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## Defrosting Regulatory Chill

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## DEFROSTING REGULATORY CHILL

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### ABSTRACT

In Homer's *Odyssey*, King Odysseus asked his men to tie him to the mast of his ship with the hope that he would not jump into the sea after listening to the Sirens. The *Odyssey's* hero made a pact to bind himself in the future. He knew that the temptation would be impossible to resist without restraints. Similarly, the creators and advocates of international investment agreements believe that providing rights to foreign investors through international treaties will chill State policies that would harm the interests of investors in the future. The "rope" to tie the State is the threat of facing multimillion-dollar claims brought by investors to international arbitration tribunals. But this widely accepted model assumes that the State, like Odysseus, is a single, static unit that can be tied to the mast.

Analyzing twenty-five years of international investment dispute data, this Article's findings challenge the conventional wisdom that

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the “ropes” are effective in chilling energy government policies. The Article analyzes two variables: 1) the time elapsed between the initial filing of an arbitral claim and the final award and 2) changes in the administration of particular countries during the pendency of the arbitration proceedings. My objective is to identify how often the government that was in power at the time of the enacted regulation is the same actor that has to compensate the investor.

The Article concludes that the chilling effects assumption does not apply evenly across all sectors and actors. Paradoxically, those countries with more democratic transitions tend to drag out the arbitration proceedings for a longer period, and investors there face more challenges in recovering compensation. In contrast, in those countries where the same party or officer remained in power for more than a decade, the government dropped out of the system by denouncing the treaties, tended to settle earlier in the process, or otherwise avoided dragging out the compensation stage. Rather than tying the hands of the State, the investment arbitration system tends to generate disparate incentives depending on who is likely to be left with the bill. Ultimately, the State, as a subject of international responsibility, has to pay, but the government actors’ self-interests predominate. Those government actors do not necessarily contemplate the country’s long-term interests, but rather the short-term benefits of policies affecting foreign investments. Rather than being the ropes that tie countries to the mast, we see that international arbitration proceedings result in individual government actors abandoning the ship and leaving someone else to pay the bill.

## TABLE OF CONTENTS

Introduction.....	600
I. Why Energy and Latin America.....	611
II. From the Day of the Action to the Day of the Bill .....	614
<i>a. Argentina</i> .....	623
<i>b. Ecuador</i> .....	628
<i>c. Venezuela</i> .....	635
<i>d. Peru</i> .....	642
<i>e. Bolivia</i> .....	646
III. The Solutions on the Table: Expedite Investor-State Dispute Settlement Proceedings, Mediation, and State-to-State Dispute Resolution .....	651
<i>a. Expedited Proceedings</i> .....	652
<i>b. Mediation</i> .....	657
<i>c. State-to-State Dispute Settlement Mechanisms</i> .....	660
IV. Conclusion.....	663
Appendix .....	667
<i>Argentina</i> .....	667
<i>Ecuador</i> .....	669
<i>Venezuela</i> .....	673
<i>Bolivia</i> .....	675
<i>Peru</i> .....	677

## INTRODUCTION

From 1996 to 2021, the Latin American region faced an unprecedented amount of investment-related litigation.<sup>1</sup> Foreign investors were able to bring 341 cases to international arbitral tribunals against government policies affecting their treaty-protected investment rights.<sup>2</sup> The claims varied from issues involving nationalizations and changes in fiscal policies to emergency measures taken in time of distress. These arbitral proceedings coalesce around an international treaty system that allows foreign companies and individuals to raise claims in international arbitral tribunals against government policies of the host States.<sup>3</sup> The basic premise of the system is that by granting substantive rights in international treaties to investors and providing them with arbitral mechanisms to enforce them, host States are dissuaded from enacting policies that negatively affect foreign investments and could get them entangled in costly litigation.<sup>4</sup> Additionally, the system would avoid diplomatic conflicts by allowing investors to bring the claims directly without

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<sup>1</sup> See Gary B. Born & Claudio Salas, *Exploring Latin America's ICSID Arbitration Landscape*, LATINLAWYER (Nov. 21, 2023), <https://latinlawyer.com/guide/the-guide-international-arbitration-in-latin-america/second-edition/article/exploring-latin-americas-icsid-arbitration-landscape#footnote-092> [<https://perma.cc/S3QG-M9K9>]. For an updated count, see *Investor-State Dispute Settlement in Latin American and the Caribbean*, CTR. FOR ADVANCEMENT RULE L. AMERICAS GEO. UNIV., <https://isdslac.georgetown.edu> [<https://perma.cc/VJE4-TXDL>] (last visited Apr. 2, 2024) [hereinafter CAROLA]; see also PETER D. CAMERON, *INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY* 13 (2010) (describing this period as a consequence of the investors fighting back against the millennium wave of unilateral state actions against energy companies).

<sup>2</sup> For the cases reported against Latin American States in that period see CAROLA, *supra* note 1; Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 EMORY L.J. 1115, 1124-25 (2017); see also James M. Claxton, *Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?*, 20 PEPP. DISP. RESOL. L.J. 78, 79 (2020).

<sup>3</sup> Studies show that in 93% of the international investment agreements, investors are allowed to raise claims against the host States. See Joachim Pohl et al., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 7 (Org. for Econ. Co-Operation & Dev., OECD Working Papers on International Investment 2012/02, 2012); see Claxton, *supra* note 2, at 78.

<sup>4</sup> See Guillermo J. Garcia Sanchez, *The Hydrocarbon Industry's Challenge to International Investment Law: A Critical Approach*, 57 HARV. INT'L L.J. 475, 481-82 (2016) [hereinafter Garcia Sanchez, *The Hydrocarbon Industry's Challenge to International Investment Law*].

needing their home governments to intervene on their behalf.<sup>5</sup> The actual effects of this arbitration regime are widely speculated and researched but rarely have we taken a deeper look into particular sectors, regions, and how the system impacts the decision-making process of government actors.<sup>6</sup> This Article seeks to fill this gap.

The need for more analysis on specific government actors' roles in the arbitration regime is due to its State-centered foundations. International bilateral investment agreements ("BITs") and trade agreements signed under the rules of public international law are the sources of the investors' rights and available remedies. Public international law, in turn, assumes that States are monolithic *units* for treaty-making and enforcement purposes. A State, for example, cannot argue domestic law as justification for breaching its international treaty obligations.<sup>7</sup> Once a treaty is in force, the assumption is that domestic law, including provincial and local legislation, should adapt to the treaty provisions. Following the

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<sup>5</sup> See Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 439 (2010); Kenneth J. Vandewelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157 (2005).

<sup>6</sup> Exceptions of scholars who focus in the energy sector in the context of investment law are the late Thomas Walde and Prof. Peter Cameron. See generally [J. Thomas W. Wälde, *Managing the Risk of Sanctions in the Global Oil &(and) Gas Industry: Corporate Response under Political, Legal and Commercial Pressures*, 36 TEX. INT'L L.J. (2001) (explaining the specialized arbitration method used in the energy sector); Thomas .W. Wälde, *Law, Contract and Reputation in International Business: What Works?*, Volume 2 B.L.I. 190 (2002) (describing the role of reputation in impacting business transactions in the energy sector, as opposed to the enforceability of contracts); Thomas .W. 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) (explaining the connection between high energy process, forced renegotiation, and the role of contracts and investment protection). For views on how "incorrect" decisions from tribunals are perceived by governments, see generally Anna de Luca et al., *Responding to Incorrect Decision-Making in Investor-State Dispute Settlement: Policy Options*, 21 J. WORLD INV. & TRADE 374 (2020) (evaluating incorrect investor-state dispute settlement decisions within the public international law lens and providing potential policy responses). For the views on how the system is being perceived, see generally Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410 (2018) (reviewing the three main reform approaches to international investment law and the role played by the United Nations Commission on International Trade Law ("UNCITRAL") and the key stakeholders in the reform debates); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361 (2018) (using a comparative institutional analysis to evaluate the alternatives for the reform of investment disputes).

<sup>7</sup> See Vienna Convention on the Laws of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention of 1969] ("A party may not invoke the provision of its internal law as justification for its failure to perform a treaty.").

same logic, international law assumes that a single actor, commonly the executive power, represents the State, such that provinces, administrative agencies, and local authorities are prohibited from engaging in treaty negotiations without central authorization.<sup>8</sup> In the same vein, international obligations assumed by the executive power are binding on local authorities and other government branches.<sup>9</sup> Treaties might still require ratification by a legislative branch depending on the form of government, but under international law, the executive's act of signing the agreement creates binding obligations.<sup>10</sup> The State, as such, is presumed to speak in one voice.<sup>11</sup> One actor negotiates the treaties, the same actor

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<sup>8</sup> See, e.g., U.S. CONST. art. I, § 10, cl. 1, 3 ("No State shall enter into any Treaty, Alliance, or confederation . . . No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . ."). Constitutions also explicitly give powers to the executive branch to be conduct international affairs and sign treaties on behalf of the State. See, e.g., U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ."). The Vienna Convention on the Law of Treaties also assumes that the head of the State is the official representative. See Vienna Convention of 1969, *supra* note 7, art. 7.2 ("In virtue of their functions and without having to produce full powers, the following are considered as presenting their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty; (b) heads of diplomatic missions, for the purposes of adopting the text of a treaty between the accrediting State and the State to which they are accredited; (c) representatives accredited by State to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.").

<sup>9</sup> See United States-Mexico-Canada Agreement art. 14.2, Nov. 30, 2018, 134 Stat. 11 [hereinafter USMCA] ("A Party's obligations under this Chapter apply to measures adopted or maintained by: (a) the central, regional, or local governments or authorities of that Party; and (b) a person, including a state enterprise or another body, when it exercises any governmental authority delegated to it by central, regional or local governments or authorities of that Party.").

<sup>10</sup> See Vienna Convention of 1969, *supra* note 7, art. 18 (discussing where after the executive power signs a treaty, even if the ratification in congress is pending, "[a] state is obliged to refrain from acts which would defeat the object and purpose of a treaty." Only when the state has "made its intention clear not to become a party to the treaty" does the obligation to refrain from acts that could defeat the object and purpose of the treaty ends.).

<sup>11</sup> This assumption has important political consequences for how the international responsibility is passed down to domestic actors. See generally Guillermo J. Garcia Sanchez, *To Speak with one Voice: The Political Effects of Centralizing the Legal Defense of the State*, 34 ARIZ. J. INT'L & COMPAR. L. 557 (2017) [hereinafter Garcia Sanchez, *To Speak with one Voice*] (describing the origins of the unitary theory and how the unitary assumption can be used by the executive power to advance policies against the branches and actors at the domestic level). In contemporary international relations, however, other actors beyond the executive

defends the State if a dispute arises, and the same actor faces the consequences of the award if it loses a case. The way the international investment regime is designed, and the scholarly work done around its analysis, are no exception to this fact. They both tend to rely on the premise that the State is a unitary actor that can be “tied to the mast” with the threat of international litigation.<sup>12</sup>

For example, advocates of the international investment system argue that allowing foreign investors to bring claims in arbitral forums facilitates foreign direct investment that eventually leads to development in the host country.<sup>13</sup> Without the protections provided in international agreements and the access to neutral tribunals to enforce them, companies would hardly risk investing in countries with a dubious rule of law record.<sup>14</sup> Governments need to

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power have engaged in international norm creation, and many scholars have pointed to the fact that these types of agreements also inform international law because they affect how governments and actors engage with each other. See generally Curtis A. Bradley et al., *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. CHI L. REV. 1281, 1293-1301 (explaining how executive agreements are now the rule, and particularly how non-binding agreements have expanded without much congressional review); see also Kathleen Claussen, *Trade's Mini-Deals*, 62 VA. J. INT'L L. 315 (2022) (explaining how the Office of the U.S. Trade Representative has engaged in mini trade deals that do not receive the same congressional supervision or support as traditional trade agreements); Guillermo J. Garcia Sanchez, *The Other Secret Deals with Mexico and the Expansion of Executive Bureaucracies* (Mar. 2022) (unpublished manuscript), <http://dx.doi.org/10.2139/ssrn.3826409> [<https://perma.cc/9LRF-EL9Z>] (describing how Mexico and the United States have delegated their binational relation to the use of memoranda of understandings and letters of intent instead of formal international agreements).

<sup>12</sup> Garcia Sanchez, *To Speak with one Voice*, *supra* note 11, at 559-60.

<sup>13</sup> See U.N. Conference on Trade and Development, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, at 3, U.N. Doc. UNCTAD/DIAE/IA/2009/11, U.N. Sales No. E.10.II.D.11 (2010) (“Host [S]tates wishing to attract and promote foreign investment often seek to offer predictability to foreign investors by favo[r]ing international arbitration as the means for investors to deal with a dispute.”); see Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689 (2014); see also Charles N. Brower & Jawad Ahmad, *Why the “Demolition Derby” That Seeks to Destroy Investor-State Arbitration?*, 91 CAL. L. REV. 59 (2018); Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471 (2009).

<sup>14</sup> See Victor Essien, Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law*, 19 FORDHAM INT'L L.J. 818, 821 (1995). In the context of Latin America, see Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 323-25 (2004). Some studies have claimed that adopting BITs increases the flow of FDI. See, e.g., Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33



tie their hands to the mast in order to attract foreign investment. Moreover, the advocates argue, the system fosters good policy and rule of law reforms in the domestic system of the host State because it subjects domestic judicial, civil and administrative proceedings to international scrutiny.<sup>15</sup> States have incentives to modify their domestic policies to be more transparent, avoid discriminatory policies, provide due process, and avoid the temptation of treating foreign capital in an unfair and inequitable way.<sup>16</sup> All of these incentives can also benefit the local population because the adoption of these practices and standards can be equally applicable to them.<sup>17</sup>

But to critics, the international investment regime is perceived as a façade for unbalanced protection in favor of foreign capital, in exchange for a reduction of regulatory autonomy from the host State.<sup>18</sup> According to these critics, governments that sign these

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WORLD DEV. 1567 (2005) (offering the first qualitative based analysis on the connection between flows of foreign direct investment and the adoption of bilateral investment agreements).

<sup>15</sup> See Charles N. Brower & Lee A. Steven, *Who Then Should Judge: Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193 (2001).

<sup>16</sup> See Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 658 (1997). For a view on how the efforts to create a permanent court might fail, see Charles N. Brower, *Doomed to Failure: Why the EU Investment Court System is Destined to Fail Both Foreign Investors and Host States – 3rd Annual EFILA Conference Keynote*, 3 EUR. INVEST. L. ARB. REV. 319 (2018).

<sup>17</sup> See Armin Von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49, 57-58 (2013). For an example of domestic constitutional changes motivated by international arbitral decisions, see Guillermo J. Garcia Sanchez, *Investment Cases in the Mexican Legal System: Willingness to Compensate, Federalism Issues, and Parallel Litigation*, in INTERNATIONAL INVESTMENT LAW: AN ANALYSIS OF THE MAJOR DECISIONS 591, 596-97 (Hélène Ruiz Fabri & Edoardo Stoppioni eds., 2022).

<sup>18</sup> See, e.g., DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 225 (2008) (arguing that the regime "destabilize[s] the functioning of democratic processes, represented by other constitutional rules."); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 1-26 (5th ed. 2021) (describing the lack of legitimacy of the system, the lack of transparency, its controversy, and system flaws); see generally THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al. eds., 2010) (identifying some of the systemic concerns, such as limitations on domestic policy space, a lack of democratic accountability, a systemic pro-investor bias, and the inability of treaties to respond to changes in economic circumstances); see also DANIEL RANGEL ET. AL, TURNING THE TIDE: HOW TO HARNESS THE AMERICAS PARTNERSHIP FOR ECONOMIC PROSPERITY TO DELIVER AN ISDS-FREE AMERICAS (Oct. 2023), <https://ccsi.columbia.edu/sites/default/files/content/docs/CCSI-americas-partnership-economic-prosperity.pdf> [https://perma.cc/H7WH-JEA5] (suggesting a set of proposals to dismantle the investor-State dispute settlement

agreements are giving away their right to regulate economic activities and attend to the needs of their population.<sup>19</sup> They are constantly facing threats of international litigation by foreign companies if they enact new environmental standards, more progressive tax regimes, or take emergency measures.<sup>20</sup> The abandonment of regulatory freedom thus outbalances any advantages of attracting foreign investment.<sup>21</sup> In the view of these critics, alternative methods to resolve investment disputes, such as specialized domestic courts, investment ombudsmen, or State-to-State arbitration, should be embraced over investor-State arbitration.<sup>22</sup> Moreover, these critics point to empirical studies that show little or no correlation between signing investment agreements and attracting foreign investments.<sup>23</sup> The existence of international

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("ISDS") regime in the Americans due the fact that it undermines democratic governance).

<sup>19</sup> See Von Bogdandy & Venzke, *supra* note 17, at 58; Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Taking's Doctrine*, 78 N.Y.U. L. REV. 30, 34-35 (2003).

<sup>20</sup> See generally Jennifer L. Tobin, *The Social Cost of International Investment Agreements: The Case of Cigarette Packaging*, 32 ETHICS & INT'L AFFS. 153 (2018) (describing the case of the tobacco industry in using ISDS to chill regulatory efforts by the States); Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat To Climate Policy Posed by Investor-State Dispute Settlement*, 7 TRANSNAT'L ENV'T L. 229 (2018) (arguing that fossil fuel companies will use the same investment litigation tactics that the tobacco companies use to prevent States from adopting policies that affect their operations); Tarald Laudal Berge & Axel Berger, *Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity*, 12 J. INT'L DISP. SETTLEMENT 1 (arguing that the state institutional capacity will impact the level of regulatory chill); Anthony Depalma, *NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES (Mar. 11, 2001), <http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html> [https://perma.cc/DT7Z-RAEV] (describing how national laws have been revoked due to the ISDS system).

<sup>21</sup> See GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 4-10 (2007).

<sup>22</sup> See, e.g., Anthea Roberts, *The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds*, EJIL: TALK! (June 15, 2017), <https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds> [https://perma.cc/KN6X-3FY4].

<sup>23</sup> Professor Jason Yackee conducted a survey of general counsels in the top 200 U.S.-based corporations asking how important was the presence or absence of bilateral investment treaties ("BIT"s) to the company's decisions to invest in another jurisdiction and of the seventy-five respondents the median response was "not very important." Moreover, only four out of the seventy-five survey companies reported that they decided not to invest in another jurisdiction due to

agreements and arbitral forums is just one of many elements that companies take into consideration before investing abroad.<sup>24</sup> In sum, to the skeptics of the investment system, governments are tying their hands to the mast for the “wrong” reasons and not receiving the benefits of doing so. In their most extreme views, the critics advocate for “wiping the slate clean” and starting the international investment system anew.<sup>25</sup>

In the middle of the debate are those who believe in the advantages of the system but try to ameliorate the loss of regulatory autonomy by advocating for procedural reforms or amendments to the existing treaties and clarifying further the right of the State to regulate in the health, safety and environmental fields without facing treaty-based liability.<sup>26</sup> These advocates push for more transparent procedures, the inclusion of amicus curiae and third parties affected by the proceedings, and expedited processes to reduce the costs of litigation.<sup>27</sup> They also advocate for the inclusion of new standards, such as anti-corruption pledges and respect for

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the lack of a BIT. See Jason W. Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 401-18 (2010); Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009); see also *Do Bilateral Investment Treaties Attract FDI Flows to Developing Economies?*, in Secretariat of the U.N. Conference on Trade and Development, *Trade and Development Report, 2014*, at 159, annex to chapter VI (2014), [http://unctad.org/en/PublicationsLibrary/tdr2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf) [<https://perma.cc/9RR2-UGEX>].

<sup>24</sup> In fact, some non-governmental organizations point to studies that show that foreign direct investment increases even after the denunciation of bilateral investment treaties. See PUB. CITIZEN GLOB. TRADE WATCH, *TERMINATION OF BILATERAL INVESTMENT TREATIES HAS NOT NEGATIVELY AFFECTED COUNTRIES' FOREIGN DIRECT INVESTMENT INFLOWS 11* (Apr. 2018).

<sup>25</sup> See M. SORNARAJAH, *RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 408 (2015) (“[W]iping the slate clean seems to be the only possible way forward.”); M. Sornarajah, *Starting Anew in International Investment Law*, 74 COLUMBIA FDI PERSPECTIVES 3 (2012) (“A truly justice-centered regime that shows concern for the interests of the poor is better than a regime that is geared to promote the narrow interests of the rich.”).

<sup>26</sup> See Catharine Titi, *The Right to Regulate*, in *FOREIGN INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA)* 159 (Makane Moïse Mbengue & Stefanie Schacherer eds., 2019); Elizabeth Trujillo, *Balancing Sustainability, the Rights of to Regulate, and the Need for Investor Protections: Lessons from the Trade Regime*, 59 B.C. L. REV. 2735 (2018); Loukas Mistelis et al., *Reforming Investor-State Dispute Settlement and Promotion of Trade and Investment Cooperation*, G20 INSIGHTS, Nov. 22, 2020, at 14; Puig & Shaffer, *supra* note 6.

<sup>27</sup> For example, the UNCITRAL is dedicating one of its working groups to investigate the reform of ISDS in order to address some the expressed concerns. *Report of the UN Commission on International Trade Law*, ¶ 264, UN Doc. A/72/17 (July 21, 2017) [hereinafter July 21 UNCITRAL Report].

human rights, to better balance the power relationship between host States and companies. Some even argue that the system could benefit from stronger institutional design that includes the creation of a multilateral investment court to serve as an appeal body balancing the different policy interests and that could work in tandem with other forms of dispute resolution.<sup>28</sup> In their view, the system can be recalibrated to advance other social and environmental goals without taking away the protections granted to foreign investors.<sup>29</sup> In sum, the ropes can be loosened to allow more flexibility for the State to act.

