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IMPLICATIONS OF THE CHANGING ENERGY POLICY LANDSCAPE IN ENERGY DISPUTES: COMPARED VIEWS FROM LATIN AMERICA AND THE EU

by Munia El Harti Alonso & Vika Lara Taranchenko

I. INTRODUCTION.

The ITA-IEL-ICC Joint Conference on International Energy Arbitration was presented in Houston, with a panel on "Implications of Changing Energy Policy in Energy Disputes" held on January 20, 2023. The joint conference included a year-in-review analysis of key developments in international energy arbitration practice during the preceding year. The panel included experts Analia Gonzalez (Partner at Baker Hostetler LLP, Washington, DC) in the moderation, Lindsey D. Schmidt (Partner at Gibson Dunn, New York), Alberto Fortún (Partner of Cuatrecasas, Madrid), and Antonio Ortiz-Mena (Partner of Denton Global Advisors Washington, DC).

In the past years, energy policies have taken divergent directions in Latin America, with polarized political swings, especially in Peru, Brazil, Chile and Mexico, leading some investors to launch international disputes in different fora.

II. THE CURRENT LANDSCAPE FOR FOREIGN INVESTORS IN LATIN AMERICA: OSCILLATING FROM LIBERALIZATION TO NATIONALISM.

Ms. Schmidt pointed out that foreign investors have long been drawn to Latin America as a resource-rich region. Concomitantly, over the last years, the COVID-19 pandemic has had a concrete impact on the progress of energy projects. For instance, governments have been taking restrictive measures in response to the pandemic, in regulated industries (*i.e.*, transportation) that were affected in response to a decrease in demand of gas and electricity.

She also shared an empirical-based view on the other side of the coin to nationalism—liberalization. Even when considering the combined economic and political instability in the region, there is an indication of an increase in investment in the last few years, including commitments for a 70% increase in renewable energy use by 2030.

A. *Mexico: A Case Study of Changing Regulations.*

Ms. Schmidt stressed that Mexico, a state within the top ten of respondents in disputes, has had significant swings regarding its approach to foreign direct investment in the energy sector.

1. The Hydrocarbons Act Amendments.

For about 75 years, Petróleos Mexicanos ("Pemex"), a state-owned Mexican company, held a monopoly on the Mexican hydrocarbons sector until 2013. The tide shifted thereafter due to significant changes to the Hydrocarbons Act[1] that went into force in April 2021, thus dismantling the principles of free market competition.[2]

The bill justified the rationale of the proposed reforms aimed at the fight against corruption in the energy sector and the protection of national sovereignty. It contains several amendments that had an impact on the obtention and maintenance of permits. For example, under the bill, permits can be suspended for national and economic security reasons (*see* Art. 59 Bis). The only possible recourse for review under Art. 59 Bis is via the governmental Energy Secretary ("Secretaria de Energía") and Energy Regulation Commission ("Comisión Reguladora de Energía"), which are the same authorities that suspend the permits. During that suspension, regulators can come in and operate the business for the duration of the suspension in the regulator´s own discretion. Investors perceive the Hydrocarbon Act as creating a system of state sanctioned expropriations (*see* Art. 57).

These measures have been challenged in the domestic courts with varying degrees of success through "amparo" constitutional actions focused on the specific changes to the permits (*see* Arts. 57 and 59), whilst amparos on the electric reform have been based on the reformed text as a whole.[3]

[1] Decreto por el que se reforma el Artículo Décimo Tercero Transitorio de la Ley de Hidrocarburos ("Amendment Decree to the Hydrocarbons Law Article Thirteen") of August 11, 2014, Diario Oficial de la Federación [DOF] 8-11-2014 (Mex.) *available at* https://www.dof.gob.mx/nota_detalle.php?codigo=5618799&fecha=19/05/2021#gsc.tab=0.

[2] On March 26, 2021, Mexican President López Obrador filed a bill to reform Mexico's Hydrocarbons Law in the Chamber of Deputies.

[3] *See e.g.*, Case 118/2021 (Mex.), *available at* https://macroeconomia.com.mx/admin/wp-content/uploads/2021/03/Suspensión-Provisional-A.I.-118.2021.pdf.

Most recently on February 28, 2023, the Comisión Reguladora de Energía established new restrictions on the number of permits that companies can submit every month, with a new limiting quota of 50 permits for hydrocarbons and 15 for electric energy.[4] This new development is demonstrative of a trend of further disputes looming in both the oil and gas and electric sectors in Mexico, with no indication of a cooling off in regulatory risk.

2. The Texas Gulf of Mexico Pipeline Dispute: Nuancing *de Facto* and *de Iure* Changes

Mr. Antonio Ortiz-Mena contextualized the dispute, explaining that even as the Electric Power Law[5] was amended,[6] there can be a lot of changes that are de facto and not just de jure. The Texas Gulf of Mexico Pipeline (or Marino Sur) dispute[7] exemplifies this distinction, whereby it was contended that the contracts were tainted by corruption with no evidence.[8] Concretely, a Canadian company pursued arbitration after the Electric Federal Commission canceled a contract the claimant had signed with the previous administration to build a natural gas pipeline near the city of Tula, Hidalgo.

