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Energy & Mining Disputes in Latin America: Trends in Arbitration

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The numbers of energy and mining related disputes in Latin America constitute 67 out of 162 or 41% of the total ICSID cases within the region. In most of these disputes the respondents are Argentina, Bolivia, Ecuador or Venezuela, which represent 52 out of 67 or 78% of the total energy and mining ICSID cases in Latin America. With the exception of Argentina, the rest of the above-mentioned countries have withdrawn from the ICSID Convention in 2007, 2010, and 2012, respectively, while of 105 ICSID total related cases submitted against them 52 or 50% are energy and mining related.

The majority of investment treaties offer claimants the option to have different arbitration *fora*. For Bolivia, Ecuador and Venezuela, Bilateral Investment Treaties usually offer as an alternative to the ICSID system the choice between the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the International Chamber of Commerce (ICC) or the Stockholm Chamber of Commerce (SCC) rules. According to the United Nations Conference on Trade and Development (UNCTAD), the UNCITRAL Arbitration Rules are the second most used rules for Investor-State Dispute Settlement with 135 or 26% of the cases, after the ICSID Convention and ICSID Additional Facility Rules with 315 or 61% of the cases. Other rules have been used less frequently, with 27 of the cases at the SCC and only 8 with the ICC.

The expectations on the UNCITRAL Arbitration Rules in investment arbitration remain high, due to the enhanced transparency standard introduced on international investment arbitrations by the UNCITRAL Working Group II in January 2013 (which will be effective as of 1 April 2014). The increase transparency will include publication of key documents (notices of arbitration, pleadings, transcripts, and all decisions and awards issued by the tribunal), public registry of disputes and open oral hearings. The rules are set to apply to future international investment arbitrations, unless otherwise agreed by the parties.

The future of energy disputes in Latin America might come from China, as this country has provided loan commitments for more than US$ 90.0 billion to Latin American countries since 2005. The governments of Venezuela, Brazil, Argentina, and Ecuador received US$ 82.7 billion or 92% of the total. Most of these loans by Chinese banks are focused on the natural resource based sector, specifically *loans-for-oil agreements* which have reached commitments for more than US$ 46.0 billion. The parties to such agreements are the two countries' state-owned banks and the oil companies, and combine a loan agreement and an oil-sale agreement. The Chinese bank approves a loan to a Latin American oil exporting country. The Latin American state oil company guarantees the delivery of oil to China every day for the duration of the loan. Chinese oil companies purchase the oil at market prices and deposit their payments into the Latin American state oil company account at the Chinese bank. Afterwards, in order to repay itself for the loan the Chinese Bank deduces the money from the account.

For some of these *loans-for-oil agreements*, the Chinese deal makers insisted on international arbitration clauses which generally refer any dispute to the Singapore International Arbitration Centre.

Energy and mining related disputes could be able to reshape the arbitration landscape within the Latin American region, with disputes under different *foras* and involving new investors. The energy outlook for the region according to the International Energy Agency (IEA), is that Latin America would need to invest nearly US$ 3.5 trillion in total energy infrastructure between 2011 and 2035, along with US$ 1.9 trillion in the oil sector.

The views contained in this article only express a personal scenario on possible international arbitration trends.

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