To support their respective claims, opponents and proponents of the system point to the costs of arbitral proceedings and the amounts of damages compensation ordered in the awards.<sup>30</sup> Proponents argue that concerns about a chilling effect are overblown, as the amounts awarded to successful investors are far less than what had originally been requested. The opponents argue that the costs of litigation and the high amounts of compensation reduce public funds that should have been directed to benefit the local population, *e.g.*, to build better health systems or expand access to public education.<sup>31</sup> These critics question why a State that wants to increase taxes on an oil company or impose new health standards on tobacco companies should face the threat of a multi-million-dollar litigation process.<sup>32</sup>

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<sup>28</sup> See Stephan W. Schill & Geraldo Vidigal, *Designing Investment Dispute Settlement à la Carte: Insights from Comparative Institutional Design Analysis*, in 18 L. PRACT. INT'L COURTS & TRIBUNALS 314 (2020) (advocating for a reform that can include the creation of a multilateral investment court coexisting with other forms of dispute resolution under a multilateral investment treaty).

<sup>29</sup> See José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223 (2011); José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405 (2003).

<sup>30</sup> See Susan D. Franck, "Rationalizing Costs in Investment Treaty Arbitration," 88 WASH. U. L. REV. 769, 782-90 (2011) (analyzing the costs of investment treaty arbitration); Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 357 (2007) (noting the disparities in the type of legal defense hired by major companies and the ones afforded by developing nations); Susan D. Franck, *Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide*, 29 ICSID REV. 66, 77-80 (2014); see also SUSAN D. FRANCK, *ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION* (2019).

<sup>31</sup> Franck, *Rationalizing Costs in Investment Treaty Arbitration*, *supra* note 30, at 788.

<sup>32</sup> Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 464 (2015).

In the debate, however, the response to a crucial question has gone missing: who actually bears the cost of treaty noncompliance? If the threat of litigation is what ties the hands of the State to the mast, then the actual cost of violating treaties should be borne by those who are supposed to be tied up. In other words, the assumption implicitly buried in the investment literature is that the State, as the internationally responsible actor, will make sure that those costs are borne by the government actors who are affecting foreign investment. It assumes that the actors who enact the policies fear being sued, including the fear of litigation costs if investors sue and win.<sup>33</sup> This basic assumption about motives within the arbitration system is shared by advocates, critics, and moderates alike. The critics go further and charge that a country's citizens will indirectly bear the costs of this fear: governments will be so concerned about litigation costs that they will forego social and environmental advancements that would benefit their citizens.<sup>34</sup>

However, the reality, as always, is more complex than what those polarized arguments present. In this Article, using energy related-litigation cases in Latin America as a case study, I show that the government in power at the time of the challenged policy is rarely the one responsible for compensating investors. To the contrary, due to the way that arbitration proceedings operate, there is a high chance that it will be a subsequent administration that will be left paying the bill.

A note of caution is warranted. The data presented in this Article does not suggest that affecting foreign investments is costless. A State might still suffer from a loss of new foreign direct investments or the expansion of existing ones when it decides to renege on its promises. Investors might see that the political risk of investing in that jurisdiction is too high. However, there are still no studies that can connect the filing of arbitral claims as a source of loss of investments. To the contrary, as the work of Professor Rachel Brewster shows, participating in arbitral proceedings is considered

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<sup>33</sup> See Claxton, *supra* note 2, at 79; Tobin, *supra* note 20; see also Tienhaara, *supra* note 20.

<sup>34</sup> See M.R. Dahlan & Wolf von Kumberg, *Investor-State Dispute Settlement Reconceptualized: Regulation of Disputes, Standards and Mediation*, 17 PEPP. DISP. RESOL. L.J. 233, 243 (2017) ("[I]t is estimated by the Organi[z]ation for Economic Co-operation and Development ([\"OECD\"]) that proceedings cost states an average of \$8 million and can exceed \$30 million, all of which they have no chance of recovering, whether they win or lose."); Wolf von Kumberg et al., *Enabling Early Settlement in Investor-State Arbitration: The Time to Introduce Mediation Has Come*, 29 ICSID REV. 133, 135 (2014).

as a good sign that the State is willing to resolve its disputes through pre-established mechanisms; it is non-participation in the proceedings that might affect the State's international reputation.<sup>35</sup> In the same vein, there is no evidence that non-compliance in one international regime might extend to other fields. For example, a breach of investment pledges does not translate into a loss of international reputation in security or environmental issues.<sup>36</sup> According to George Downs and Michael Jones, it will depend on how interconnected the issues are and how they value them.<sup>37</sup>

This Article, as such, makes three contributions to the scholarly literature. First, it identifies the relevant actor defending the State through the lifespan of the case to test the assumption embedded in the investment regime that the threat of litigation chills government policies.<sup>38</sup> In doing so, my analysis provides a unique perspective on who is the ultimate actor responsible for litigating, enforcing, and compensating an investor for an award. Second, the Article identifies how the investment regime operates in a particular sector and in a concrete region of the world. As explained below, Latin America represents close to a third of the global investment cases and close to half of these are related to the energy sector. Hence, the Article invites the reader to reflect on the importance of considering the energy sector separately from other types of investments. Further research would require comparing the findings of Latin American energy cases with other regions of the world. But the initial findings here allow us to identify how the system operates in States highly dependent on foreign investment for the development of the energy sector.<sup>39</sup> A finding that in turn might help to explain why close to half of the global cases are connected to the energy sector.

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<sup>35</sup> See Rachel Brewster, *The Limits of Reputation on Compliance*, 1 INT'L THEORY 323 (2009); Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 HARV. INT'L L.J. 259 (2013).

<sup>36</sup> See George W. Downs & Michael A. Jones, *Reputation, Compliance and Development*, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 117, 118 (Eyal Benvenisti & Moshe Hirsch eds., 2004).

<sup>37</sup> See *id.*

<sup>38</sup> I recognize that the action might have an origin in a subnational entity, such as a local government, or a central/federal agency. The State however, as it is explained further below, is traditionally defended by the executive branch. Regardless of the origin of the measure, it is one branch that has to defend the case and enforce the decision by the arbitral tribunal.

<sup>39</sup> See *infra* Section II (describing the importance of the energy sector in the region and how it differs from other investments).

Third, this Article provides a set of new data valuable for international investment and arbitration scholars and policymakers. By reviewing the amount of time it takes to litigate energy-related cases and the challenges of enforcing the awards, the Article provides information that can assist in evaluating whether it is worth bringing future claims under current conditions. If the goal of litigating is to “chill” government policies, the data show that this happens under a limited set of circumstances. Paradoxically, the existence of peaceful democratic transitions of government seems to benefit those government officials that seek a short-term gain in forcing foreign companies to renegotiate concessions, licenses, or give away some of their rents. Ultimately, if investors decide to bring a claim against those governments, future administrations will be the ones litigating the case and potentially paying compensation down the line. The analysis provided here is also valuable for policymakers engaged in the reform process of the investment regime. As the Article shows, at least three recent reforms can impact the arbitration proceedings’ lifespan. These reforms are the use of expedited proceedings under the new rules enacted by the International Center for the Settlement of Investment Disputes (“ICSID”), the adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the “Singapore Convention”), and the prioritization in the agreements of State-to-State dispute resolution mechanisms to espouse investors’ claims.<sup>40</sup> The Article reviews each of these reforms in light of the data findings.

This Article proceeds as follows: Part I explains the importance of the energy sector for the Latin American States and how it differs from other types of investments. This part further explains how the energy-related cases impact the development of investment law and why I selected this particular sector and region as a point of departure. Part II uses the Latin American energy-related cases to illustrate the bottlenecks within investment-related litigation that tend to transcend governmental administrations. Part III reviews existing efforts to reform the system, particularly the expedited review process and efforts to increase the use of mediation, and analyzes whether the amendments might help in preventing disputes capable of chilling changes in energy policies. Part IV concludes.

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<sup>40</sup> See *infra* Section IV (analyzing the impact of the three reforms proposed in light of the evidence presented in this Article).

## I. WHY ENERGY AND LATIN AMERICA

International energy-related investments can be classified into three groups. There are those connected to its extractive side: the exploration, extraction and development of energy-connected minerals such as oil, gas, and coal.<sup>41</sup> Even the current trend to reduce the use of fossil fuels to generate energy has an extractive component since the extraction of cobalt, lithium, nickel, and copper are key for the construction of electric vehicles, solar panels, wind turbines, and electrical grids.<sup>42</sup> Hence, the extraction of natural resources is a fundamental component of the energy industry.<sup>43</sup>

Energy investments have also a midstream side that involves the construction and operation of the necessary infrastructure to bring the extracted energy-connected minerals to the processing sites.<sup>44</sup> These midstream investments can be found in the shape of processing stations, pipelines, transmission lines, and specialized ports. Finally, the energy sector investments can also take place in the downstream side through the construction of power generation plants, electricity distribution terminals, plants to liquify natural gas, or refineries to process crude oil.

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<sup>41</sup> See ANNA-ALEXANDRA MARHOLD, *ENERGY IN INTERNATIONAL TRADE: CONCEPTS, REGULATION AND CHANGING MARKETS* 14-15 (2021).

<sup>42</sup> JORGE VIÑUALES, *THE INTERNATIONAL LAW OF ENERGY* 402-03 (2022). For cases involving investment disputes in the renewable energy sector, see Yulia S. Selivanova, *Changes in Renewables Support Policy and Investment Protection Under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases*, 33 ICSID REV. 433, 445 (2018); Daniel Behn & Ole Kristian Fauchald, *Governments Under Cross-fire? Renewable Energy and International Economic Tribunals*, 12 MANCHESTER J. INT'L ECON. L. 117 (2015).

<sup>43</sup> See Yulia Selivanova, *Managing the Patchwork of Agreement in Trade and Investment*, in *GLOBAL ENERGY GOVERNANCE: THE NEW RULES OF THE GAME* 49 (Andreas Goldthau & Jean Martin Witte eds., 2010) (describing the multiplicity of agreements that deal with the extracted products required for the energy sector, including challenges involving transit, trade, and investment agreements); see also Yulia Selivanova, *International Energy Governance: The Role of the Energy Charter*, 106 PROC. ASIL ANNU. MEETING-AM. SOC. INT. L. 394 (2012) [hereinafter Selivanova, *International Energy Governance*] (describing how energy products differ from other commodities traded around the world, including the fact that these tend to be in small number of resources owning countries).

<sup>44</sup> Selivanova, *International Energy Governance*, *supra* note 43, at 395-96; CAMERON, *supra* note 1, at 4-7; see James W. Coleman, *Pipelines & Power-Lines: Building the Energy Transport Future*, 80 OHIO ST. L.J. 263 (2019) (arguing that the U.S. need to invest in energy transport infrastructure, such as pipelines and powerlines, in order to benefit from the new energy technologies associated with renewable energy, natural gas, and light crude oil).



What all of these investments have in common is the presence of large sunk costs, non-interchangeable infrastructure, complex financing with long-term contracts attached, and a need for long-term stability in order to make it economically feasible. The other element that they have in common is their impact on governance in the host State.<sup>45</sup> In some cases, the operation of the sector represents close to a third of the economy and it finances half of the State expenditures.<sup>46</sup> Additionally, in most jurisdictions, the government is the owner of the mineral resources contained in the subsoil, the continental platforms, and the exclusive economic zone.<sup>47</sup> Moreover, the operation of the energy system has a direct impact on all the economy of the State, threatening to halt it if it fails to provide reliable service and a competitive price. If the power goes down or the electricity bills go up, the government faces open revolt from its citizens. Hence, the temptation to forcibly renegotiate existing contracts, and the threats of expropriation and nationalization, are always present in these jurisdictions.<sup>48</sup>

For these reasons, it is not surprising that the international regime protecting foreign direct investments and the energy industry have always been interconnected.<sup>49</sup> The very first investment standards developed under customary international law had some connection to the energy sector.<sup>50</sup> For example, the nationalization of the oil industry in Libya led to the development of standards to consider the legality of expropriation measures under international law.<sup>51</sup> The *Barcelona Traction* case in the

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<sup>45</sup> Garcia Sanchez, *The Hydrocarbon Industry's Challenge to International Investment Law*, *supra* note 4, at 496-500.

<sup>46</sup> *Id.* at 497.

<sup>47</sup> Jørn Øyrehagen Sunde & Tina Soliman Hunter, *Introduction to THE CHARACTER OF PETROLEUM LICENSES: A LEGAL CULTURE ANALYSIS* 1-4 (Tina Soliman Hunter et al. eds., 1<sup>st</sup> ed. 2020).

<sup>48</sup> For a review on how energy impacts the exercise of independence, security, and sovereign rights, *see generally* Guillermo J. Garcia Sanchez, *In the Name of Energy Sovereignty*, 63 B.C. L. REV. 2475 (2022) (explaining the fragmentation and inconsistencies in international energy governance through the concept of energy sovereignty).

<sup>49</sup> CAMERON, *supra* note 1.

<sup>50</sup> *Id.* at 4-8 (connecting the development of the regime with the pursuit of stability in the energy sector and how the rise of nationalism, increase of commodity prices, and the temptation to renegotiate contracts are all historical factors that explain why energy disputes have an important presence in the history of international investment law).

<sup>51</sup> *See* Texaco Overseas Petrol. Co. v. Gov't Libyan Arab Republic, Award on the Merits, 53 I.L.R. 389, 508 (1977); Libyan Am. Oil Co. (LIAMCO) v. Gov't Libyan Arab Republic, 20 I.L.M. 1, 125 (1981); BP Expl. Co. Ltd. v. Gov't Libyan Arab

International Court of Justice, involving a Canadian power company's investment in Spain, is one of the most highly cited cases for its contribution of veil piercing to determine the nationality of investors.<sup>52</sup> The Iran-U.S. Claims Tribunal that was created as a consequence of the Iranian revolution and the oil and gas connected cases constituted an important part of the docket.<sup>53</sup> Finally, more recently, the Spanish, Italian, and Czech Republic cases involving changes in tax and pricing incentives for renewable energy projects reminded us that the international investment regime can also impact projects necessary to combat the climate crisis.<sup>54</sup> This "renewable energy saga" shaped the extent to which we review investor backed expectations in the face of economic challenges and the role played by international institutions, such as the European Union, in the enforcement of awards.<sup>55</sup>

Energy-related disputes historically account for close to 47% of all investment claims brought to investment arbitration tribunals around the globe.<sup>56</sup> In the case of Latin America, this number is

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Republic, Award, 53 I.L.R. 297, 354 (1973); *Amoco Int'l Fin. Corp. v. Islamic Republic Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 243 (1987). For a review of the importance of the Libyan cases, see Garcia Sanchez, *The Hydrocarbon Industry's Challenge to International Investment Law*, *supra* note 4, at 519-20.

<sup>52</sup> See *Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain)*, Second Phase, 1970 I.C.J. 3 (Feb 5).

<sup>53</sup> Damien Charlotin, *A Data Analysis of the Iran-US Claims Tribunal's Jurisprudence*, 1 ITA REV. 1, 26 (2019).

<sup>54</sup> See Maximilian Schmidl, *The Renewable Energy Saga from Charanne v. Spain to the PV Investors v. Spain: Trying to See the Wood for the Trees*, KLUWER ARB. BLOG (Feb. 1, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/02/01/the-renewable-energy-saga-from-charanne-v-spain-to-the-pv-investors-v-spain-trying-to-see-the-wood-for-the-trees/> [https://perma.cc/5Q6T-USMZ]; Caleb Symons, *EU Says €291M Arbitration Award Violates European Law*, LAW 360 (June 3, 2022) <https://www.law360.com/articles/1499190/print?section=energy> [https://perma.cc/2G5R-U5FA].

<sup>55</sup> See Schmidl, *supra* note 54.

<sup>56</sup> The average of energy-related cases in the International Center for the Settlement of Investment Disputes ("ICSID") annual reports from 2010 to 2021 is 46.9% of the total caseload. The 2021 ICSID annual report documented 43% of energy-related cases from the total case load. See ICSID, THE ICSID ANNUAL REPORT 27 (2021). The report also recognized that "[h]istorically, the extractive and energy sectors have accounted for the largest share of cases, and this trend continued in FY2021." In 2020, the annual report documented 50% of energy-related cases from the total case load. ICSID, THE ICSID ANNUAL REPORT 25 (2020). In 2019, the annual report documented 42% of energy-related cases from the total case load. ICSID, THE ICSID ANNUAL REPORT 24 (2019). In 2018, the annual report documented 37% of energy-related cases from the total case load. ICSID, THE ICSID ANNUAL REPORT 30 (2018). In 2017, the annual report documented 27% of energy-related cases from the total case load. ICSID, THE ICSID ANNUAL REPORT 34 (2017). In 2016, the annual

slightly lower, 40.8%, for the same period.<sup>57</sup> Nonetheless, almost half of the investment cases in the region involve the energy sector either in its extractive end, or the midstream or upstream ends of the system. The next sections will explain how a review of this 40.8% of all Latin American investment cases challenges the assumption that the investment regime has a deterring effect on energy-related government policies. That is, government officials are afraid of facing international investment claims when considering enacting regulations or passing policies that impact the energy sector because they will have to compensate them.

## II. FROM THE DAY OF THE ACTION TO THE DAY OF THE BILL

The following section reviews the data registered in the Latin American Investment Cases database from the Center for the Advancement of the Rule of Law in the Americas at Georgetown University ("CAROLA"), and the available cases published by ICSID, the United Nations Conference on Trade and Development Investment Policy Hub website, and the University of Victoria's Investment Treaty Arbitration website.<sup>58</sup> The analysis focuses on

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report documented 55% of energy-related cases from the total case load. ICSID, THE ICSID ANNUAL REPORT 34 (2016). In 2015, the annual report documented 58% of energy-related cases from the total case load. ICSID, THE ICSID ANNUAL REPORT 25 (2015). In 2014, the annual report documented 56% of energy-related cases from the total case load. ICSID, THE ICSID ANNUAL REPORT 25 (2014). In 2013, the annual report documented 30% of energy-related cases from the total case load. ICSID, THE ICSID ANNUAL REPORT 25 (2013). In 2012, the annual report documented 33% of energy-related cases from the total case load. ICSID, THE ICSID ANNUAL REPORT 29 (2012). In 2011, the annual report documented 41% of energy-related cases from the total case load. ICSID, THE ICSID ANNUAL REPORT 29 (2011). In 2010, the annual report documented 44% of energy-related cases from the total case load. ICSID, THE ICSID ANNUAL REPORT 26 (2010). All of the ICSID reports can be found at <https://icsid.worldbank.org/resources/publications/icsid-annual-report> [<https://perma.cc/7XAF-KMLG>].

<sup>57</sup> See CAROLA, *supra* note 1; see also *The ICSID Caseload - Statistics*, INT'L CTR. FOR SETTLEMENT INV. DISP., <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics> [<https://perma.cc/N63E-5XS4>] (last visited Apr. 2, 2024) [hereinafter ICSID Caseload Database].

<sup>58</sup> See CAROLA, *supra* note 1; ICSID Caseload Database, *supra* note 57; see also *Investment Dispute Settlement Navigator*, U.N. CTR. FOR TRADE & DEV. INV. POL'Y HUB, <https://investmentpolicy.unctad.org/investment-dispute-settlement> [<https://perma.cc/5UAQ-BME4>] (last visited Apr. 2, 2024); see also ITALAW, <https://www.italaw.com/> [<https://perma.cc/FY2J-DDYD>] (last visited Apr. 2, 2024).

Latin America because, according to ICSID's database, this region represents 28% of all investment disputes filed against States since 1966.<sup>59</sup> This makes it the region in the world with the largest number of investment cases, followed only closely by Eastern Europe and Central Asia with 26%.<sup>60</sup>

It is important to note that the databases only register the date of filing of a case and not the date when the dispute arose. A government action might have taken place months and even years before the actual claim is filed and registered by an arbitral institution. Moreover, many investment treaties require investors to exhaust domestic remedies, or spend some time in domestic courts, before bringing an international claim to an international dispute body.<sup>61</sup> A number of investment treaties also require investors to spend time, usually six months, negotiating with the government before filing a claim.<sup>62</sup> The "cooling off period" and the domestic litigation requirements can be waived by the State or they can be ignored if the investor can successfully argue that they are futile to

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<sup>59</sup> According to ICSID's statistical report from 1966 to 2022, South America represented 22% of the case load, while Central America and the Caribbean represented 6% of the caseload. Added together, these two regions, which would encompass all Latin America but Mexico, represented twenty-eight percent. Mexico is not included in the region because it is classified in the ICSID database as North America. ICSID, *THE ICSID CASELOAD – STATISTICS: ISSUE 2022-2*, at 12 (2022), [https://icsid.worldbank.org/sites/default/files/publications/The\\_ICSID\\_Caseload\\_Statistics\\_2022-2\\_ENG.pdf](https://icsid.worldbank.org/sites/default/files/publications/The_ICSID_Caseload_Statistics_2022-2_ENG.pdf) [<https://perma.cc/S6M-KANH>].

<sup>60</sup> *Id.*

<sup>61</sup> See MARTIN DIETRICH BRAUCH, *EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL INVESTMENT LAW* 33 (2017), <https://www.iisd.org/system/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf> [<https://perma.cc/5JDY-VYYL>] (reviewing the origins of the rule to exhaust domestic remedies and proposing options and approaches to setting up the rule in new treaties); see generally Zachary Mollengarden, *The Utility of Futility: Local Remedies Rules in International Investment Law Note*, 58 VA. J. INT'L L. 403 (2018) (describing how tribunals have interpreted the futility principle to avoid having to exhaust domestic remedies before bringing a claim to international tribunals).