The Canadian firm had already built most of the pipeline intended to supply a power plant but could not finalize the project due to resistance by local communities. In his remarks, Mr. Ortiz-Mena also nuanced that it is necessary to understand the

[4] ACUERDO Núm. A/004/2023 de la Comisión Reguladora de Energía por el que se reanudan los plazos y términos legales de manera ordenada y escalonada, que modifica el diverso A/001/2021 mediante el cual se establece la suspensión de plazos y términos legales, como medida de prevención y combate de la propagación del coronavirus COVID-19 (Agreement No. A/004/2023 of the Energy Regulation Commission amending Agreement A/001/2021 that suspended legal terms during the coronavirus COVID-19), Diario Oficial de la Federación [DOF] 2-28-2023 (Mex.), *available at* https://www.dof.gob.mx/nota_detalle.php?codigo=5680987&fecha=28/02/2023#gsc.tab=0.

[5] *See* Decreto por el que se reforman y adicionan diversas disposiciones de la Ley de la Industria Eléctrica ("Decree Amending and Adding Various Provisions of the Electricity Industry Law"), Diario Oficial de la Federación [DOF] 3-9-2021 (Mex.), *available at* https://dof.gob.mx/nota_detalle.php?codigo=5613245&fecha=09/03/2021#gsc.tab=0.

[6] On February 1, 2021, the President of Mexico, Mr. López Obrador, announced the amendments to the Power Industry Law ("Ley de la Industria Eléctrica"). On March 2, 2021, the amendment was approved by the Mexican Congress.

[7] ATCO Pipelines S.A. de C.V. v. Comisión Federal de Electricidad, LCIA Case No. 173641.

[8] From the same token, no proof emerged from the assertion that profits from the energy companies were unbalanced.

sovereign subtleties of the political aims behind the law. In that regard, it is important for investors to consider investing in Mexico to assess political, economic, and legal risks which are a challenge for energy companies.

3. Untested Waters of the US-Mexico-Canada Agreement (USMCA) and North American Free Trade Agreement (NAFTA) Legacy Claims

Ms. Schmidt noted that Mexico experienced an increase in so-called NAFTA[9] legacy claims, in advance of the March 31, 2023 filing deadline for those claims. In contrast, the USMCA[10] offers a more restrictive scope, particularly for access to arbitration for fair and equitable treatment claims in "covered sectors", which prima facie would include energy. The contours of the USMCA are, however, untested and not comparable by analogy to Mexico´s other investment agreements, and thus the application framework of the USMCA is yet to be defined and implemented.

B. Elucidating the Continuous Changes of the Framework of Renewable Energy

Turning to another part of the globe, Mr. Alberto Fortun explained that some of the Member States of the European Union and the regulatory changes implemented by those Member States have been challenging to investors in the renewable energy sector.

1. A Double-Edged Sword

Regarding the implications of changing policies on energy disputes, there is a political commitment to fight against climate change and in the balance of this commitment, there are 80 arbitration disputes in renewable energy at the Stockholm Chamber of Commerce alone, some of which are still pending.

Mr. Fortun stressed that changes to the regulatory framework are acceptable, provided that the changes are only affecting future investments. The crux of the problem is regarding changes to the regulatory framework aimed at protecting the environment that impact exiting investments.

[9] North American Free Trade Agreement (NAFTA), Jan. 1, 1994, 32 I.L.M. 289.

[10] Agreement between the United States of America, the United Mexican States, and Canada (USMCA), July 1, 2020, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

2. A Retrospective on the Energy Charter Treaty

Three key historical periods were identified by Mr. Fortun:

- **1994–1998**: The European Union established a clear energy policy to protect the environment. This period started in 1994 with the signing of the Energy Charter Treaty (entered into force in 1998)[11] and ended in 1997 with the signing of the Kyoto Protocol (that entered into force in 2005).[12.]
- **2001**: The regulatory framework from the international law perspective was anchored in the Energy Charter. In this point of the Energy Charter Treaty reform, there was a combination of high-level investment protection and an attractive framework for investment energy.
- **2015–2017**: There was a regulatory change affecting existing investments with the adoption of the Paris Agreement during COP21 and with the modernization process of the Energy Charter Treaty.[13]

In view of that attractive framework, states received investments in solar, wind and thermos-solar plants with some investments that were already in operation and delivering power into the grid. The concrete implication of the regulatory changes resulted in investment arbitrations under the Energy Charter Treaty (*see* Art. 26).

The system of investment protection in 1998 and the international law framework applying to investment decisions has been successful and effective. Investors have been granted favorable decisions stemming from international arbitrations under both the International Centre for Settlement of Investment Disputes and the Stockholm Chamber of Commerce.

This goes to show on a positive outlook that it is possible to conciliate energy policies to fight climate change and at the same time preserve the substantive protection that respective investment treaties provide. Mr. Fortun stressed that as it stands, treaties are the guarantors of investor rights.[14]

[11] Energy Charter Treaty (ECT), Dec. 17, 1994, 2080 U.N.T.S. 100.

[12] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.

[13] In November 2017, the Energy Charter Conference confirmed in Ashgabat the launching of a discussion on the potential modernization of the Energy Charter Treaty. Within the framework set out by the Conference (CCDEC2017 23), it was also agreed to establish a subgroup of the Strategy Group to centralize and conduct the discussions in the most effective way.

[14] However, the European Commission and the European Parliament published a communication in 2019 stating that the level of protection under European Union law was similar or even higher than the level of protection under the treaties.

III. LESSONS LEARNED FOR THE NEXT YEARS: TIME IS OF THE ESSENCE

In the concluding remarks, the panel closed with lessons learned, focusing especially on large economies. The very timing of the investment regarding whether it is the beginning, or the conclusion of a government cycle should be critically considered. The recent March pensions reform strike of March 23, 2023, in France is an example of the direct ramifications of political contexts on concrete segments of energy supply, with the specter of blockades in petroleum refineries and gas supply. Pragmatically, this is because the promises and benefits could change or disappear in a transitory process of the government.

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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.

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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.

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