-American Hydrocarbon Regulators Dialogue," an initiative that seeks to create a forum for research and knowledge between oil companies, regulatory agencies, and academia. He works with companies and government agencies in various areas of regulation and public policies in the hydrocarbons sector including offshore oil and gas regulation in Colombia, oil and gas arbitration in Mexico, and led a UH team that provided technical assistance to the 2019 Gabon Hydrocarbons Code. He has been a speaker in more than 15 countries on issues related to energy law and is frequently interviewed by media outlets on Latin American affairs and energy industry matters. Since June 2019 he serves as a member of the Ad Hoc Administrative Board of Petróleos de Venezuela. Before joining the University of Houston he practiced international arbitration in France and was a career diplomat at the Ministry of Foreign Affairs of Venezuela.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
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The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

A. *Mission.*

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

B. *Why Become a Member?*

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning–an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

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The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

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The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

E. *Publications.*

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary

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