<sup>62</sup> See Aravind Ganesh, *Cooling Off Period (Investment Arbitration)* (Max Planck Inst. Lux., Working Paper No. 7, 2017), [https://pure.mpg.de/rest/items/item\\_2511828/component/file\\_2511827/content](https://pure.mpg.de/rest/items/item_2511828/component/file_2511827/content) [<https://perma.cc/73T2-WEGT>] (analyzing the practice of including cooling off periods in BITs, and comparing it to other mechanisms such as commercial arbitration, trade law, and alternative dispute resolution clauses for international disputes); see also Dmitry V. Kaysin & Aigul F. Urmantseva, "Cooling-off Period" *Clauses in Investment Treaties Articles: Russian & Foreign Experience*, 2021 INT'L COMM. ARB. REV. 24 (2021) (providing a study on the nature of the cooling off period clauses, the consequences of non-compliance with them, and the common jurisdictional and admissibility objections).

resolve the dispute. In general, however, investors spend time trying to negotiate (and to a significantly lesser degree, mediate) with the government before bringing an investment claim.<sup>63</sup>

A closer analysis would be required to review how much additional time should be added to the life cycle of a dispute beyond the registered litigation date. Moreover, there are no empirical studies showing how many of these cases are resolved in the domestic judiciary or during the cooling off period through negotiation.<sup>64</sup> There is only anecdotal evidence reported in the investment-related media that in some cases the existence of these steps mandated by the treaty help defuse some investment disputes.<sup>65</sup> Regardless of the lack of evidence of how these processes take place, one could infer that the government actions that provoked the dispute took place months, if not years, before the dispute took the shape of a claim under the investment arbitral regime.

Between 1996 and 2021, there were 341 cases against sixteen States in the Latin American region.<sup>66</sup> One hundred and thirty-nine of those cases involved energy-related investments—41% of the

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<sup>63</sup> See Andrea Kupfer Schneider & Nancy Welsh, *Bargaining in the Shadow of Investor-State Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management*, 17 U. ST. THOMAS L.J. 373 (2021) [hereinafter Schneider & Welsh, *Bargaining in the Shadow of Investor-State Mediation*]; Nancy Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEG. L. REV. 71 (2013); see also Nancy Welsh & Andrea Kupfer Schneider, *Becoming "Investor-State Mediation"*, 1 PENN ST. J. L. & INT'L AFF. 86 (2012).

<sup>64</sup> There are databases used for this Article that show those arbitral cases that were initiated and then settled or discontinued, but I was unable to find any data regarding the cooling-off period that takes place before filing a case. See ICSID Caseload Database, *supra* note 57; see also CAROLA, *supra* note 1.

<sup>65</sup> See CAMERON, *supra* note 1, at 9 (describing the case of Repsol and City Oriente reaching a deal with Ecuador in 2008 to withdraw their arbitral claim in exchange for an extension of time for their exploration rights and to Ecuador's benefits). In 2008, the Italian oil and gas company, ENI, reached a deal with Venezuela to withdraw its ICSID claim after signing a new joint-venture agreement to develop a larger oil field in the Orinoco Belt and receive a \$7000 million compensation for the nationalization of another oil field. See *Jad Mouawad, Eni of Italy in Oil Deal in Venezuela*, N.Y. TIMES (Mar. 1, 2008), <https://www.nytimes.com/2008/03/01/business/worldbusiness/01oil.html> [https://perma.cc/7JG9-PF3D]. The ENI claim in ICSID was filed in February 2007 and discontinued in April 2008 after the signing of the deal. For procedural details of the case, see *Eni Dación B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/4, Order Taking Note of the Discontinuance of the Proceeding (Apr. 18, 2008).

<sup>66</sup> The database includes all of the investment cases registered against Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Jamaica, Mexico, Nicaragua, Panama, Peru, and Venezuela.

total case load.<sup>67</sup> Out of the 139 energy related cases, thirty-eight cases (28% of the total energy-related) were still pending in 2021.<sup>68</sup> Of those pending cases, 43.2% (sixteen cases) were initiated after 2020, 16.2% (six cases) had been on the docket for three years, and 21% for two years.<sup>69</sup> The oldest pending case began in 2002, making it a nineteen-year-old case.<sup>70</sup>

Close to 20% of the total energy-related cases reached a settlement.<sup>71</sup> The average time that it took to reach a settlement was 3.2 years from the time of filing to the day that the case was registered as reaching a settlement. This number shows how, even in the face of litigation, States and investors continue talks to attempt to reach settlement. These talks might be a continuation of the initial consultation period that took place before the claim was filed or new processes initiated after the arbitral tribunal was officially constituted. We do not have evidence of how much time this pre-litigation negotiation takes, but what we can conclude from the analyzed data that negotiation remains an important process that helps to resolve close to 20% of the energy-related cases. Additionally, 5% of the total energy-related cases were discontinued. The average time they spent on the docket was 3.16 years, similar to the settled cases. Hence, 25% of all initially filed cases never reached a final award because the parties reached a settlement, or the claimant discontinued the case.

The remaining 45% of the 139 energy-related cases (63) were finally resolved through an arbitral tribunal's decision. In other words, of all the "resolved cases" (settled + discontinued + concluded = ninety-six total), 66% were resolved through an arbitration proceeding that ended with an award.

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<sup>67</sup> The database shows 40.8%, but for purposes of the article, the number is rounded up to 41%.

<sup>68</sup> See CAROLA, *supra* note 1.

<sup>69</sup> *Id.*

<sup>70</sup> AES Corporation brought a case against Argentina involving electricity generation and distribution operations on December 19, 2002. On April 6, 2022, the Chair of the Administrative Council declined the disqualification of the three arbitrators. AES Corp. v. Argentine Republic, ICSID Case No. ARB/02/17, Decision on the Respondent's Proposal to Disqualify all Members of the Tribunal (Apr. 6, 2022).

<sup>71</sup> The database shows that 19.4% (twenty-seven cases) reached a settlement. See CAROLA, *supra* note 1.

	Settled	Discontinued	Concluded with an award	Total (Not counting pending cases)
Energy Related- Cases Resolved (not counting pending cases)	27 (28%)	6 (6%)	63 (66%)	96 (100%)
Average time	3.2 years	3.16 years	6.75 years	

**Table 1: Resolved Cases**

The average time to resolve an energy-related investment case through arbitration was 6.75 years. Twenty-two cases took eight or more years (34% of the total settled through arbitration), and the case that took the longest to reach an arbitral award was eighteen years. The case that took the least amount of time to be resolved through arbitration required two years. In 10.9% of the cases resolved through arbitration, the tribunal concluded that it lacked jurisdiction to resolve the dispute. Therefore, the underlying merits of the dispute were not resolved through arbitration.

The databases also allow us to distinguish those cases that went through an annulment proceeding following the arbitral award.<sup>72</sup> Of the sixty-three concluded cases, only four cases were subjected to annulment proceedings as part of Section 5 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"). The average time of an energy-related investment case that was subjected to an annulment proceeding was 11.25 years from the date of initial filing to the date of issuance of the annulment decision. The longest case was thirteen years, and the shortest case was seven years.<sup>73</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> If we add all the concluded cases and the pending annulment cases (64+4=68), the average time of litigation is seven years. Twenty-five of the sixty-eight cases have taken eight or more years.

In terms of the distribution of winners and losers, 49.2% (thirty-one cases) of the concluded cases were decided in favor of the State, 49.2% (thirty-one cases) were decided in favor of the investor, and one case was registered as decided in favor of neither. Out of the thirty-one cases decided in favor of the investor, the average and median time of litigation was eight years. That is, successful investment claims in the energy-sector in Latin America take eight years before the arbitral institutions issue a final award. In contrast, those cases where the State was successful in its defense took an average of 4.4 years and a median of four. Hence, investors are taking double the amount of time to win a case against a government action.

	In Favor of the State	In Favor of Investor
Energy Related-Cases Resolved	49% (31)	49% (31)
Average Time	4.4 years	8 years
Median Time	4 years	8 years

**Table 2: Success Rates in the Region with Average and Median Times**

It is important to note that the databases do not contemplate consistently any proceedings in local courts to recognize the awards. That is, there might be additional judicial proceedings connected to the enforcement of the investment awards that might push the timeline even further. If the State is not a signatory of the ICSID Convention, parties would still need to seek a recognition and enforcement procedure in domestic courts under the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“New York Convention”).<sup>74</sup> If the State is a signatory of the ICSID Convention, the “pecuniary obligations” of the award should, in theory, require no enforcement and recognition proceedings because Article 54 of the ICSID Convention stipulates

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<sup>74</sup> See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].



that it should be treated as a “final judgment of a court in that State.”<sup>75</sup>

Moreover, there is no database available on whether the State paid the award in full immediately after it was issued, whether the State tried to annul the award in domestic judicial proceedings, or whether a negotiation period with the investor was initiated to determine payment of the award after its issuance. Even if the State is a signatory of the ICSID Convention, and Article 54 applies to the award, there are cases registered and described below in which investors must initiate domestic proceedings to have the award recognized before the governments can issue a compensation “check” or reach a settlement on how to achieve compensation.<sup>76</sup> This is important to consider when trying to determine who actually will be responsible for issuing the compensation check to an investor who has won their case before an investment tribunal.

What we can conclude from the above data is that investment cases in the energy sector in Latin America take close to seven years to be processed, and in those cases where the investors win, it requires eight years for the investors to receive a final award from an investment tribunal. Hence, the fact that close to 25% of the cases are not concluded through arbitration—either because they are discontinued or because they get settled—should be no surprise. An investor in the energy sector must be ready to litigate for at least eight years and then seek the enforcement of the award if they wish to realize the benefits of arbitrating the dispute. The investor might reach a settlement with the State within the first three years of filing

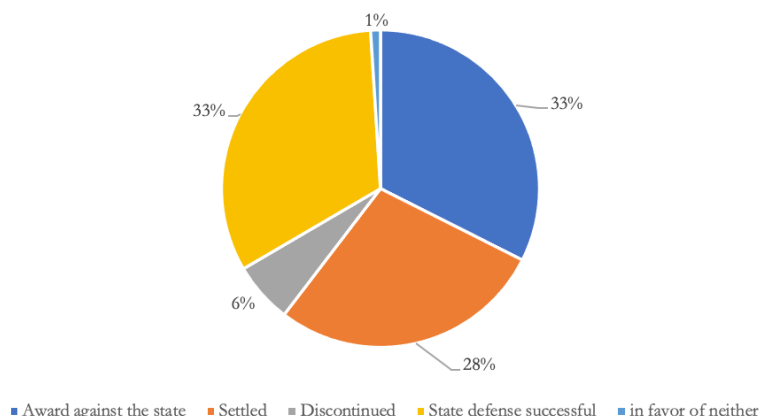
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<sup>75</sup> See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention] (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”). For a review of how tribunals have relied on monetary compensation and the issues that this approach generates in incentivizing the governments, see also Garcia Sanchez, *The Hydrocarbon Industry's Challenge to International Investment Law*, *supra* note 4, at 509-13.

<sup>76</sup> ICSID Convention, *supra* note 75, art. 53 (“The award shall be binding on the parties and shall not be subjected to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”).

the dispute, but if the case continues it must be willing to spend at least another five years waiting for a final award.

Another conclusion from the analyzed data is that most filed cases do not end with an adverse decision against the State (*see* Chart 1). If we add the success rate of State defenses with the settled and discontinued cases, we can conclude that in 67% of the cases, the State does not have to face an award compelling it to compensate the investor. Since we do not have disclosed information on the settlements reached by the parties, we cannot conclude which party benefited the most from the settlement. We can only assume that it was advantageous for both, and that at least the State did not have to face the consequences of losing a case and being forced to compensate. The same can be said about the investor. We can only assume that the settlements also benefit the companies. Hence, from the investors' perspective, the system allows them to receive some compensation through a settlement in 28% of the cases, and an award that could serve as a mechanism to negotiate with the State or a tool to seek compensation through enforcement proceedings in 33% of the cases (*see* Chart 1).



**Chart 1: Distribution of Total Resolved Cases with Success Rates**

The amount of time required to reach the conclusion of an investment arbitration case also has an impact on the decision-making process of government officials. It will rarely be the case that the government official who enacted the policy that breached the treaty obligations—be it the legislative body or the head of State—will have to compensate the investor. The most likely scenario, considering the number of years involved, is that future elected officials will have to pay the “bill” of any policy enacted by their

predecessors. The State as a unit will still be liable, but the government official who was supposed to consider the potential "costs" of his or her actions will not have to pay the consequences. They will pass on the bill to their successors, perhaps even future generations. I recognize that there might be other costs borne by the government actor associated with the enacted policies, such as the loss of prospective new investment in the sector or the freezing of expansion plans of existing projects. These costs, however, would take place regardless of the existence of investment claims filed as a consequence of the enacted policies and are difficult to pin down to particular events. In contrast with an award against a State for a specific government policy, the reduction of foreign direct investment into a country might be the result of a number of external variables, including the state of the world economy or changes in a company's business strategies.<sup>77</sup>

The next section reviews some of the most frequent repeat players in the system--Argentina, Ecuador, Venezuela, Peru, and Bolivia--and reviews the changes of administration in each jurisdiction. Examining these five States is particularly appropriate because 93 out of the 139 cases in the database involving the energy sector arose there. That is, 67% of the energy-related cases in the region were litigated by only five of the sixteen Latin American States with investment cases.<sup>78</sup>

The following subsections analyze the time from the moment of filing to the end of the investment proceedings. Does the same administration, or even political party, have to deal with the arbitral proceeding's outcomes? In other words, how often does the same actor who was in power when the action was taken have to face both the investment and enforcement of the award? A note of caution is warranted. I recognize that in some cases the action might have originated in a different branch or government level than the one defending the State.<sup>79</sup> That is, some cases originate from legislative actions or from decisions taken by provincial/local authorities. The executive government at the central level, however, is the one responsible for defending the State before an international

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<sup>77</sup> See Yackee, *supra* note 23.

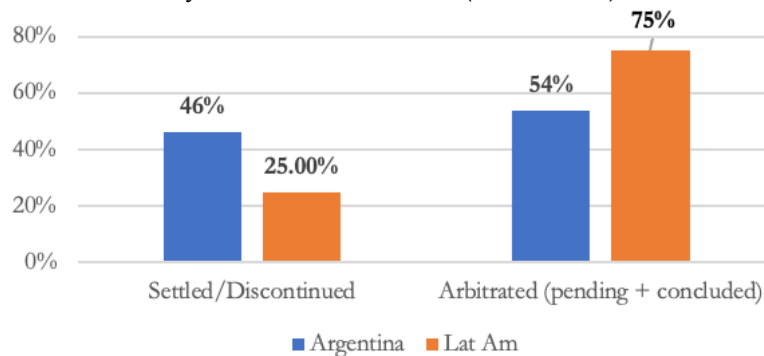
<sup>78</sup> Argentina registered twenty-six cases, Ecuador twenty cases, Venezuela sixteen cases, Peru thirteen cases, Bolivia eleven cases, representing together a total of eighty-six cases out of the one hundred and forty-four cases in the region.

<sup>79</sup> See generally Garcia Sanchez, *To Speak with one Voice*, *supra* note 11 (discussing the ways in which actions can be brought through the legislative and executive branches of government).

tribunal.<sup>80</sup> This is a mandate recognized in customary international law and in many of the investment treaties.<sup>81</sup> Each State must determine whether and how to allocate other governmental actors' funds in order to pay for arbitration proceedings and the award. The common element in all of the cases, however, is that the central government is responsible for defending the State and must decide how to transfer responsibility to other actors.

#### *a. Argentina*

Out of the twenty-six energy-related cases filed against Argentina between 1999 and 2021, 31% (eight cases) were settled. The average time to settle a case with Argentina was 3.87 years, and the median was four years. This is close to a year more than the average three years in the region. Fifteen percent of the cases (four cases) were discontinued, taking an average of 2.75 years for the case to be reported as discontinued. Hence 46% of the cases did not reach a final decision by an arbitral tribunal (*see* Chart 2).



**Chart 2: Argentina Energy-Related Cases**

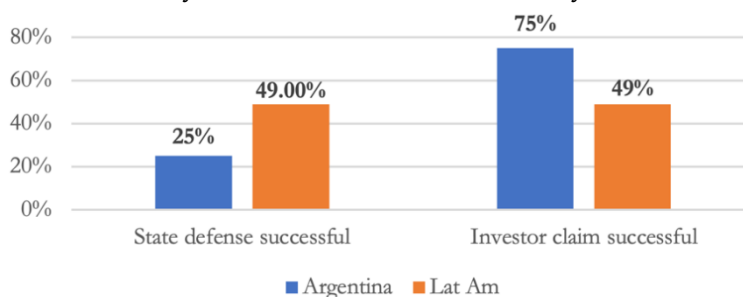
Of the remaining fourteen cases reported against Argentina, there are two pending cases. The *AES Corporation* case has been on the docket since 2002; the other pending case was initiated in 2019

<sup>80</sup> *Id.*

<sup>81</sup> According to the Vienna Convention on the Law of Treaties, a State cannot argue domestic law as a defense for a breach of its international obligations. *See* Vienna Convention of 1969, *supra* note 7, art. 27. BITs and trade agreements recognize the existence of different subnational authorities, but they explicitly state that is up to the central government to ensure that the treaty obligations are complied by them. *See, e.g.,* USMCA, *supra* note 9, art. 14.2.

(*Orazul International España Holdings*).<sup>82</sup> The remaining 46% (twelve cases) of the total caseload against Argentina is reported as concluded with an average of time on the docket of 9.83 years. The Argentina cases took three more years to get resolved compared to the average in the region.

Out of the twelve concluded cases in the energy sector, 75% (nine cases) were decided in favor of the investor (*see* Chart 3). The average time for a case where the investor received a favorable award was 12.11 years and a median of twelve years.



**Chart 3: Argentina Success Rates**

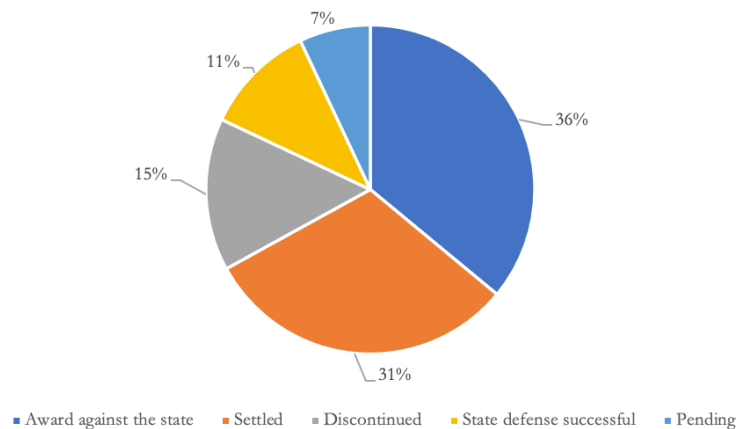
This is consistent with the previous finding of taking an average of three additional years for the Argentina cases to be resolved. The three cases in the energy sector where Argentina won the average time was 6.6 years and the median was four years.<sup>83</sup> The other case reported as concluded in favor of the State, *Houston Industries v. Argentina*, took three years but after a closer look at the file, the case

<sup>82</sup> See *Orazul Int'l España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Decision on the Respondent's Request for Bifurcation (Jan. 7, 2021).

<sup>83</sup> *Houston Energy* was filed in 1998 and resolved in 2001. *Wintershall* took four years to be resolved in favor of the State. The *Sempre* case took thirteen years because it went through an annulment proceeding that was resolved in favor of the State. *Houston Indus. Energy, Inc. v. Argentine Republic*, ICSID Case No. ARB/98/1, Award (Aug. 24, 2001); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008). The *Sempre Energy* case was filed on December 6, 2002, the original tribunal issued its award on September 28, 2007 in favor of the investor, the ad hoc annulment committee issued its annulment decision on June 29, 2010, and the case was resubmitted by the investor on November 12, 2010, but on April 13, 2015, the investors decided to discontinue the proceedings. There is no information on whether the parties reached an agreement or whether the claimants decided to discontinue unilaterally. See procedural details on the *Sempre* case available at: <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/02/16>.

should be reported as a settled case.<sup>84</sup> The award issued by the tribunal in favor of the State involved a claim by Argentina regarding the reimbursement of proceeding costs due to the fact that the investor had reached a settlement with the provincial government responsible for the treaty violation.<sup>85</sup> In other words, the tribunal never had the chance to resolve the merits of the dispute.

Hence, in the case of Argentina, out of the total twenty-six cases that were filed against the State in the energy sector, the government has only had an award against the State nine times (*see* Chart 4). In the remaining 64% of the cases, Argentina either settled the case, the investors discontinued their claims, or the government was successful in its defense.



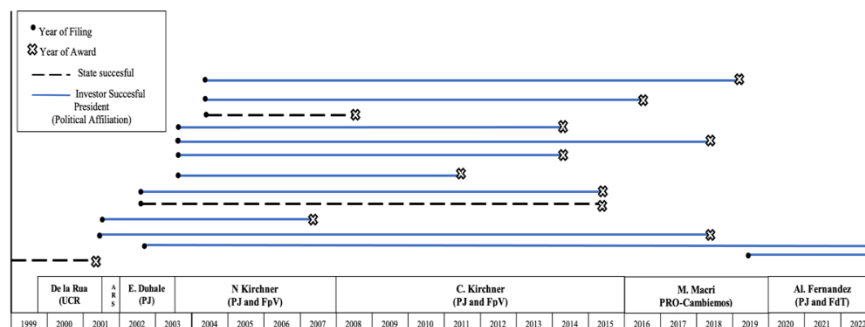
**Chart 4: Total Filed Cases Against Argentina**

A review of the political changes in Argentina during the same time frame reveals that the administration that was in power at the time of the filing of all of the claims was not the one responsible for litigating the case or compensating the investor when the award was issued. Figure 1 shows the list of the presidents of Argentina in power between 1998 and 2021, including their political affiliations,

<sup>84</sup> See *Houston Indus. Energy, Inc. v. Argentine Republic*, ICSID Case No. ARB/98/1, Award (Aug. 24, 2001); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008).

<sup>85</sup> See *Houston Indus. Energy, Inc. v. Argentine Republic*, ICSID Case No. ARB/98/1, Award, (Aug. 24, 2001).

the date of filing, and the date of the award regarding the pending and concluded cases against Argentina.<sup>86</sup>



**Figure 1: Lifespan of Cases (Concluded and Pending) Filed Against Argentina**

In all of the nine cases lost by the Argentinian State, the President who was in power when the action was taken against the investor did not have to face the financial challenge of complying with an arbitral award (see Figure 1). In fact, in half of the cases, the government facing the award belonged to a different political party. The most striking case being the presidency of Mauricio Macri, who had to compensate four investors for actions taken by previous administrations from a completely different political party and ideology.<sup>87</sup> Mauricio Macri was the first president of the opposition after close to thirteen years of continued rule of the Kirchner family and the Partido Justicialista ("PJ") and the Frente para la Victoria ("FpV").<sup>88</sup> Hence, in an effort to "lure back foreign investors," Macri agreed to compensate the companies involved in the long-standing arbitration cases.<sup>89</sup> In 2016, two years after the final awards were issued during the Kirchner administration, Mauricio Macri reached a deal with BG Group PLC and with El Paso Energy International

<sup>86</sup> Details of caseload and changes in Appendix 1. The list of the presidents of Argentina and their affiliations can be found in the government's presidency website. CASA ROSADA: PRESIDENCIA, <https://www.casarosada.gob.ar/nuestro-pais/presidentes> [https://perma.cc/L5G5-WXN3] (last visited Apr. 2, 2024).

<sup>87</sup> See Jonathan Blitzer, *Argentina's Kirchner Era Ends*, NEW YORKER (2015), <http://www.newyorker.com/news-desk/argentinas-kirchner-era-ends> [https://perma.cc/5XH8-KW8S].

<sup>88</sup> *Id.*

<sup>89</sup> See *Argentina Agrees \$217 Million Arbitration Deal with Energy Companies*, REUTERS, (May 14, 2016), <https://www.reuters.com/article/us-argentina-arbitration-idUSKCN0Y50ML> [https://perma.cc/9BYT-YEWR].

Company to compensate the investors.<sup>90</sup> The agreement reached with the investors reduced by an average of 31% the amount awarded by the tribunals.<sup>91</sup>

This last data point reinforces the assumption shared in the introduction—that even after the award is issued, in some cases, investors will be subject to negotiations with the State that could lead to a reduction of the amounts to be compensated and increase the time that elapses between the date the dispute arises and the date the investor is compensated.

In four of the nine cases, the direct successor from the same political party faced an arbitral award against the State.<sup>92</sup> This was the case of four cases filed during the Nestor Kirshner administration for the emergency decrees enacted to combat the Argentinean economic crisis of the early 2000s. Nestor Kirchner's wife and successor, Cristina Fernandez, faced the enforcement of

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<sup>90</sup> See *BG Group Plc v. Republic of Arg.*, UNCITRAL, Final Award (Dec. 24, 2007); *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011); Press Release, Ministerio de Hacienda y Finanzas Públicas, *Acuerdos con BG Group y El Paso Energy en el marco del CIADI* (May 13, 2016), <https://www.italaw.com/sites/default/files/case-documents/italaw7319.pdf> [<https://perma.cc/M9H9-HUCX>].

<sup>91</sup> See Press Release, Ministerio de Hacienda y Finanzas Públicas, *supra* note 90.

<sup>92</sup> The *National Grid* tribunal issued its award in November 2008. The State then filed a motion to vacate or modify the award in U.S. courts. A U.S. court of appeals denied the motion to vacate the award on April 21, 2011. The U.S. Supreme Court denied certiorari on November 28, 2011. See *Argentine Republic v. National Grid PLC*, 2010 WL 1229950 *aff'd*, 637 F.3d 365 (D.C. Cir. 2011) (per curiam) *cert. denied*, 565 U.S. 1059 (2011). For the release of the award and decision on annulment in the *El Paso Energy* case, see *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶ 4 (Oct. 31, 2011) (registering arbitration on June 12, 2003); *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Annulment (Sept. 22, 2014). For the third case filed during the Nestor Kirshner administration, see *BG Group Plc v. Republic of Arg.*, UNCITRAL, Award (Dec. 24, 2007); Petition to Vacate or Modify Arbitration Award, *Republic of Arg. v. BG Grp. PLC*, Case No. 08-485 (RBW) (D. D.C. Mar. 21, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0082.pdf> [<https://perma.cc/JS8T-LMKX>]; *BG Grp. PLC v. Republic of Arg.*, 572 U.S. 25 (2014); Press Release, Ministerio de Hacienda y Finanzas Públicas, *Acuerdos con BG Group y El Paso Energy en el marco del CIADI* (May 13, 2016), <https://www.italaw.com/sites/default/files/case-documents/italaw7319.pdf> [<https://perma.cc/M9H9-HUCX>] (settlement reached on the unpaid award). As to the fourth case, the claimants in the *LG&E* case withdraw their request for partial annulment on February 20, 2015. The original tribunal had issued its award on July 25, 2007. The claimants requested a supplementary decision that was issued on July 8, 2008, and then filed an annulment request on September 19, 2008. *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 8 (Oct. 3, 2006) (claim filed on December 21, 2001).



these awards during her second term.<sup>93</sup> Initially, her administration's position was that the investors had to initiate enforcement proceedings in Argentinean courts for the government to comply with them.<sup>94</sup> According to news reports, after two years of the issuance of the *National Grid* Award, and under the pressure of the U.S. government, she successfully settled with one of the investors to reduce the amount of compensation by 25% and for the investor to accept the payment in U.S. dollar-denominated bonds issued by the Argentinean government.<sup>95</sup> The rest of the awards were left for the Macri administration to resolve. Again, this example shows that even with a final award in hand, the investor had to spend a couple of years negotiating the satisfaction of the award and, in many cases, had to accept the reduction of the amount and receive compensation in the form of government bonds instead of cash.

*b. Ecuador*

In the case of Ecuador, the databases report twenty-one cases against the State for energy-related projects. In contrast with the average in Latin America, only two cases were settled, and one was discontinued, representing 14% of the total compared with the 25% in the region (see Chart 5).<sup>96</sup> The *Noble Energy* case was active for four years and the *Repsol YPS* and others were active three years, an average of 3.5 years which is consistent with the 3.2 years average in the region. Similar to the settled cases, the only case registered as discontinued, *City Oriented Limited*, lasted two years on the docket.<sup>97</sup>

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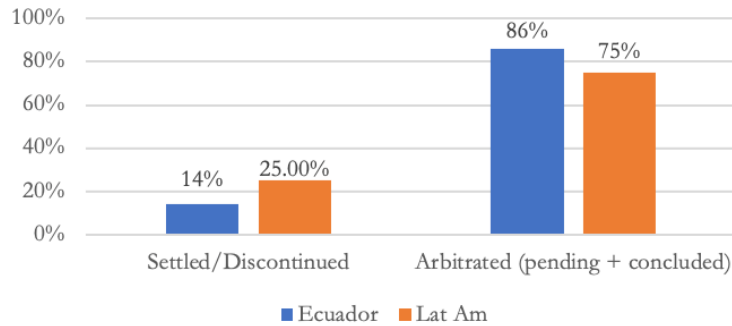
<sup>93</sup> Blitzer, *supra* note 87.

<sup>94</sup> See Emmanuel Gaillard & Ilija Mitrev Penushliski, *State Compliance with Investment Awards*, 35 ICSID REV. 540, 552 (2021).

<sup>95</sup> See Buenos Aires, *Argentina to Pay About \$500 Mln to Resolve Disputes with Foreign Firms*, REUTERS (Oct. 18, 2013), <https://www.reuters.com/article/argentina-worldbank-payment-idINL1N0I80NJ20131018> [<https://perma.cc/2H5B-EHTB>].

<sup>96</sup> The cases reported as settled are: *Noble Energy Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/12, Order Taking Note of the Discontinuance (May 20, 2009); *Repsol YPF Ecuador, S.A. v. Republic of Ecuador*, ICSID Case No. ARB/08/10, Procedural Order No. 1 (June 17, 2009). The cases reported as discontinued was *City Oriented Ltd v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (Nov. 19, 2007).

<sup>97</sup> See *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Order Taking Note of the Discontinuance for the Proceedings (Sept. 22, 2008).



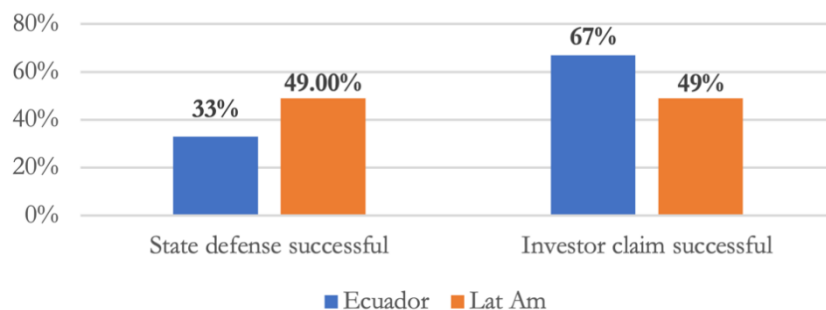
**Chart 5: Ecuador Energy-Related Cases**

Of the total twenty-one cases against Ecuador, there were three cases still pending of resolution in 2021. The longest was filed in 2001, and the shortest in 2019.<sup>98</sup> The average length of time of the pending cases is eight years, and the median is ten years.

Of the fifteen concluded cases on the Ecuadorian docket, the average time of litigation was 6.2 years and a median of six years. The shortest amount it took for a tribunal to issue an award was two years (*Murphy Exploration and Production Company Int'l, I*), and the longest was thirteen years (*Perenco*).<sup>99</sup> These numbers are also consistent with the Latin American region. However, out of the total concluded cases, Ecuador was only successful in its defense in 33% of the cases litigated. Hence, in contrast with the 49% claimant's success rate of the region, in the case of the proceedings against Ecuador, foreign investors were able to win 67% of the cases against the State (*see* Chart 6).

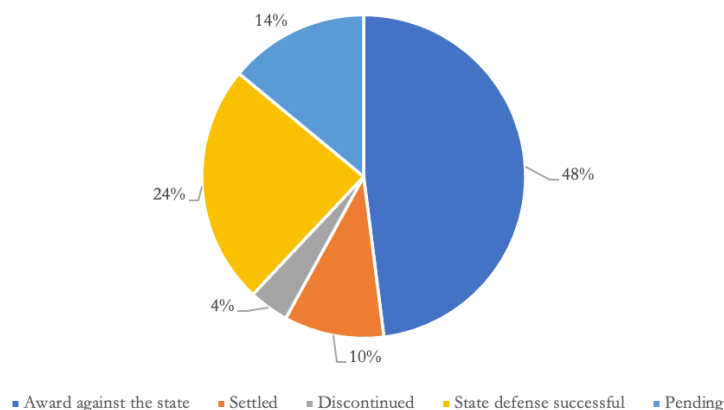
<sup>98</sup> See *Worley Int'l Serv. Inc. v. Republic of Ecuador*, UNICTRAL, PCA Case No. 2019-15, Final Award, ¶ 8 (Dec. 22, 2023) (case filed on Feb. 14, 2019); *Zamora Gold Corp. v. Ecuador*, JUSMUNDI, <https://jusmundi.com/en/document/decision/fr-zamora-gold-corporation-v-ecuador-pas-encore-disponible-saturday-1st-january-2011> (last visited Apr. 3, 2024) (case filed on July 7, 2011); *RSM Prod. Corp. v. Republic of Ecuador*, JUSMUNDI, <https://jusmundi.com/en/document/decision/en-rsm-production-corporation-v-republic-of-ecuador-friday-1st-january-2010> (last visited Apr. 3, 2024) (case filed on May 13, 2010).

<sup>99</sup> See *Murphy Expl. & Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (Dec. 15, 2010); *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Award (Sept. 27, 2019).



**Chart 6: Ecuador Success Rates**

In contrast with the rest of the region, the Ecuadorian government faced an award against the State in 48% of the cases initiated by investors in arbitral proceedings. The remaining half were either settled, discontinued, are still pending, or the State was successful in its claims (*see* Chart 7).



**Chart 7: Total Filed Cases Against Ecuador**

The average time of the unsuccessful claims against the State was 3.6 years with a median of three; in contrast, the average and median time for the successful claims was 7.5 years. This finding is consistent with the regional average and median of eight years.<sup>100</sup>

<sup>100</sup> It is worth exploring why Ecuador lost such a higher percentage of cases, and why the median time to successful resolution was lower. Were Argentina's lawyers more effective? Or alternatively, did Ecuador's government behave so much more badly in dealing with investors?

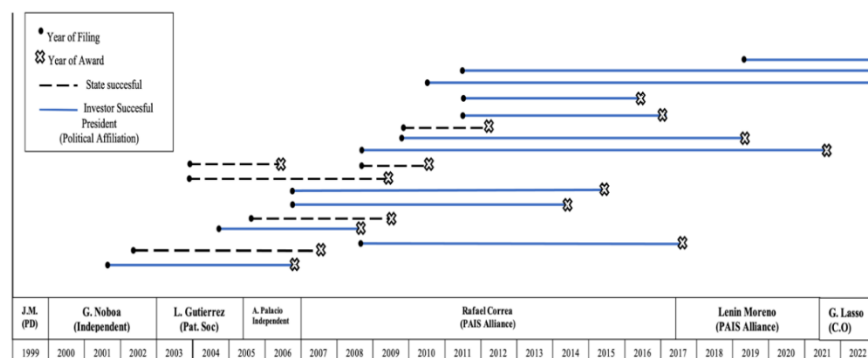


Figure 2: Lifespan of Cases Filed Against Ecuador<sup>101</sup>

Out of the ten cases where the investors won an arbitration proceeding against the State, on only two occasions, the executive in power at the time of the claim was also the officer at the time of the award (*Copper Mesa* and *Murphy Exploration (II)*) (see Figure 2).<sup>102</sup> The *Copper Mesa* case involved the revocation of mining concessions by the Rafael Correa administration after a constitutional amendment proposed to transfer privately-held concessions to the control of the State.<sup>103</sup> The *Murphy Exploration (II)* case involved changes to the hydrocarbons law and the issuances of presidential decrees in connection to the new law during the Correa administration.<sup>104</sup> Hence, in these two cases, Rafael Correa was in power at the time of the action, his administration was responsible for the challenged actions, and it also faced contrary arbitral awards. In the case of *Copper Mesa*, the arbitral tribunal issued its award on March 15, 2016, for \$19.4 million in damages plus interest, but the investor was forced to seek the enforcement of the award in U.S. and Dutch courts

<sup>101</sup> Details of the cases in Appendix 1. For a list of the presidents of Ecuador and their political affiliation, see *Republic of Ecuador*, POL. DATABASE AMERICAS, <https://pdba.georgetown.edu/Executive/Ecuador/pres.html> [https://perma.cc/NV27-C5QU] (last visited Apr. 2, 2024).

<sup>102</sup> *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012-2, Award, ¶ 1.11 (Mar. 15, 2016) (case filed on January 21, 2011); *Murphy Expl. & Prod. Co. – Int’l v. Republic of Ecuador*, UNCITRAL PCA Case No. 2012-16, Final Award, ¶ 6 (Feb. 10, 2017) (case filed on September 21, 2011).

<sup>103</sup> See Matthew Levine, *Ecuador Ordered by PCA Tribunal to Pay \$24 Million to Canadian Mining Company*, INV. TREATY NEWS (Dec. 12, 2016), <https://www.iisd.org/itn/en/2016/12/12/ecuador-ordered-by-pca-tribunal-to-pay-24-million-to-canadian-mining-company-copper-mesa-mining-corporation-v-republic-of-ecuador-pca-2012-2> [https://perma.cc/Z8UY-VR8G].

<sup>104</sup> See *Murphy Expl. & Prod. Co. Int’l v. Republic of Ecuador*, PCA Case No. 2012-16, Final Award (Feb. 10, 2017).

because the Correa administration failed to comply with the award.<sup>105</sup> Rafael Correa's successor, Lenin Moreno, negotiated a settlement agreement on July 19, 2018, where the company agreed to compromise on its claims for interests to avoid the costs of the enforcement proceedings.<sup>106</sup> As to the *Murphy Exploration (II)*, Rafael Correa did not satisfy the award but rather the dispute was passed on to the Moreno administration. In July 2018, during a trip to the United States, Ecuador's Foreign Trade Minister announced that it was committed to satisfying the *Murphy Exploration* award, but no further information confirming the payment is publicly available.<sup>107</sup> Hence, even though Rafael Correa faced two energy-related awards involving its administration, it did not satisfy either of them but passed the bill down to the next administration.

Rafael Correa was also the President of Ecuador when three other tribunals issued awards against the State for actions taken by the previous three presidencies, none of which were from the same political party (see Figure 2). In contrast with the awards issued against his own policies, Rafael Correa paid *Duke Energy* \$11 million after four months of the issuance of the award against the State.<sup>108</sup> Additionally, Correa issued a payment for \$980 million to *Occidental Petroleum* as part of a settlement reached in 2016 for the 2012 arbitral award that ordered Ecuador to pay \$1.77 billion in compensation.<sup>109</sup> Hence, it took Occidental four years of negotiations to receive a reduced payment after winning the arbitral claim against the State. In the third case, Rafael Correa paid Chevron \$112 million in 2016 for a claim brought in 2006 against the State regarding breaches of

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<sup>105</sup> See *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 17-394, Petition for Confirmation, Recognition, and Enforcement of Foreign Arbitral Awards (Mar. 3, 2017).

<sup>106</sup> The parties filed a joint motion for stay of the pending completion of the settlement agreement on July 25, 2018. See *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 17-394, Joint Motion for Stay of the Pending Action Pending Completion of Settlement Agreement (Mar. 3, 2017).

<sup>107</sup> See Maria Angelina Castillo, *Ministro Campana Asiste a la Cumbre de la Alianza Pacifico y Luego Viaja a EE.UU* [Minister Campana Attends the Pacific Alliance Summit and Then Travels to the United States], EL COMERCIO (July 11, 2018), <https://www.elcomercio.com/actualidad/negocios/pablocampana-viaje-cumbre-alianzapacifico-estadosunidos.html> [<https://perma.cc/95GS-GK8B>].

<sup>108</sup> See *Ecuador Pays Duke Without Delay*, LATIN LAWYER (Dec. 11, 2008), <https://latinlawyer.com/article/ecuador-pays-duke-without-delay> [<https://perma.cc/3Y5L-94EV>].

<sup>109</sup> See Alexandra Valencia, *Ecuador to Pay \$980 Million to Occidental for Asset Seizure*, REUTERS (Jan. 13, 2016), <https://www.reuters.com/article/ecuador-occidental-idUSL2N14X0U420160113> [<https://perma.cc/AK85-QRG7>].

contract by the State and delays in the Ecuadorian judiciary.<sup>110</sup> The original award was issued in 2011, but Ecuador sought an annulment procedure in the Netherlands that ended in the upholding of the award in 2014.<sup>111</sup> Hence, except for *Duke Energy*, the other two cases in which Correa compensated the investor required at least four years of negotiation or enforcement procedure in other jurisdictions, and in the case of *Occidental*, a reduction of half of the awarded amount, for the investors to receive any benefit of the arbitral proceeding.

It is no surprise, then, that after facing several awards during the Correa administration, Ecuador sent a letter in December 2007 to the ICSID secretary stating its withdrawal of consent to arbitrate disputes related to the oil, gas, and mining sectors.<sup>112</sup> In 2009, Rafael Correa took the further step of withdrawing Ecuador's consent to the ICSID Convention,<sup>113</sup> a decision that took effect on January 7, 2010. With this step, Ecuador took away from the investors the primary instrument of enforcement of any arbitration award. In his final month in office in 2017, Rafael Correa withdrew from sixteen BITs, taking away the substantive rights of investors from key energy capital-exporting States, including Argentina, Canada, Chile, China, France, Germany, Italy, the Netherlands, Spain, United Kingdom, and the United States.

Lenin Moreno, Rafael Correa's successor, and former Vice President from the same political party, faced two arbitration awards against Ecuador that originated in his predecessor's policies, and one from another administration (see Figure 2). In 2017, Lenin

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<sup>110</sup> See *Ecuador Pays Chevron Arbitration Court Award of \$112 Million over Dispute Related to Development of Oil Fields*, BUS. & HUM. RTS. RES. CTR. (July 23, 2016), <https://www.business-humanrights.org/en/latest-news/ecuador-pays-chevron-arbitration-court-award-of-112-million-over-dispute-related-to-development-of-oil-fields/> [https://perma.cc/YC6H-5Z5X].

<sup>111</sup> See *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 34877, Final Award (Aug. 31, 2011); HR 26 September 2014, ECLI:NL:HR:2014:2837 (*Chevron Corp./Republiek Ecuador*) (Neth.).

<sup>112</sup> See Press Release, ICSID, Ecuador's Notification Under Article 25(4) of the ICSID Convention (Dec. 5, 2007), <https://icsid.worldbank.org/news-and-events/news-releases/ecuadors-notification-under-article-254-icsid-convention> [https://perma.cc/Z5L6-75EA]. For an analysis on the contents of the notice, see Xavier Cadena & Marco T. Montanes, *Introductory Note to Ecuador's Notice Under ICSID Article 25(4)*, 47 INT'L LEGAL MATERIALS 154, 154-61 (2008).

<sup>113</sup> See Press Release, ICSID, Denunciation of the ICSID Convention by Ecuador (July 9, 2009), <https://icsid.worldbank.org/news-and-events/news-releases/denunciation-icsid-convention-ecuador> [https://perma.cc/JL2J-825A]; regarding the president of Ecuador who was in power at the time of the denunciation see POL. DATABASE AMERICAS, *supra* note at 101.

Moreno reached an agreement with ConocoPhillips on the terms of payment to its subsidiary, Burlington, for the award issued in 2016 against the State. The case involved the forced renegotiation of Burlington's oil concession's terms, including a new tax regime, that started in 2006 but continued during the Correa administration.<sup>114</sup> The tribunal issued an initial award in 2012, finding that Ecuador had unlawfully expropriated the company's investments, but during the damages stage, Ecuador successfully brought a counterclaim for environmental damages incurred by the company.<sup>115</sup> In 2017, the annulment committee lifted the stay of enforcement of the award, and Lenin Moreno reached an agreement to pay the investor \$337 million.<sup>116</sup> The settlement amount includes the offset for the counterclaim awarding Ecuador \$42 million.<sup>117</sup>

It is noteworthy that Rafael Correa remained in power for ten consecutive years and that his immediate successor stayed for another four years. The same political group remained in power for fourteen years and faced seven of the nine issued awards in the caseload of energy-related cases against Ecuador. Three originated from different administrations, but the remaining four resulted from policies taken during their tenure.

As in the case of Argentina, in Ecuador the only occasions in which an executive officer faced the outcome of an arbitration award from actions committed by the same party or actor are situations in which the same family, as in the case of Argentina, or the same political group, as in the case of Ecuador, repeat for several periods and remained in power close to a decade. Constant democratic

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<sup>114</sup> See

<sup>115</sup> See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, ¶ 1075 (Feb. 7, 2017). The company and Ecuador later settled on the payment of the award. See *ConocoPhillips and the Republic of Ecuador Agree to Settlement of ICSID Award*, BUS. WIRE (DEC. 4, 2017), <https://www.businesswire.com/news/home/20171204005245/en/ConocoPhillips-and-the-Republic-of-Ecuador-Agree-to-Settlement-of-ICSID-Award> [https://perma.cc/TFZ3-9D5H].

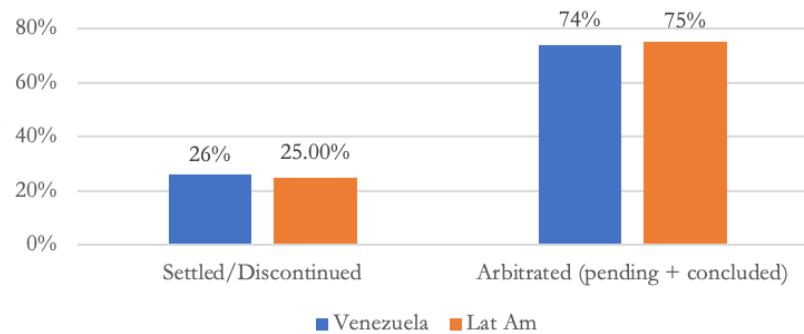
<sup>116</sup> See *ConocoPhillips and the Republic of Ecuador Agree to Settlement of ICSID Award*, BUS. WIRE (DEC. 4, 2017), <https://www.businesswire.com/news/home/20171204005245/en/ConocoPhillips-and-the-Republic-of-Ecuador-Agree-to-Settlement-of-ICSID-Award> [https://perma.cc/TFZ3-9D5H].

<sup>117</sup> *Id.*

transitions seem to imply that the governments will not likely have to compensate investors for actions taken during their tenure.<sup>118</sup>

*c. Venezuela*

Venezuela faced nineteen energy-related investment cases for the period 1998 to 2021. Out of the nineteen cases, 21% (four cases) were settled with the investor.<sup>119</sup> The average and median time of a case against Venezuela before it reached a settlement was five years. The longest it took to settle a case was nine years. Only one case against Venezuela was discontinued after being on the docket for four years.<sup>120</sup> This means that 26% of the cases against Venezuela did not reach a final decision, but were resolved by other methods, including negotiation (*see* Chart 8). This rate is slightly higher than the 25% averaged in the region of cases either settled or discontinued.



**Chart 8: Venezuela Energy-Related Cases**

<sup>118</sup> Another interesting line of research would be to note which administrations entered into BITs—and whether they ever had to pay out as a result.

<sup>119</sup> *See Hortensia Margarita Shortt v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/11/30, Order Taking Note of the Discontinuance of the Proceedings (May 11, 2015); *Universal Compression Int'l Holdings, S.L.U. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/10/9, Order Taking Note of the Discontinuance of the Proceedings (Jan. 3, 2019); *Eni Dación B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/4, *Eni Dación B.V. v. Bolivarian Republic of Venez.* (Apr. 18, 2008).

<sup>120</sup> *See Highbury Int'l AVV v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/14/10, Order for the Discontinuance of the Proceeding (Jan. 5, 2015).



Out of the remaining cases five were pending in 2021 at the time of writing this Article: the *Venezuela Holdings B.V.* is a case that was originally annulled by an ICSID ad hoc committee and it was resubmitted; the *ConocoPhillips* is pending annulment; the *Crystallex* award is pending enforcement in U.S. courts; and two are waiting for the original proceedings award.<sup>121</sup> The *Venezuela Holdings B.V.* case brought by ExxonMobil and the *ConocoPhillips* case were still pending resolution in 2021 by ICSID annulment committees or newly constituted tribunals and have been on the docket for fourteen years, making them two of the longest cases on the docket.<sup>122</sup> The other energy-related cases pending against Venezuela are: *Venezuela US, SRL*, that was in its eighth year of litigation in 2021, and *Williams Companies International et al*, that was filed in 2019.<sup>123</sup> This takes the average time of pending cases to twelve years.

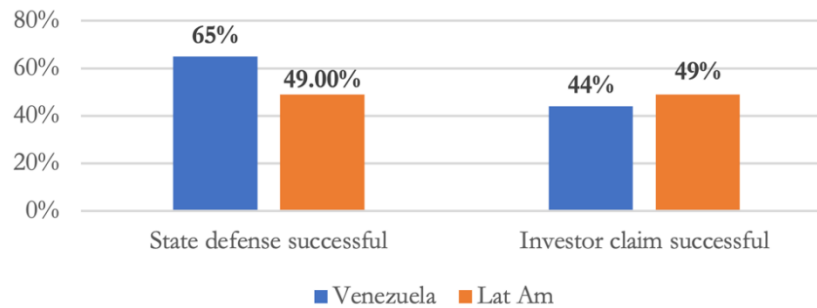
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<sup>121</sup> The *Venezuela US SRL* case was filed on March 22, 2013. See *Venez. US, S.R.L. (Barb.) v. Bolivarian Republic of Venez.*, PCA Case No. 2013-34, Interim Award on Jurisdiction, ¶ 3 (July 26, 2016). The *Venezuela Holdings* case was filed on August 8, 2008; the tribunal issued its award on October 9, 2014; the tribunal issued a decision on revision on June 12, 2015; the ad hoc annulment committee issued its decision in favor of the State on March 9, 2017; the investors filed a resubmission on October 24, 2018; the respondents filed a rejoinder on the merits on May 19, 2022; *Venezuela Holdings B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/27, Resubmission Award (July 10, 2023). The *Williams* case was filed on October 16, 2019. See *Case Details, Williams Co. Int'l Holdings B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/19/3, ICSID, [https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB\(AF\)/19/3](https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB(AF)/19/3) [https://perma.cc/YKV5-WHWG] (last visited Apr. 3, 2024). The *Crystallex* case was filed on March 9, 2011; the tribunal award was issued on April 4, 2016; the claimant petitioned the U.S. District Court for the District of Columbia to confirm the award on April 7, 2016. Since then, the case has been litigated in U.S. courts. See Memorandum Order, *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, No. 17-151-LPS (D. Del. Apr. 27, 2023).

<sup>122</sup> See *Venez. Holdings B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/27, Resubmission Award, ¶ 6 (July 10, 2023) (noting case registration on October 24, 2018) The *ConocoPhillips* case was filed on December 13, 2007; on March 8, 2019, the tribunal issued its award in favor of the investor; on August 19, 2019, the tribunal issued a decision on the rectification of the award; on December 16, 2019, the respondents initiated an annulment proceeding that as of June 7, 2022 is still pending, the latest reported advancement of the case was registered on June 1, 2022, stating that the ad hoc annulment committee was reconstituted. See *Case Details, ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/30, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/07/30> [https://perma.cc/X27J-VUK3] (last visited Apr. 3, 2024).

<sup>123</sup> See *Venez. US, S.R.L. (Barb.) v. Bolivarian Republic of Venez.*, PCA Case No. 2013-34 (2016), Interim Award on Jurisdiction, ¶ 3 (July 26, 2016); see also *Case Details, Williams Co. Int'l Holdings B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/19/3, ICSID, <https://icsid.worldbank.org/cases/case-database/case->

The concluded cases against Venezuela took at average and median of 5.5 years to be resolved. This is a slightly lower time than the 6.75 years in the region. However, the average time for those cases won by the State was 5.4 years with a median of 5 years. The average time for cases won by the investor was 5.5 years with a median of 6.5 years. That is, the time to resolve an investment case against Venezuela is very similar for investors and the State. However, if we add the two cases that are pending annulment proceedings brought by the State, *Venezuela Holdings* and *ConocoPhillips*, and the award pending enforcement in U.S. courts, *Crystallex*, to the cases won by investors, the average time jumps to 9.3 years with a median of nine years. It is important to note that out of the nine concluded cases against Venezuela, the State was successful in its defense in five of them.<sup>124</sup> Investors have been able to win only in 44% of the cases.



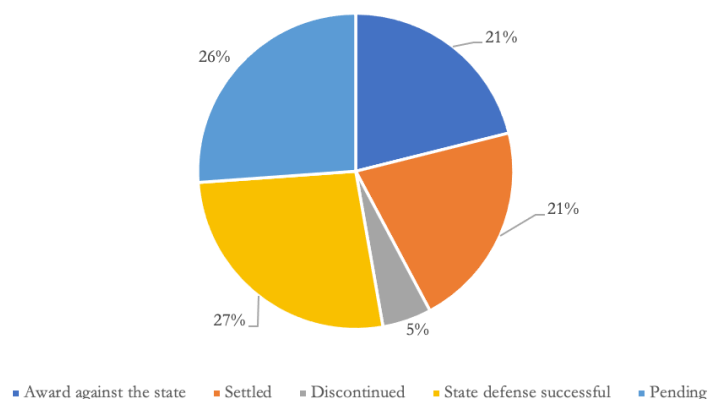
**Chart 9: Venezuela Success Rates**

For purposes of the analysis done in this Article, it is safe to conclude that Venezuela only had to face the internal consequences of compensating an investor due to an investment filed claim in only 21% of the energy-related cases. That is, 79% of all cases brought by investors against Venezuela in an arbitral tribunal have not reached an award against the State.

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detail?CaseNo=ARB(AF)/19/3 [https://perma.cc/YKV5-WHWG] (last visited Apr. 3, 2024) (filed on October 16, 2011).

<sup>124</sup> Venezuela was successful in its defenses in the following cases: *see* *Anglo Am. PLC v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/14/1, Award (Jan. 18, 2019); *Highbury Int'l AVV v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/11/1, Decision on Annulment (Sept. 9, 2019); *Nova Scotia Power Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/11/1, Award (Apr. 30, 2014); *Nova Scotia Power Inc. (Can.) v. Bolivarian Republic of Venez.*, PCA Case No. 42538, Award on Costs (2010); *Vannessa Ventures Ltd. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/04/6, Award (Jan. 16, 2013).



**Chart 10: Total Filed Cases Against Venezuela**

In terms of the political transitions in Venezuela, the same political party, United Socialist Party ("USP"), has been in power since 1999. That is, one single political group has ruled Venezuela for more than twenty-two years.<sup>125</sup> Hence, it is no surprise that the cases brought against the State have all been resolved under the same political party rule.<sup>126</sup>

Notwithstanding this fact, there has been a transition of the executive power between USP allies because President Hugo Chavez died in March 2013, and the Vice President, Nicolas Maduro, took office in his place.<sup>127</sup> The subsequent elections in April 2013 and of January 2019 were contested by the opposition, and in January 23, 2019, the President of the National Assembly, Juan Guaido, declared himself interim president until the next elections.<sup>128</sup> Nicolas Maduro

<sup>125</sup> For a chronology of the Chavez regime up to the entry into power of Nicolas Maduro in 2013, see *Venezuela's Chavez Era*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/timeline/venezuelas-chavez-era> [https://perma.cc/653Q-NBKC] (last visited May 12, 2022). Regarding the sidelining of the opposition and the autocratic regime of Nicolas Maduro from 2017 to 2021, see *Venezuela: A Democratic Crisis*, U.S. DEP'T OF STATE BUREAU OF W. HEMISPHERE AFFAIRS, <https://2017-2021.state.gov/a-democratic-crisis-in-venezuela/> [https://perma.cc/M8LF-QBUX] (last visited Apr. 3, 2024).

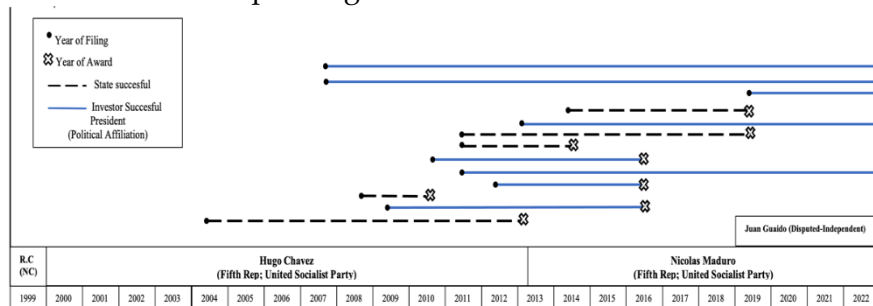
<sup>126</sup> See *Venezuela's Chavez Era*, *supra* note 125.

<sup>127</sup> *Id.*

<sup>128</sup> See *Venezuela Election: Maduro Wins Second Term Amid Claims of Vote Rigging*, BBC (May 21, 2018), <https://www.bbc.com/news/world-latin-america-44187838> [https://perma.cc/9RSB-NE2U]; see also Press Release, Ned Price, Speaker, U.S. Dep't. of State, U.S. Recognition of Venezuela's 2015 National Assembly and Interim President Guaidó (Jan. 4, 2022), <https://www.state.gov/u-s-recognition-of-venezuelas-2015-national-assembly-and-interim-president-guaido/>

also declared himself the elected president with the support of the judiciary and the military. Some States in the region, including Colombia, Chile and the United States, recognized Guaido as the interim president of Venezuela, triggering a constitutional and diplomatic crisis.

It is beyond the scope of this Article to explain the consequences of official recognition, but for purposes of the Article's analysis, it is worth clarifying that, as of the writing of this Article, Nicolas Maduro is still in power and in control of the military and the internal finances of the State. Guaido's administration does have access to some confiscated funds due to sanctions in States that recognize him as the official interim president, but the vast majority of the government revenues flow to Maduro, as many key allies, such as the European Union, still recognize him as the head of the State.<sup>129</sup> Consequently, it has been under Maduro's term that the investment awards have been issued for actions taken during his party's reign. Below is the comparison of the political transitions in the country compared with the date of filing and date of the award for concluded and pending cases.



**Figure 3: Lifespan of Cases (Concluded and Pending) Filed Against Venezuela<sup>130</sup>**

According to the database, Venezuela has a total of forty-two cases brought against the Chavez/Maduro twenty-two years' tenure. These include all investment cases, not only those connected

[<https://perma.cc/QCD2-X3LQ>] (announcing the official position of the U.S. State Department in continuing the recognition of the authority of the opposition leader and member of the National Assembly Juan Guaido as the Interim President of Venezuela).

<sup>129</sup> See *EU States No Longer Recognise Guaido as Venezuela's Interim President*, REUTERS (Jan. 25, 2021), <https://www.reuters.com/article/us-venezuela-politics-eu-idUSKBN29U1A3> [<https://perma.cc/353Z-H8P7>].

<sup>130</sup> See details of the cases in Appendix 1.

to the energy sector. A year before President Chavez passed away, on January 24, 2012, with twenty-two cases filed against the State, Venezuela submitted its written notice to withdraw from the ICSID Convention.<sup>131</sup> This action followed Venezuela's denunciation of the BIT with the Netherlands in 2008 and of the Free Trade Agreement with Mexico and Colombia in 2006.

A recent article by Emmanuel Gaillard and Ilija Mitrev Penushliski that reviewed the compliance with the ICSID awards states that Venezuela has only paid two adverse awards, none connected to the energy-sector.<sup>132</sup> The same reports state that the policy of paying damages compensation changed in 2013 with the arrival of Nicolas Maduro to the presidency. Since then, only the *Gold Reserve* case has officially been reported as paid. This last case was initiated in 2009 and the award was issued in 2014 for \$746 million, but Venezuela fought the enforcement of the award for two more years in French, U.S., and U.K. courts.<sup>133</sup> After the State lost the domestic proceedings, the parties reached an agreement on August 8, 2016 in which the State agreed to pay \$1 billion,

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<sup>131</sup> *Venezuela Submits a Notice under Article 71 of the ICSID Convention*, ICSID, <https://icsid.worldbank.org/news-and-events/news-releases/venezuela-submits-notice-under-article-71-icsid-convention> [<https://perma.cc/4ABU-Y2N2>] (last visited May 12, 2022).

<sup>132</sup> Gaillard & Mitrev Penushliski, *supra* note 94, at 555.

<sup>133</sup> See, e.g., *Gold Rsrv. Inc., Gold Reserve Provides Update to Legal Proceedings Related to Collection of Arbitration Award*, (Jan. 14, 2016), <https://www.goldreserveinc.com/gold-reserve-provides-update-to-legal-proceedings-related-to-collection-of-arbitration-award-16-02-2/> [<https://perma.cc/5HWZ-82DW>] (last visited May 12, 2022); *Gold Rsrv. Inc., U.S. District Court for the District of Columbia Enters Judgement Against Venezuela in Excess of \$760 Million; Denies Motion to Stay Enforcement*, (Nov. 23, 2015), [www.goldreserveinc.com/us-district-court-for-the-district-of-columbia-enters-judgement-against-venezuela-in-excess-of-760-million-denies-motion-to-stay-enforcement-15-13/](http://www.goldreserveinc.com/us-district-court-for-the-district-of-columbia-enters-judgement-against-venezuela-in-excess-of-760-million-denies-motion-to-stay-enforcement-15-13/) [<https://perma.cc/T8HM-WAM8>] (last visited May 12, 2022); *Gold Rsrv. Inc., Gold Reserve Expands its Arbitral Awards Collection Efforts to Luxembourg*, (Apr. 13, 2015), <https://www.goldreserveinc.com/wp-content/uploads/2016/02/15-05.pdf> [<https://perma.cc/2Y6K-NPBG>] (last visited May 12, 2022); *Gold Rsrv. Inc., Gold Reserve Seeks Enforcement of its US\$ 713 Million Award and Costs Against Venezuela in the US District Court for the District of Columbia*, (Dec. 1, 2014), <https://www.goldreserveinc.com/wp-content/uploads/2016/02/14-11.pdf> [<https://perma.cc/BB9P-LVKP>] (last visited May 12, 2022); *Gold Rsrv. Inc., Gold Reserve Provides Update to Legal Proceedings in US District Court for the District of Columbia*, (June 18, 2015), <https://www.goldreserveinc.com/wp-content/uploads/2016/02/15-08.pdf> [<https://perma.cc/5VJJ-WY4H>] (last visited June 18, 2020); *Gold Rsrv. Inc., Gold Reserve Inc. Updates Shareholders on ICSID Award*, (Nov. 6, 2014), <https://www.goldreserveinc.com/wp-content/uploads/2016/02/14-10.pdf> [<https://perma.cc/7FQE-BWUS>] (last visited May 12, 2022).

comprising the full awarded amount and a fee to obtain mining data.<sup>134</sup> Additionally, the parties signed an agreement to develop jointly new mining projects in Venezuela.<sup>135</sup> The news reports state that the agreement allowed Venezuela to obtain close to \$2 billion in loans by using the mining rights in the settlement as collateral.<sup>136</sup>

The two years that passed between the date of the final award and the agreement to compensate the investor are consistent with the argument advanced in this Article that States rarely compensate immediately for energy-related investments, but rather seek to lower the amount of compensation by fighting the enforcement of the award and initiating subsequent negotiations with the investors.

As of fall 2021, there are no additional reports on Venezuela paying the remaining twelve issued awards in all sectors. In fact, the reports found that investors have initiated at least ten enforcement actions in different jurisdictions.<sup>137</sup>

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<sup>134</sup> See Gaillard & Mitrev Penushliski, *supra* note 94, at 556; see also Gold Rsrv. Inc., *Gold Reserve Enters into Memorandum of Understanding with the Government of Venezuela to Settle Gold Reserve's Arbitration Award and Jointly Develop the Brisas and Las Cristinas Projects*, (Feb. 29, 2016), <https://www.goldreserveinc.com/wp-content/uploads/2016/02/16-04.pdf> [<https://perma.cc/A7B2-4SDK>] (last visited May 22, 2022) (describing the contents of the settlement between Venezuela and Gold Reserve regarding the payment of the ICSID award).

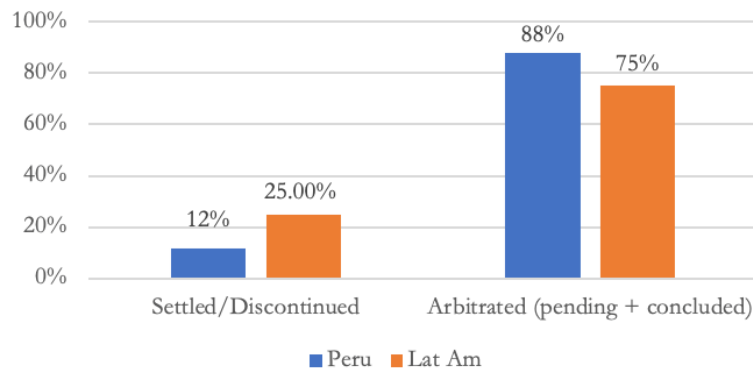
<sup>135</sup> See Gold Rsrv. Inc., *Bolivarian Republic of Venezuela Agrees to Pay Gold Reserve Arbitral Award and Acquire Mining Data and Executes an Agreement to Jointly Develop the Brisas Cristinas Gold Copper Mining Project*, (Aug. 8, 2016), <https://www.goldreserveinc.com/wp-content/uploads/2016/08/16-13.pdf> [<https://perma.cc/32QA-JKUR>] (last visited May 22, 2022).

<sup>136</sup> *Id.*; see also Alexandra Ulmer & Girish Gupta, *Venezuela, Gold Reserve to Settle Arbitration Dispute with Joint Venture*, REUTERS (Feb. 25, 2016), <https://www.reuters.com/article/us-venezuela-arbitration/venezuela-gold-reserve-to-settle-arbitration-dispute-with-joint-venture-idUSKCN0VY05Y> [<https://perma.cc/8DR8-8D86>] (describing the announcement by Venezuela and the Canadian mining company Gold Reserve in reaching a settlement on the payment of the ICSID award).

<sup>137</sup> See, e.g., *OI Eur. Grp. BV v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/11/25, Award (Mar. 10, 2015); *Tidewater Inv. SRL & Tidewater Caribe, CA v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/10/5, Award (Mar. 13, 2015); *Mobil Cerro Negro Holding v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/27, Award (Oct. 9, 2014); *Vestey Group Ltd. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/06/4, Award (Apr. 15, 2016); *Tenaris SA v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/12/23, Award (Nov. 12, 2016); *Valores Mundiales, SL v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/13/11, Award (July 15, 2017); *Saint-Gobain Performance Plastics Eur. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/12/13, Award (Nov. 3, 2017); *Tenaris SA v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/11/26, Award (Jan. 19, 2016); *Koch Minerals Sàrl v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/11/19, Award (Oct. 30, 2017); *Rusoro Mining Ltd. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016); *ConocoPhillips v.*

*d. Peru*

From 1996 to 2021, Peru faced a total of seventeen cases brought against it for energy-related investments, representing 56% of the total cases faced by the State for the same period. Of the seventeen energy-related cases registered, two were settled, seven reached a final award, and eight cases are still pending of resolution. Seventy-five percent of those pending were filed in 2020, and the remaining 25% were filed in 2019.



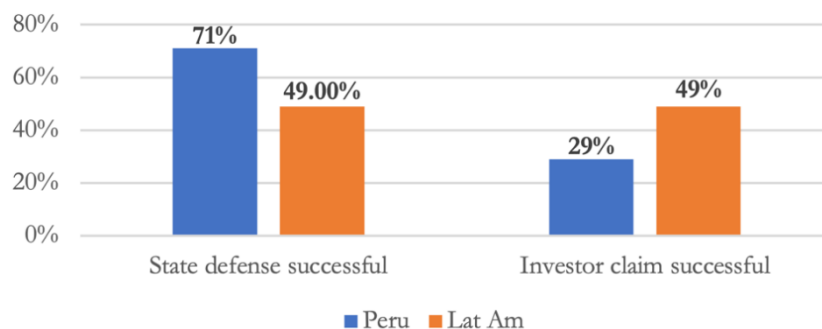
**Chart 11: Peru Energy-Related Cases**

The average time of the pending cases against Peru is 1.2 years with a median of one year. Peru settled two cases in the same period, with an average time of 2.5 years. This is a slightly slower average time compared to the 3.2 years to settle a case in the region.

The average time for these cases that reached a final decision from a tribunal was 3.7 years with a median of three years, the shortest took two years, and the longest took eight years. Peru also has a higher percentage of successful energy-related defenses. In 71% of the cases, the State was successful in its defense, compared with the 45% success rate of State defenses in the region.

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Bolivarian Republic of Venez., ICSID Case No. ARB/07/30, Award (Mar. 8, 2019); Crystallex Int'l Corp. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016).



**Chart 11: Peru Rates of Success**

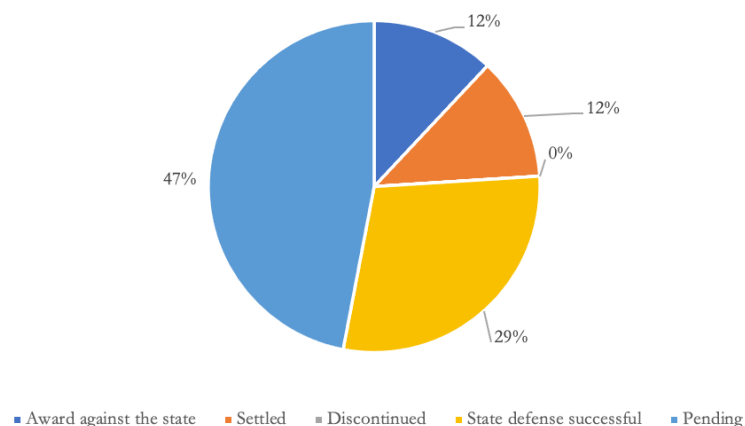
The average time for the cases decided in favor of the investor was 5.5 years. Hence, the cases favorable to the investor in the case of Peru took a shorter time to reach a final arbitral resolution compared to the eight average in the region. The average and median time of litigation of the successful State defenses was three years.

This last data point might change once the vast majority of the cases filed in 2020 reach a final conclusion. In fact, out of all the eleven cases concluded against Peru, including other non-energy related cases, the State has won eight of them.<sup>138</sup> Two of the three cases it has lost are energy-related.

What the data does suggest is that Peru has a high rate of successful defenses and has successfully kept many cases in the litigation docket pending of resolution. Consequently, the government of Peru has only been asked by an arbitral tribunal to compensate foreign investors in 12% of all the energy-related cases brought against the State.

<sup>138</sup> Peru won the following cases: *Industria Nacional de Alimentos, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award (Feb. 7, 2005); *Aguaytia Energy, LLC v. Republic of Peru*, ICSID Case No. ARB/06/13, Award (Dec. 11, 2008); *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award (Feb. 26, 2014); *Renco Grp., Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Final Award (Nov. 9, 2016); *Renée Rose Levy v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (Jan. 9, 2015); *Caravelí Cotaruse Transmisora de Energía S.A.C. v. Republic of Peru*, ICSID Case No. ARB/11/9, Award (Apr. 15, 2013); *Pluspetrol Perú Corporation v. Perupetro S.A.*, ICSID Case No. ARB/12/28, Award (May 21, 2015); *Hydrika 1 S.A.C. v. Republic of Peru*, ICSID Case No. ARB/18/48, Award (Aug. 17, 2021).



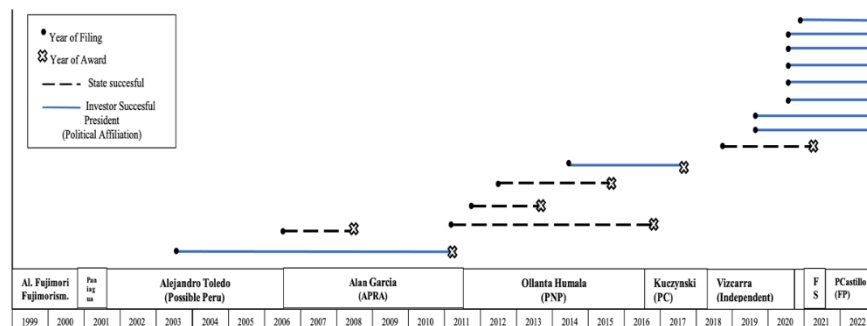


**Chart 12: Total Filed Cases Against Peru**

In terms of the transition of power and the cases filed against Peru, there are two specific periods of time where investment claims have accumulated, but they do not belong to the same political party. The first wave of investment claims against Peru were during the Ollanta Humala administration (2011-2016). During his administration, five cases in the energy sector were filed against Peru, and also during his administration, two of them were resolved--both in favor of the State.<sup>139</sup> Hence, even if Ollanta

<sup>139</sup> For the two cases where the award favored the State, see *Caravelí Cotaruse Transmisora de Energía S.A.C. v. Republic of Peru*, ICSID Case No. ARB/11/9, Award, ¶ 185 (Apr. 15, 2013); *Pluspetrol Perú Corporation v. Perupetro S.A.*, ICSID Case No. ARB/12/28, Award, ¶ 2018-2020 (May 21, 2015). According to the procedural history of *Pluspetrol*, the case was filed in 2012. See *Case Details, Pluspetrol Perú Corporation v. Perupetro S.A.*, ICSID Case No. ARB/12/28, ICSID <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/28> [<https://perma.cc/2SYF-EKCX>] (last visited Apr. 3, 2024). Regarding the other four cases filed during the Humala administration, see *Case Details, Renco Grp., Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/13/1> [<https://perma.cc/26LT-CUPF>] (last visited Apr. 3, 2024); *Case Details, Caravelí Cotaruse Transmisora de Energía S.A.C. v. Republic of Peru*, ICSID Case No. ARB/11/9, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/11/9> [<https://perma.cc/K64F-8NL4>] (last visited Apr. 3, 2024); *Case Details, Isolux Corsán Concesiones S.A. v. Republic of Peru*, ICSID Case No. ARB/12/5, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/5> [<https://perma.cc/VES7-U4UD>] (last visited Apr. 3, 2024); *Case Details, Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/14/21> [<https://perma.cc/8HJ8-VMUK>] (last visited Apr. 3, 2024).

Humala had to face the resolution of the arbitration proceedings, the favorable awards to the State did not translate into the government having to compensate an investor for its actions. Two of the five cases filed during Humala's administration were resolved during the administration of his successor, Pedro Pablo Kuczynski; the remaining one case was resolved in favor of the investor, but the amount of compensation was reduced due to the company's lack of adequate engagement with local communities.<sup>140</sup>



**Figure 4: Lifespan of Cases (Concluded and Pending) Filed Against Peru<sup>141</sup>**

The second wave of cases against Peru was initiated after President Kuczynski was forced to resign due to corruption and bribery scandals involving the construction of oil and gas company Oderbrecht. His successor, Martin Vizcarra, remained in power only two years and faced the initiation of seven arbitration proceedings against Peru. Only one of those cases, the *Hydrika* case, was resolved in favor of Peru in 2021, which was during the presidency of the recently elected President Pedro Castillo.

The only other case that has been resolved in favor of investors, was filed in 2003 during the Alejandro Toledo administration, but was resolved during the Presidency of Alan Garcia. In that particular case, the amount claimed by *Duke Energy* for

<sup>140</sup> See *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017) (finding that plaintiff corporation had ignored the best practices involving the right of consultation of indigenous communities as codified in international instruments. The dissent by Phillipe Sands argued that the company should have also borne the costs of not engaging adequately with the communities in addition to a reduction in compensation); see also *Renco Grp., Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Final Award (Nov. 9, 2016) (resolved in favor of Peru during the Kuczynski administration).

<sup>141</sup> See details of the cases in Appendix 1.

compensation was reduced 51% (from \$37.5 million to \$18.4 million) and Peru tried unsuccessfully to annul the decision.<sup>142</sup>

Even though Peru has been highly successful in its defenses, President Pedro Castillo, who in 2021 faced the seven pending litigation cases against Peru, has threatened to denounce the ICSID Convention.<sup>143</sup>

*e. Bolivia*

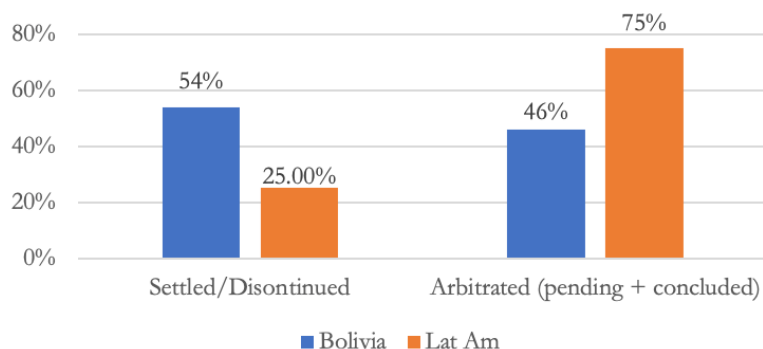
Between 1996 and 2021, there were seventeen cases filed against the government of Bolivia. Out of those seventeen cases, 64.7% of them involved energy-related investments (eleven cases total). This is a substantially higher percentage than the regional average of 41% or the global average of 46%.<sup>144</sup> Out of the eleven energy-related cases, 54% of them reached a settlement with the investor, and none were registered as discontinued unilaterally by the investor. Consequently, the government of Bolivia has reached a settlement in more than half of its cases, compared to the regional average of 25% of settlement and discontinued case rates.

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<sup>142</sup> Duke Energy had calculated the total damages of the action taken by Peru to amount to \$37,533,190 plus pre-and post-award interest, but the tribunal only awarded the claimant a total of \$18, 440, 746 plus pre-and post-award interest. See *Duke Energy Int'l Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award, ¶¶ 465, 483 (Mar. 1, 2011).

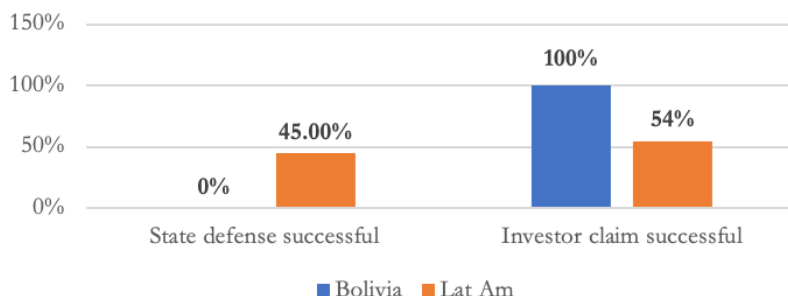
<sup>143</sup> See Pablo Mori Bregante & Micaela Ossio, *What If Peru (or Another Country) Leaves the ICSID Convention? Possible Recourses for Investors Facing a Potential Change in the Game*, KLUWER ARB. BLOG (Feb. 5, 2022), <http://arbitrationblog.kluwerarbitration.com/2022/02/05/what-if-peru-or-another-country-leaves-the-icsid-convention-possible-recourses-for-investors-facing-a-potential-change-in-the-game/> [https://perma.cc/D6MH-VVXV].

<sup>144</sup> It is worth exploring which companies are filing all of these arbitration claims – and represented by which law firms. Are there some repeat players here? Did Susan Franck develop some data on this?



**Chart 13: Bolivia Energy-Related Cases**

Consistent with the willingness to negotiate, the six cases settled by Bolivia with the investors had an average time of 1.5 years and a median of 0.875. As such, most cases with Bolivia were settled within a year of the filing of the claim. This is a striking lower time of negotiation compared to the regional average of 3.2 years. The remaining five cases are composed of three concluded in favor of the investor and two are pending. In contrast to its willingness to settle, Bolivia has not won any of its energy-related arbitration cases. In all three cases that reached a final decision from an investment tribunal, the investor's claims were successful.

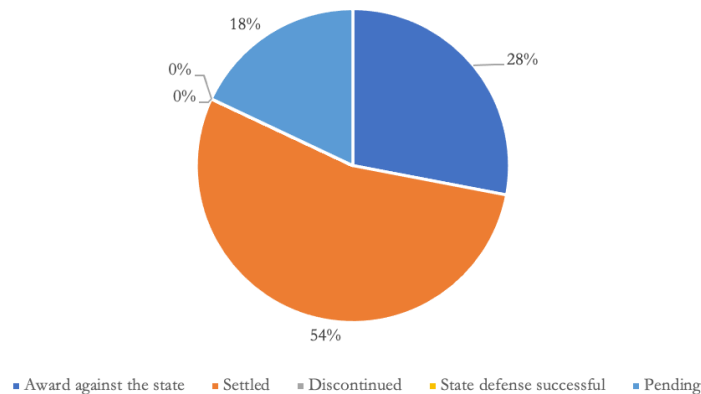


**Chart 14: Rates of Success for Bolivia**

The pending cases in the docket have an average of four years. Both cases were initiated after 2016.<sup>145</sup> The concluded cases had an

<sup>145</sup> See Julio Miguel Orlandini-Agreda v. Bol., PCA Case No. 2018-39, Terms of Appointment, ¶ 2.2 (Dec. 18, 2018) ("By Notice of Arbitration dated January 31, 2018 . . ."); Memorandum of Law in Support of Petition for Discovery in Aid of a Foreign Proceeding Pursuant to 28 U.S.C. § 1782, In Re Julio Miguel Orlandini-Agreda, No. 17-354 (Sept. 25, 2017); see also Glencore Finance (Berm.) Ltd. v.

average time of seven years and a median of five years. The longest case took twelve years, and the shortest case took four years. These numbers are lower than the eight years average and median regional time that it took other investors to win a case against the State. It can be concluded, then, that when Bolivia litigates a case, it does not drag the proceedings for many years, but also, the State is willing to reach a settlement quickly at the start of the proceedings. This partly explains why in only 28% of the cases filed against Bolivia did the government face a contrary award (*see* Chart 15). The vast majority of the cases, 54%, were settled before they reached an arbitral decision.



**Chart 15: Total Filed Cases Against Bolivia**

In terms of the executive officer who has faced the awards against the State, Bolivia is an outlier in the region since the same president who enacted the policies faced the enforcement of the awards (*see* Figure 6). Notwithstanding this fact, Bolivia is consistent with the rest of the region in the fact that longer presidential periods—in the case of Evo Morales, thirteen years in power— increase the possibility of facing arbitral awards against policies taken by the same administration.

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Plurinational State of Bol., PCA Case No. 2016-39, Notice of Arbitration (July 19, 2016).

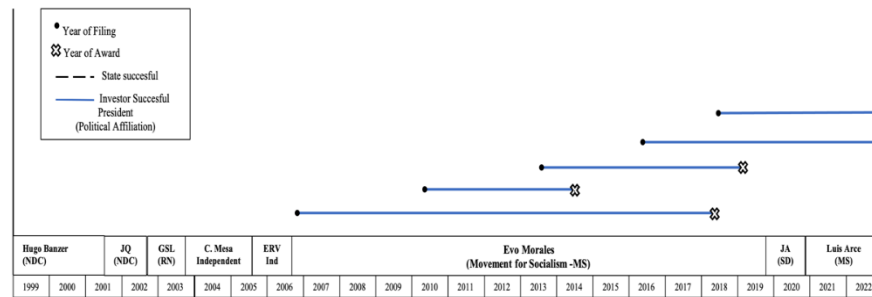


Figure 5: Lifespan of Cases Filed Against Bolivia<sup>146</sup>

All of the concluded and pending cases were filed during the Evo Morales administration; all of the awards issued in the concluded cases were under his administration; and all of the settlements also occurred during the Morales administration. Consistent with the cases of Ecuador and Venezuela, Bolivia withdrew on May 2007 its consent to the ICSID Convention.<sup>147</sup> Moreover, between 2007 and 2013, Bolivia denounced twenty-one BITs with key home jurisdictions of energy investments, such as the Netherlands, France, Spain, the United States, and Italy.<sup>148</sup> These denunciations took place in accordance with the entry into force of a new constitution in February 2009 that specifically states in Article 320 that, among other things, “Bolivian investment will be prioritized over foreign investment,” and that “all foreign investment will be submitted to the jurisdiction, the laws, and Bolivian authorities, and nobody will be able to invoke any

<sup>146</sup> See details of the cases in Appendix 1.

<sup>147</sup> *Denunciation of ICSID Convention*, ICSID, <https://icsid.worldbank.org/news-and-events/news-releases/denunciation-icsid-convention> [https://perma.cc/9RK4-8ZVR (last visited May 23, 2022)].

<sup>148</sup> According to the 2013 Report of the Ministry of Foreign Affairs, the twenty-one BITs were denounced in the following order: Switzerland (2006); Republic of Korea (2007); Cuba (2008); the Netherlands (2009); Mexico (2010); Italy (2011); Spain (2012), Paraguay, Sweden, Austria, and United States (2012); 3 Chile, Peru, Ecuador, United Kingdom, Denmark, Rumania, Germany, China, France, Luxemburg, and Argentina (2013). See MINISTERIO DE RELACIONES EXTERIORES ESTADO PLURINOMINAL DE BOLIVIA, *Denuncia y Renegociación de Tratados Internacionales para su Adecuación a la Constitución Política del Estado* 8-9 (2013), [https://www.procuraduria.gob.bo/ckfinder/userfiles/files/PGE-WEB/\\_Subs/Sub1/Denuncia\\_y\\_Renegociacion\\_de\\_Tratados\\_Internacionales.pdf](https://www.procuraduria.gob.bo/ckfinder/userfiles/files/PGE-WEB/_Subs/Sub1/Denuncia_y_Renegociacion_de_Tratados_Internacionales.pdf) [https://perma.cc/CG89-8FGW] (last visited May 23, 2022) [hereinafter 2013 Report of the Ministry of Foreign Affairs of Bolivia].

exception, nor appeal to diplomatic protection to obtain a more favorable treatment.”<sup>149</sup>

An interesting fact for the case of Bolivia is that Evo Morales' administration settled all of the six cases on the docket with an average time of less than a year. Consistent with its willingness to settle, the Morales administration has also been quick in reaching an agreement with the investors to compensate them after the award is issued. For example, in the *Guarachi America, Inc. and Rirelec PLC* case, the award was issued by a tribunal on January 31<sup>st</sup>, 2014 and, after a short request for correction of the award, the parties notified the Permanent Court of Arbitration (“PCA”) on May 29, 2014 that they reached an agreement regarding the “compliance of the arbitral award.”<sup>150</sup> In a press conference, the Procurador General del Estado (Attorney General) informed that they had reached a deal with the investors to pay \$31.5 million (\$28.9 million plus interest) as ordered by the PCA tribunal.<sup>151</sup> In his view, the agreement was a successful negotiation for the State because the investor had originally requested \$142.3 million as compensation for the nationalization of the Guaracachi electric company.<sup>152</sup> The agreed amount between the State and the company represented only 22% of the originally requested amount by the investor.

A similar agreement was reached with the investors in the *South American Silver Limited* case.<sup>153</sup> The award was issued on November 22, 2018, ordering Bolivia to provide compensation to the investor in the amount of \$18.7 million and to pay interest from August 1, 2012 to the date of payment.<sup>154</sup> According to a press release issued by the company on the August 29, 2019, the parties reached an agreement to “avoid the time and expenses of pursuing

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<sup>149</sup> Constitución de 2009 del Estado Plurinacional de Bolivia Feb. 7, 2009, art. 320 (Bol.) (translation provided by Author); see 2013 Report of the Ministry of Foreign Affairs of Bolivia, *supra* note 148.

<sup>150</sup> *Guaracachi America, Inc. v. Plurinational State of Bol.*, PCA Case No. 2011-17, Letter from Parties to Tribunal on Award Compliance (May 29, 2014) (“[A]greement on the compliance of the arbitral award by Bolivia, Express Resignation by Rurelec Plc and General and reciprocal release of obligations.”) (translation provided by the Author).

<sup>151</sup> See *Bolivia Paga USD 31,5 Millones a Rurelec por Nacionalización de Guaracachi*, NOTICIAS – COMUNIDAD PORTAL MINERO (May 30, 2014), <http://www.portalminero.com/pages/viewpage.action?pageId=89629095> [<https://perma.cc/U95U-Y3EJ>].

<sup>152</sup> *Id.*

<sup>153</sup> See *S. Am. Silver Ltd. v. Plurinational State of Bol.*, PCA Case No. 2013-15, Award (Aug. 30, 2018).

<sup>154</sup> *Id.* ¶¶ 938 (g)-(h).

enforcement proceedings to collect the [a]ward.”<sup>155</sup> Pursuant to the agreement, Bolivia agreed to pay a total sum of \$25.8 million as a final settlement amount in exchange with the company stopping any enforcement proceedings in domestic courts to collect the award and transferred crucial mining data to Bolivia to facilitate the further development of the project.<sup>156</sup> As in other cases, the agreed amount was substantially lower than what the investor had requested in the original proceedings. In the case of American Silver, Bolivia agreed to pay only 6.6% of what had been requested by the company in its claim for arbitration (\$385.7 million).<sup>157</sup>

### III. THE SOLUTIONS ON THE TABLE: EXPEDITE INVESTOR-STATE DISPUTE SETTLEMENT PROCEEDINGS, MEDIATION, AND STATE-TO-STATE DISPUTE RESOLUTION

The evidence presented above leads to the following conclusion: most energy-related investment cases in the Latin America region take more time to get resolved than the political cycles of the actors involved in the decisions. The only exceptions involved States where the same political party or group perpetuates itself in power for close to a decade. In these cases, the political group in power tends to denounce their BITs and the ICSID Convention in order to avoid further litigation. Paradoxically, in some cases, such as Bolivia, the same political group would tend to settle quickly with the investors.<sup>158</sup> In contrast, a State such as Venezuela would tend to drag the proceedings by requesting annulment of the awards.

The second conclusion that can be inferred from the review of the databases is that on average, the State has at least a 50% chance of winning the case or dragging it through enforcement hurdles and annulment processes that at the end force the investors back to the negotiation table. Hence, even if awards arguably should deter

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<sup>155</sup> See *TriMetals Mining to Receive US\$ 25.8 Million from Bolivia*, ITALAW (Aug. 29, 2019), <https://www.italaw.com/sites/default/files/case-documents/italaw10794.pdf> [<https://perma.cc/GY2A-H64F>].

<sup>156</sup> *Id.*

<sup>157</sup> See *S. Am. Silver Ltd. v. Plurinational State of Bol.*, PCA Case No. 2013-15, Award, ¶ 248 (Aug. 30, 2018).

<sup>158</sup> It is worth researching further if it was settled for a lower compensation amount than the one requested in the arbitral proceedings. See *supra* Part II (analyzing the cases where there is information on the settlements reached after the award was issued and the amounts of compensation paid).



energy-related policies that breach investors' expectations, this is not necessarily the end of the game. These awards represent just one step in a protracted negotiation process where the individuals and political parties representing the State keep switching.

As mentioned at the beginning of this Article, critics of the investment system accuse the proceedings of curtailing government policy space. The less extreme solutions proposed by the critics include providing more flexibility to governments to enact policies without incurring liability. Additionally, more moderate views see mediation or encouragement of negotiation as plausible paths to defuse litigation and help parties reach a settlement where everyone's interests are considered.<sup>159</sup> The defenders of the system, in exchange, argue for procedural reforms that in part seek to reduce the costs and time of the proceedings. Expedited proceedings and increased use of State-to-State dispute resolution mechanisms are some of the proposed changes. In the following section, I review the three concrete approaches in light of the evidence presented in the Article.

#### *a. Expedited Proceedings*

On March 21, 2022, the ICSID Administrative Council approved amendments to the ICSID Rules for Arbitration and Conciliation.<sup>160</sup> The amendments were the culmination of a six-year process that included several working groups with the major States, practitioners, and other stakeholders.<sup>161</sup> According to the president of the World Bank and Chair of the ICSID Administrative Council, "the amended rules streamline procedures to enable greater access

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<sup>159</sup> See Schneider & Welsh, *Bargaining in the Shadow of Investor-State Mediation*, *supra* note 63, at 374 (arguing in favor of "stakeholder negotiations," i.e., "structured negotiations with relevant stakeholders that include full discussions of interests and relationships, with sufficient process protections for the parties, including legal representation").

<sup>160</sup> ICSID Administrative Council Approves Amendment of ICSID Rules, ICSID (Mar. 21, 2022), <https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules> [https://perma.cc/B26L-B8D6]. For the legislative history of the amendments, see *ICSID Rules and Regulations Amendment*, ICSID, <https://icsid.worldbank.org/resources/rules-amendments> [https://perma.cc/3PG7-3VKV] (last visited Apr. 3, 2024).

<sup>161</sup> See *ICSID Rules and Regulations Amendment*, ICSID, <https://icsid.worldbank.org/resources/rules-amendments> [https://perma.cc/3PG7-3VKV] (last visited Apr. 3, 2024).

and speed, increase transparency, and enhance disclosures, with the ultimate goal of facilitating foreign investment for economic growth.”<sup>162</sup> Two key components of the amendments seek to expedite the proceedings. First, the new ICSID Rules include mandatory timeframes for rendering orders and awards.<sup>163</sup> Second, new expedited arbitration rules were adopted with the goal of cutting the case time in half.

Examples of procedural rules that seek to expedite the process include new Rule 31, which provides that arbitration tribunals must hold one or more case management conferences with a view to “conducting an expeditious and cost-effective proceeding.”<sup>164</sup> In these conferences, the parties and the arbitrators must identify uncontested facts, clarify and narrow the issues, and address any other procedural or substantive questions that could help to speed the process.<sup>165</sup> In the same spirit, Rule 22(1)(a) sets a limit of twenty-one days to submit a proposal for disqualification of an arbitrator, compared to the previous rule that only established a “promptly” standard. Another reform that seeks to expedite the process is Rule 29(5), which established a new requirement for the first procedural order to be signed within the first fifteen days after the first session.<sup>166</sup> Finally, the new Rule 58 provides that an award is to be rendered no later than 240 days after the last submission; 60 days after the tribunal’s constitution or the last submission in cases

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<sup>162</sup> ICSID Administration Council Approves Amendment of ICSID Rules, *supra* note 160.

<sup>163</sup> Rule 19(1)(a) for example sets a limit of twenty-one days to submit a proposal for disqualification of an arbitrator, compared to the previous rule that only established a “promptly” standard; Rules 22 and 23 mandate time limits for the exchange of comments and the decision on disqualification of an arbitrator; another example is Rule 29(5) that established a new requirement for the first procedural order to be signed within the first fifteen days after the first session. See ICSID, ICSID/15/REV. 3, ICSID CONVENTION, REGULATIONS AND RULES 99-102, 104-05 (July 2022) (hereinafter ICSID Rules).

<sup>164</sup> ICSID, PROPOSED AMENDMENTS TO THE REGULATIONS AND RULES FOR ICSID CONVENTION PROCEEDINGS 41 (proposed Jan. 20, 2022).

<sup>165</sup> ICSID Rules, *supra* note 163, at 101, Rule 22(1)(a) (setting a new timeline for parties to a proposal to disqualify one or more arbitrators, such that “the proposal shall be filed after the constitution of the Tribunal and within 21 days after the later of: (i) the constitution of the Tribunal; or (ii) the date on which the party proposing the disqualification first knew or first should have known of the facts on which the proposal is based”).

<sup>166</sup> *Id.* at 104-05, Rule 29(5) (“The tribunal shall issue an order recording the parties’ agreement and any Tribunal decisions on the procedure within 15 days after the later of the first session or the last written submission on procedural matters addressed at the first session.”).

involving the special procedure for claims that are manifestly without legal merit (Rule 41)<sup>167</sup>; or 180 days after the last submission of the award is rendered pursuant to the preliminary objection with a request for bifurcation under Rule 44(3)(c).<sup>168</sup> The previous rules required the tribunal to sign the award within 120 days after the “closure of the proceeding” which was not defined.<sup>169</sup>

In terms of the expedited procedure, Chapter XII of the new rules seeks to create a proceeding that should be completed within 470 to 530 days—or less than two years—after the registration of a request for arbitration.<sup>170</sup> According to Rule 75(1), parties can opt-in to the procedure at any time by jointly notifying the Secretary-General in writing of their consent.<sup>171</sup> To speed the proceedings, parties may not request a bifurcated proceeding.<sup>172</sup> Hence, parties would not be able to have a jurisdictional phase split from a merits and liability stage, or a stage for the quantum of loss. The expedited proceeding also establishes shorter time limits on the filing of pleadings (sixty days for the memorial and counter-memorial, and

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<sup>167</sup> *Id.* at 109-110, Rule 41(2) (establishing a special procedure for manifest lack of legal merit objections, whereby “a party shall file a written submission no later than 45 days after the constitution of the Tribunal” and “the Tribunal shall render its decision or Award on the objection within 60 days after the later of the constitution of the Tribunal or the last submission on the objection”).

<sup>168</sup> *Id.* at 112, Rule 44(3) (regulating the preliminary objections proceedings involving a request for bifurcation, whereby “[i]f the tribunal decides to address the preliminary objection in a separate phase of the proceedings, it shall: . . . (c) render its decision or Award on the preliminary objection within 180 days after the last submission, . . .”).

<sup>169</sup> ICSID Rule 46 of 2006 states that “[t]he award (including any individual or dissenting opinion) shall be drawn up and signed within 120 days after closure of the proceeding. The Tribunal may, however, extend this period by a further 60 days if it would otherwise be unable to draw up the award.” See ICSID, ICSID/15, ICSID CONVENTION, REGULATIONS AND RULES 121 (Apr. 2006).

<sup>170</sup> See *Expedited Arbitration – ICSID Convention Arbitration (2022 Rules)*, ICSID, <https://icsid.worldbank.org/procedures/arbitration/convention/expedited-arbitration/2022#:~:text=If%20followed%20fully%2C%20expedited%20arbitration,a%20single%20proceeding%20without%20bifurcation.&text=Expedited%20arbitration%20is%20also%20available%20for%20post%2DAward%20remedy%20proceedings> [https://perma.cc/H82V-NKBR] (last visited Apr. 3, 2024) (“If followed fully, expedited arbitration would conclude within 470-530 days after the date of registration in a single proceeding without bifurcation.”).

<sup>171</sup> ICSID Rules, *supra* note 163, at 132, Rule 75(1) (“At any time, the parties to an arbitration conducted under the Convention may consent to expedite the arbitration in accordance with this Chapter [“expedited arbitration”] by jointly notifying the Secretary-general in writing of their consent.”).

<sup>172</sup> *Id.*, Rule 75(2) (stating that that under the expedited arbitration proceedings, all rules apply, except that “[r]ules 15, 16, 18, 39, 40, 41, 42, 44 and 46 do not apply in an expedited arbitration”).

forty days for the reply and rejoinder), and limits the total pages of the memorial and counter-memorial to 200 pages.<sup>173</sup> Rule 81 also forces the tribunal to hold a hearing within sixty days after the last written submission is filed.<sup>174</sup>

It is left to be seen how often the expedited proceeding will be used, especially for complex energy-related projects. Assuming that the energy-sector decides to employ these proceedings, in theory, lower litigation times would potentially raise the costs to the enacting authority. Those government officials who enacted the policies would have to face the challenge of compensating for their own actions. But the Ecuador, Bolivia, Peru and Venezuela experiences serve as a reminder that when that happens, the temptation of dropping out of the system is higher.<sup>175</sup> Argentina, even with all of the adverse cases, is an exception in that it remained a player in the system.

Even if States complain about the litigation costs, today's investment regime seems to not defer government action violating investors' expectations. Those governments in breach of their international obligations may pass on the costs of litigation to future administrations. If government officials really want to get the issue resolved quickly, they can always settle through negotiation. The cases of Argentina and Bolivia are illustrative of this fact.<sup>176</sup>

Perhaps the key variable to identify whether the process would be settled quickly is the adoptions of administrative reforms to allow for negotiation and mediation to move forward. The more protection government officials receive to negotiate deals, without facing political or administrative backlashes, the higher the chances

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<sup>173</sup> See *Id.* at 135, Rule 81 (“(a) [T]he claimant shall file a memorial within 60 days after the first session; (b) the respondent shall file a counter-memorial within 60 days after the date of filing the memorial; (c) the memorial and counter-memorial referred to in paragraph (1)(a) and (b) shall be no longer than 200 pages; (d) the claimant shall file a reply within 40 days after the date of filing the counter-memorial; (e) the respondent shall file a rejoinder within 40 days after the date of filing the reply; (f) the reply and rejoinder referred to in paragraph (1)(d) and (e) shall be no longer than 100 pages; (g) the hearing shall be held within 60 days after the last written submission is filed . . .”).

<sup>174</sup> See *id.*, Rule 81(1)(g).

<sup>175</sup> See *supra* Part II (analyzing the data of the cases where these states were involved in arbitration, the continuation of the same administration thought out the time of the case, and the fact that they dropped out of the system after facing several awards against the same political party).

<sup>176</sup> See *supra* Subsections II.a and II.b.

there will be for settlement of a case.<sup>177</sup> Future research could focus on this factor. A survey on national administrative regulations could shed light on internal administrative processes that incentivize negotiation and mediation, instead of litigation.<sup>178</sup> The system as it stands today, relying on litigation for 75% of the cases, provides administrative and political coverage to the government officials who enact the policies.

Another plausible avenue to enhance government accountability would be to pre-establish in the contract that the expedited proceeding should be the default if a dispute arises. Most energy-related disputes involve some type of government contract. It might be a license, concession agreement, production sharing contract, joint operation agreement, or power generation contract. As the work of Professor Stratos Pahis shows, most investment disputes involving big companies do not require the existence of an investment treaty to initiate international arbitral proceedings because companies can negotiate access to the system through contractual clauses.<sup>179</sup> As stated above, in the energy sector, States depend on foreign companies to manage the risk of energy-related projects, or to bring the technology and capital to the energy sector.<sup>180</sup> Hence, they have the bargaining capacity to include an expedited proceeding as a default rule in their contractual arrangements with the State if they wish to pursue it. Moreover, a fast-track process might also encourage negotiation or mediation to occur more promptly too. In sum, with or without a treaty protecting the investor's right, government and companies could pre-select the expedited proceeding rules as the default option in case disputes arise in the future.

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<sup>177</sup> For, example, it would be worth exploring whether this was the case of Ecuador and Bolivia where the settlement worked well without apparent backlash.

<sup>178</sup> In the United States, what has worked best is that courts have required the use of these procedures. See Schneider & Welsh, *Bargaining in the Shadow of Investor-State Mediation*, *supra* note 63, at 397-400.

<sup>179</sup> See generally, Stratos Pahis, *An Investment Theory of International Investment Law: Form, Function & Reform*, 63 VA. J. INT'L L. 447, 451 (2023) (discussing how States and investors can protect and promote investment, as well as enhance international cooperation, through investor-State contracts).

<sup>180</sup> See *supra* Part I (describing why energy companies required investment protection); see also Pahis, *supra* note 179, at 464-65 (describing the importance of technology transfer).

*b. Mediation*

The recent efforts to use mediation as a primary method to resolve investment disputes culminated with the passing in 2018 of the Singapore Convention.<sup>181</sup> The Singapore Convention's primary goal is to set up a system of domestic enforcement mechanisms of mediated settlement agreements for international commercial and investment disputes.<sup>182</sup> The process is inspired in the New York Convention and in the UNCITRAL Arbitration Model Law, in that it creates summary proceedings to enforce the agreements. In other words, mediation settlements are to be treated much like international arbitral awards, leaving very few grounds for the refusal of enforcement.<sup>183</sup>

Article 4 establishes the formalities for relying on a settlement agreement that, just as arbitration agreements and awards, are based on the spirit of facilitating the process and shifting the burden of

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<sup>181</sup> See G.A. Res. 73/199, at 13-14 (Dec. 20, 2018); Working Group III (Investor-State Dispute Settlement Reform), Secretariat of the U.N. Comm'n on Int'l Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Assessment of Damages and Compensation; Memorandum Signed to Develop Mediation Rules for Disputes over China BRI Projects*, JONES DAY (Feb. 2019), <https://www.jonesday.com/en/insights/2019/02/memorandum-signed-to-develop-mediation> [<https://perma.cc/UJ5V-TQ42>] (discussing the mediation component of China International Commercial Court); Hal Abramson, *New Singapore Cross-Border Mediated Settlements: Key Choices*, in *MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES* 360, 360-88 (Catharine Titi & Katia Fach Gomez eds., 2019); see also S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J.L. & POL'Y 11, 33-8 (2014) (outlining what a new convention would need to include to promote enforcement). For a qualitative study reflecting on one of the advantages of mediation to help parties "control the outcome" of the investment dispute resolution proceedings, see CENTRE FOR INT'L L., NAT'L UNIV. SING., *REPORT: SURVEY ON OBSTACLES TO SETTLEMENT OF INVESTOR-STATE DISPUTES* 10 (2018), <https://cil.nus.edu.sg/wp-content/uploads/2018/09/NUS-CIL-Working-Paper-1801-Report-Survey-on-Obstacles-to-Settlement-of-Investor-State-Disputes.pdf> [<https://perma.cc/AW5M-PYA3>].

<sup>182</sup> See G.A. Res. 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018) (hereinafter *Singapore Convention*).

<sup>183</sup> See *id.* art. 5 (stating the few grounds on which a competent authority may refuse to grant relief at the request of one of the parties. Similar to the New York Convention, these may include cases where one of the parties lacks capacity to sign the agreement, or where the settlement agreement is "null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it.").

proof to the reluctant party.<sup>184</sup> A party seeking to enforce the agreement only needs to supply to the competent authority the settlement agreement signed by them and evidence that the settlement results from a mediation process. It is up to the reluctant party to prove that the agreement falls under one of the grounds for refusal to grant relief by the local court.<sup>185</sup> As of February 2024, only fifty-six States have signed the Singapore Convention, including seven Latin American States, and thirteen States in the world are ratifying parties.<sup>186</sup>

The role that the Singapore Convention might have in investment disputes has been widely analyzed by scholars. Professors Andrea Schneider and Nancy Welsh argue, for example, that with the Singapore Convention in place mediation “should be made mandatory—not because that will make the occurrence of mediation more likely, but because the *threat* of mandatory mediation will incentivize parties to intervene earlier, negotiate sooner, and negotiate more effectively.”<sup>187</sup> These authors, however, also recognize that mediation has a lower chance to succeed if the political costs of settling cases are not addressed, if there is a lack of coordination between government officials from different agencies, if there are challenges involving jurisdiction among State actors, and if a misalignment of interests exists.<sup>188</sup> These are all factors that were present in the cases analyzed above as affecting the decision-making process of the State. When the costs of making decisions do not fall clearly under one actor, and rather can be fragmented among administrations or branches, then there are fewer incentives to

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<sup>184</sup> See *id.* art. 4 (“1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought: (a) The settlement signed by the parties; (b) Evidence that the settlement agreement resulted from mediation, such as: (i) The mediator’s signature on the settlement agreement; (ii) A document signed by the mediator indicating that the mediation was carried out; (iii) An attestation by the institution that administered the mediation; or (iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.”).

<sup>185</sup> See *id.* art. 5 (stating that the competent authority “may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that . . .”).

<sup>186</sup> See *Status: United Nations Convention on International Settlement Agreements Resulting from Mediation*, U.N. COMM’N ON INT’L TRADE L., [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements/status](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status) [https://perma.cc/D579-6F7U] (last visited Feb. 27, 2024).

<sup>187</sup> Schneider & Welsh, *Bargaining in the Shadow of Investor-State Mediation*, *supra* note 63, at 374.

<sup>188</sup> *Id.*

comply with treaty obligations. This claim is also consistent with the findings of Professor Weijia Rao, who found that governments are less willing to settle when elections approach because of the low public support to compensating foreign investors for State actions.<sup>189</sup>

Moreover, mediation is rarely referred to in the existing international bilateral agreements or investment chapters in trade agreements. According to a recent study, mediation was only referenced in fifty-three out of 1,141 analyzed international investment agreements.<sup>190</sup> In fact, even when referenced, dispute resolution clauses are drafted so as not to require mediation.<sup>191</sup> On the contrary, they seem to imply the existence of a “fork in the road” scenario. As documented by Brian Chang and Daniel Kang, most investment agreements provide advance consent by the State to “conciliation or arbitration.”<sup>192</sup> The provisions could be interpreted as forcing the investors to choose only one method for resolving the dispute, but not to pursue both in parallel, or as subsequent steps. Additionally, international investment agreements rarely specify mediation institutional rules, or clarify that the limitation periods to initiate arbitration should be suspended if mediation procedures occur. In the same vein, current dispositions that include mediation as an option do not ensure the parties that the communications employed in the mediation proceedings will not be disclosed or used in the arbitral proceedings.<sup>193</sup>

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<sup>189</sup> See Weijia Rao, *Domestic Politics and Settlement in Investor-State Arbitration*, 50 J. LEGAL STUD. 145, 147 (2020).

<sup>190</sup> See Romesh Weeramantry et al., *Conciliation and Mediation in Investor-State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis*, ICSID REV. 5 (2022) (distinguishing mediation from conciliation references, and only included dispute resolution clauses for claims brought by investors and not in State-to-State mechanisms); Cf. Catherine Kessedjian et al., *Mediation in Future Investor-State Dispute Settlement* (Acad. F. ISDS Concept Paper 2020/16, 2020) (demonstrating that per the U.N. Commission on International Trade Law (“UNCTAD”), only 627 of 2577 mapped investment agreements contained a provision for voluntary conciliation/mediation, no treaty contained a provision for compulsory conciliation/mediation, and 1813 had no provision on conciliation/mediation at all).

<sup>191</sup> Kessedjian et al., *supra* note 190.

<sup>192</sup> Brian Chang & Daniel Kang, *Advancing Alternatives: Promoting Mediation and Conciliation in Investor-State Dispute Settlement*, COLUM. FDI PERSP., Sept. 19, 2022.

<sup>193</sup> See Investment Agreement of the Mainland and Hong Kong Closer Economic Partnership Arrangement, China-H.K., arts. 19, 20, June 28, 2017), <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3780/china---hong-kong-cepa-investment-agreement-2017-> (last visited Nov. 4, 2022) [<https://perma.cc/K43P-BZMZ>]; see also Investment Protection Agreement, E.U.-Sing., at art. 3.4 Oct. 15, 2018), <https://investmentpolicy.unctad.org/international->



In sum, current mediation efforts do not fully tame the incentives to kick the dispute down the road and pass the costs to future administrations. The lack of clarity on providing government officials enough political coverage to settle, the uncertainty in existing clauses to avoid a fork-in-the-road scenario for investors, and the lack of clarity in terms of the communications, rules, and suspension of deadlines to file arbitration claims reduce the incentives to rely on mediation as a primary method to resolve the disputes.

*c. State-to-State Dispute Settlement Mechanisms*

Seen through the eyes of incentives to government authorities, State-to-State dispute settlement ("SSDS") proceedings have two main advantages over the traditional investor-State dispute settlement ("ISDS") mechanisms. First, SSDS mechanism allow authorities from the home State to participate in the proceedings. Their participation might lead to an opportunity to mediate between the investors and the host State authorities.<sup>194</sup> Many treaties have as a provisional step before initiating SSDS mechanism, an official consultation proceeding where both governments have an opportunity to resolve the dispute. The second advantage of SSDS over ISDS mechanisms is that the proceedings tend to be less contentious and more focused on treaty interpretation, rather than on fact finding exercises. States that have relied on SSDS mechanisms use them as opportunity to signal to arbitral tribunals that they disagree with a particular treaty interpretation and want to use the SSDS mechanism as a way to correct their course.<sup>195</sup>

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investment-agreements/treaties/treaties-with-investment-provisions/3545/eu---singapore-investment-protection-agreement-2018- (last visited Nov. 4, 2022) [<https://perma.cc/8KGN-ZUW8>].

<sup>194</sup> See Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT'L L.J. 70 (2014); Jarrod Wong, *The Subversion of State-to-State Investment Treaty Arbitration*, 53 COLUM. J. TRANSNAT'L L. 44 (2014).

<sup>195</sup> See David Gaukrodger, *State-to-State Dispute Settlement and the Interpretation of Investment Treaties* 22 (OECD, Working Papers on International Investment No. 2016/03 2016); see also Wong, *supra* note 194 ("P]resumably, the tribunal was never going to abide by Peru's naked bid to circumvent investor-[S]tate arbitration, but it would have been helpful to learn precisely on what rationale the tribunal based its conclusion."); see also Luke Eric Peterson, *Kyrgyz Republic Seeks Authoritative Interpretation of Obscure CIS Treaty That Multiple Foreign Investors Are Invoking*, INV. ARBITRATION REP., 6 June 2014.

Hence, the proceedings tend to take less time.<sup>196</sup> Finally, if a concrete dispute arises regarding facts, and the State that breached its treaty obligations decides to continue with its policies, the home State may retaliate with proportional counter measures. That is, instead of relying exclusively on monetary compensation to make the breach of international treaty obligations unacceptably costly, SSDS allows the other State to impose measures that could hurt the State in breach and prod it into compliance.<sup>197</sup> The expediency of the proceedings and the possibility of counter measures are elements that might lead the host State's administration to second guess its policies or at least integrate the costs of its decisions in the short run. It is harder to pass along the costs onto future administrations.

Brazil is a paradigmatic example of a State relying on SSDS mechanisms in its investment treaties. Under the Brazilian Cooperation and Investment Facilitation Agreements, ISDS are not available, and all the disputes are to be resolved by SSDS mechanisms.<sup>198</sup> This agreement has been the basis for agreements signed by Brazil with Mozambique, Angola, India, Ecuador, Morocco, United Arab Emirates, Guyana, Suriname, Ethiopia, Chile, Colombia, Mexico, Malawi, and Chile.<sup>199</sup>

The United States has also signed BITs excluding the use of ISDS, and in its recent negotiation of the United States-Mexico-Canada

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<sup>196</sup> See, e.g., USMCA, *supra* note 9, Ch. 31. For a description of the shorter timeline for State-to-State dispute resolution in the USMCA, see also Guillermo J. Garcia Sanchez & James W. Coleman, *North American Energy in the Crossfire*, 55 CORNELL INT'L L.J. 215, 245-47 (2022).

<sup>197</sup> Garcia Sanchez & Coleman, *supra* note 196, at 247-48.

<sup>198</sup> *Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and*, U.N. CONF. ON TRADE & DEV., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download> [https://perma.cc/KXN8-TSTV] (last visited Apr. 3, 2024) [hereinafter Brazil's Model Agreement]. For a review of Brazil's Model Agreement, see Nathalie M-P Potin & Camila Brito de Urquiza, *The Brazilian Cooperation and Facilitation Investment Agreement: Are Foreign Investors Protected?*, KLUWER ARB. BLOG, (Dec. 29, 2021), <https://arbitrationblog.kluwerarbitration.com/2021/12/29/the-brazilian-cooperation-and-facilitation-investment-agreement-are-foreign-investors-protected/> [https://perma.cc/4CCF-UYRX]. For a review on the history of Brazil's opposition to investment agreements, see Nancy A. Welsh et al., *Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties*, 45 WASH. U. J.L. & POL'Y 105, 106 (2014).

<sup>199</sup> For a complete list of countries that have signed Brazil's Model Agreement after 2015, see *Brazil Bilateral Investment Treaties*, U.N. CTR. FOR TRADE & DEV. INV. POL'Y HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil> [https://perma.cc/CSY4-ZRCZ] (last visited Apr. 3, 2024).

Agreement ("USMCA") that replaced the North American Free Trade Agreement, the United States reduced the use of ISDS for most investments.<sup>200</sup> For example, the USMCA no longer allows claims by Canadian investors that challenge U.S. government actions.<sup>201</sup> The only fully protected investments are those connected to government contracts signed by the Mexican government with U.S. investors in the infrastructure, telecommunications, energy, and hydrocarbons sector.<sup>202</sup> The United States has also excluded ISDS mechanisms in the 2004 Australia-United States Free Trade Agreement.<sup>203</sup> Replicating this trend, Australia also excluded the use of ISDS in its agreement with Japan.<sup>204</sup> These last two agreements have a strong focus on non-pecuniary remedies, flexibility in the implementation of "suggested measures" by the panels, and a fast-track procedure with tight time lines. In the case of Australia and Japan, however, these agreements were substituted by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), which brings back the ISDS mechanism.<sup>205</sup> The efforts, however, to reduce the use of ISDS, are prevalent in the negotiation of new BITs.

Now, the challenge with SSDS is that it could be subjected to political tradeoffs and geopolitical implications. Home States might not be willing to initiate proceedings against the host State because they are afraid of "contaminating" the bilateral agenda. Initiating

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<sup>200</sup> See USMCA, *supra* note 9, Ch 14. Chapter 14 does not allow ISDS claims between Canadian and U.S. investors, who can only bring Annex 14-C Legacy claims and pending NAFTA claims. The only ISDS claims available under the USMCA are Annex 14-D and Annex 14-E. Under Annex 14-D, Mexico-U.S. Investment Disputes, investors from Mexico or the United States can only bring claims for breaches connected to national treatment, most-favored nation treatment, and direct expropriation (Article 14.D.3). Under Annex 14-E, Mexico-United States Investment Disputes Related to Covered Government Contracts, investors from the United States that signed a contract with Mexico related to energy, oil and gas, infrastructure, and telecommunications sectors can bring any claim. For a full review of the investment claims under the USMCA for energy disputes, see Garcia Sanchez & Coleman, *supra* note 196, at 239-44.

<sup>201</sup> *Id.*

<sup>202</sup> See USMCA, *supra* note 9, Ch. 14 Annex 14-E.

<sup>203</sup> See Free Trade Agreement, Austl.-U.S., May 18, 2004.

<sup>204</sup> See 2014 Japan-Australia Economic Partnership Agreement, Austl.-Japan, July 8, 2014 (entered into force on Jan. 15, 2015).

<sup>205</sup> See Austl. Dep't of Foreign Aff. & Trade, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership> [https://perma.cc/P6ZW-MP57].

proceedings against another government because of actions taken against energy investors might affect the cooperation of the home State in other areas. In the case of Latin America, this concern is particularly salient considering the importance of the energy sector, both for U.S. energy security and the bilateral ties in other regional challenges, such as immigration or drug trafficking. For example, the United States might be reluctant to initiate proceedings against Mexico, if it might affect its relationship to deal with the flow of migrants from Central America or the flow of energy products to reduce prices in North America.

#### IV. CONCLUSION

The energy sector, whether in its extractive segment or in the production of electricity, is of national importance for governments.<sup>206</sup> Foreign companies that invest capital in this sector are not only bringing funds and know-how into the country, they are also touching the governments' operational nervous systems.<sup>207</sup> The outcomes of these investments impact government budgets, the development of provinces, and the security of the State.<sup>208</sup> Hence, energy investment disputes tend to dominate, particularly in regions such as Latin America that have a rich history in energy governance. It is very likely that governments will pass regulation that at some point will touch the fundamentals of the investments in order to bring more control or capture more rents from the private sector.

Many of the cases analyzed above show how individual government administrations benefit from the length of the ISDS proceedings brought by energy companies against them. The State, of course, would still be liable internationally, but the administration that makes the decision to affect foreign investors might not be in power when it is time to compensate the investor after an adverse award is issued. By stretching the timeline of the arbitral process for investors to win to an average of eight years,

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<sup>206</sup> See Garcia Sanchez, *In the Name of Energy Sovereignty*, *supra* note 48, at 2484-94.

<sup>207</sup> See Garcia Sanchez, *The Hydrocarbon Industry's Challenge to International Investment Law*, *supra* note 4, at 475-95.

<sup>208</sup> See Garcia Sanchez, Garcia Sanchez, *In the Name of Energy Sovereignty*, *supra* note 48, at 2484-520.

governments can pass down the bill of the energy policies that affect foreign capital down to future administrations. They can change the law now, capture the rent and regain control, and leave it to future administrations to pay later. When the same administration or political party stays in power for more than a decade, then we see pushback efforts against the investment regime. The evidence shows as well that negotiation processes do not end with an adjudicated result. Even in the face of awards that emanate from actions taken by the same political party or actor, the investors face the difficulties of negotiating new terms in order to recover the damages awarded by the tribunals. That is, they have to sit down to negotiate terms of compliance with the award, adding an additional one to three years to the process before seeing a check or other types of relief.

Through a close review of the applicable timelines and administrations, we can better understand why governments may appear willing to participate in the proceedings but unwilling to immediately comply with the award.<sup>209</sup> The lengthiness of the proceedings benefits them. If the goal of the ISDS regime is to create incentives for government actors to comply with their treaty obligations towards investors, the proposed reforms are good efforts that might have some positive consequences. Mediation might lead to more actors being involved in the decision-making process, raising awareness of the interests involved, and helping to diffuse some contentious atmosphere. But the system will not be effective if government officials involved in the settlement are sanctioned or if political backlash emerges from signing a settlement agreement that might be seen as too onerous.<sup>210</sup> Throwing the ball down the line to future administrations and blaming the hole in government finances on outside and unaccountable arbitrators are advantages to the government.<sup>211</sup>

The proposal to increase SSDS mechanisms has the disadvantage of bringing back politics into the equation. A home

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<sup>209</sup> See Brewster, *The Limits of Reputation on Compliance*, *supra* note 35, at 323-31.

<sup>210</sup> See Rao, *supra* note 189.

<sup>211</sup> This is consistent with the findings of the survey conducted with practitioners by Seraphina Chew, Lucy Reed, and J Christopher Thomas where they concluded that "the most significant obstacle to settlement is the desire to defer responsibility for decision-making to a third-party." See Seraphina Chew et al., *Report: Survey on Obstacles to Settlement of Investor-State Disputes 1-12* (NUS Centre for Int'l L., Working Paper No. 18/01, 2018), <http://dx.doi.org/10.2139/ssrn.3247492> [<https://perma.cc/6B7R-WX6W>].

State might have difficulties in bringing a claim against another government if there are more items in the agenda, and especially if the dispute will involve a sensitive national security sector, such as energy. Moreover, States might reach an agreement, leave the policy in place, and find ways to compensate each other, but not the investor. Hence, the so-called efforts to have the government officials pay for the consequences of their decisions is left buried under the dirt of diplomacy.

Finally, the expedited proceedings adopted by ICSID might be the most promising to hit the government official with the consequence of its action. The expedited process, however, also complicates the proceedings for cases involving complex fact finding, discovery, and bringing expert opinions for the valuation of assets. All of these complex proceedings would need to be resolved in a single stage. Ultimately, the State might not be eager to accept the expedited proceeding if there is a potential of losing the case. The government in power might as well rely on the old procedural rules and drag the proceeding out for several years. Notwithstanding these challenges, the expedited process could encourage negotiation and mediation to occur. Moreover, now that we have actual rules for the expedited proceedings, States and investors could contractually bargain *ex ante* to have them be the default rules in case of a dispute. Instead of relying on both parties to agree to submit to the expedited rules once the dispute arises, they could select them as the default proceeding when they are negotiating their energy-related concession, license, or association agreement.

Where is the solution, then? This Article sides with the findings proposed by Professor Schneider and Welsh, that domestic administrative proceedings matter.<sup>212</sup> If we wish to prevent disputes from escalating, finding the right incentives internally to allow all the important stakeholders to participate is key. More importantly, we need more transparent negotiation and mediation proceedings to make sure that the settlements reached by these actors will not become political weaponry used against them (*e.g.*, accused of corruption or selling the nation's crown jewels to foreign powers). As this Article shows, parties go back to the negotiation table even after the ISDS proceeding ends. Why spend eight years litigating if at the end they will have to come back to the negotiation table to

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<sup>212</sup> See Schneider & Welsh, *Bargaining in the Shadow of Investor-State Mediation*, *supra* note 63, at 374.

reach settlement regarding the compliance of the award? The key variable here is to bring more transparency, best standards, and administrative proceedings that protect the negotiating parties.

## APPENDIX

*Argentina*

Name	Year	Political Affiliation	Cases filed	Cases resolved
Fernando de la Rúa	Dec. 10, 1999-Dec 21, 2001	UCR Alianza	2 (2001) <sup>213</sup>	1 (2001) (filed in 1998) <sup>214</sup>
Adolfo Rodríguez Saá	Dec 23, 2001-Dec 30, 2001	PJ		
Eduardo Duhalde	Jan 2, 2002-May 25, 2003	PJ	2 (2002) <sup>215</sup> 1 (2003) <sup>216</sup>	

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<sup>213</sup> The Enron case was filed on April 11, 2001. *See* Enron Creditors Recovery Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 8 (May 22, 2007); *see also* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 7 (May 12, 2005) (registering arbitration request on August 24, 2001).

<sup>214</sup> *See* Houston Indus. Energy, Inc. v. Argentine Republic, ICSID Case No. ARB/98/1, Award (Aug. 24, 2001) (registering arbitration on February 25, 1998).

<sup>215</sup> LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, ¶ 5 (Apr. 30, 2004) (case filed on January 31, 2002); AES Corp. v. Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶ 4 (Apr. 26, 2005) (registering request for arbitration on December 19 2002, and pending resolution).

<sup>216</sup> Nat'l Grid PLC v. Argentine Republic, UNCITRAL, Award, ¶ 1 (Nov. 3, 2008) (case filed on April 25, 2003).



Nestor Kirshner	May 25, 2003- Dec. 2007	PJ and FPV	4 (2003) <sup>217</sup> 2 (2004) <sup>218</sup>	1 (2007) (filed in 2001) <sup>219</sup>
Cristina Fernandez de Kirchner	Dec. 2007- Dec. 2011- Dec. 2011- Dec. 2015	PJ and FPV		1 (2008) (filed in 2004) <sup>220</sup> 1 (2011) (filed in 2003) <sup>221</sup> 2 (2014) (filed in 2003) <sup>222</sup>

<sup>217</sup> See, e.g., *Petition to Vacate or Modify Arbitration Award* ¶ 6, Republic of Arg. v. BG Grp. PLC, Case No. 08-0485 (RBW) (D. D.C. Mar. 21, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0082.pdf> [<https://perma.cc/V33C-3D77>] (claim filed on April 25, 2003); EDF Int'l S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award, at x (June 11, 2012) (claim filed on June 16, 2003); El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 4 (Oct. 31, 2011) (claims registered on June 12, 2003); Nat'l Grid PLC v. Argentine Republic, UNCITRAL, Award, ¶ 1 (Nov. 3, 2008) (case filed on April 25, 2003).

<sup>218</sup> See *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 15 (Dec. 8, 2008) (filing on July 15, 2004); see also *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, ¶ 7 (Feb. 1, 2016) (filed on April 2, 2014).

<sup>219</sup> See *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment (Sept. 25, 2007).

<sup>220</sup> See *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008).

<sup>221</sup> The *National Grid* tribunal issued its award in November 2008. The State then filed a motion to vacate or modify the award in U.S. courts. A U.S. court of appeals denied the motion to vacate the award on April 21, 2011. The U.S. Supreme Court denied certiorari on November 28, 2011. See *Argentine Republic v. National Grid PLC*, 2010 WL 1229950 *aff'd* 637 F.3d 365 (D.C. Cir. 2011) (per curiam) *cert. denied*, 565 U.S. 1059 (2011).

<sup>222</sup> See *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶ 4 (Oct. 31, 2011) (registering arbitration on June 12, 2003); *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Annulment (Sept. 22, 2014) (upholding award). For the second case, see *BG Group Plc. v. Republic of Arg.*, UNCITRAL, Award (Dec. 24, 2007); *Petition to Vacate or Modify Arbitration Award*, Republic of Arg. v. BG Grp. PLC, Case No. 08-485 (RBW) (D. D.C. Mar. 21, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0082.pdf> [<https://perma.cc/JS8T-LMKX>]; *BG Grp. PLC v. Republic of Arg.*, 572 U.S. 25 (2014); Press Release, Ministerio de Hacienda y Finanzas Públicas, Acuerdos con BG Group y El Paso Energy en el marco del CIADI (May 13, 2016),

				1 (2015) (filed in 2002) <sup>223</sup>
Mauricio Macri	Dec. 2015- Dec. 2019	PRO- Cambiemos	1 (2019) <sup>224</sup>	1 (2016) (filed in 2004) <sup>225</sup> 2 (2018) (1 filed in 2001 <sup>226</sup> and 1 in 2003) 1 (2019) (filed in 2004)
Alberto Fernandez	Dec. 2019- 2023	PJ and FdT		

### *Ecuador*

Name	Year	Political Affiliation	Cases filed	Cases resolved
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<https://www.italaw.com/sites/default/files/case-documents/italaw7319.pdf>  
[<https://perma.cc/M9H9-HUCX>] (settlement reached on the unpaid award).

<sup>223</sup> The claimants in the *LG&E* case withdraw their request for partial annulment on February 20, 2015. The original tribunal had issued its award on July 25, 2007. The claimants requested a supplementary decision that was issued on July 8, 2008, and then filed an annulment request on September 19, 2008. *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 8 (Oct. 3, 2006) (claims filed on December 21, 2001).

<sup>224</sup> See *Orazul Int'l España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award, ¶ 27 (Dec. 14, 2023) (noting date of registration as September 11, 2019).

<sup>225</sup> See *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Award (Nov. 27, 2013); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment (Feb. 1, 2016).

<sup>226</sup> The resubmission *Enron* tribunal issued its award on July 19, 2018. See *Case Details, Enron Creditors Recovery Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, ICSID <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/01/3> [<https://perma.cc/7GCC-ESCH>] (last visited Apr. 3, 2024).

Jamil Mahuad	Aug. 10, 1998-Jan 22, 2000	Popular Democracy		
Gustavo Noboa	Jan. 22, 2000-Jan. 15, 2003	Independent	1 (2001) <sup>227</sup> 1 (2002) <sup>228</sup>	
Lucio Gutierrez	Jan. 15, 2003-Apr. 20, 2005	Patriotic Society	2 (2003) <sup>229</sup> 1 (2004) <sup>230</sup>	
Alfredo Palacio	Apr. 20, 2005-Jan. 15, 2007	Independent	1 (2005) <sup>231</sup> 2 (2006) <sup>232</sup>	1 (2006) <sup>233</sup> 1 (Jan 8, 2007) (filed in 2001) <sup>234</sup>

<sup>227</sup> The *Repsol YPF* case was filed on October 5, 2001. See *Case Details, Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, ICSID (last visited Apr. 3, 2024).

<sup>228</sup> The *Occidental* case was filed on November 11, 2002 in the London Court of International Arbitration, which applied UNCITRAL's rules. See *Occidental Expl. v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, ¶ 6 (July 1, 2004).

<sup>229</sup> See *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN3481, Award, ¶ 1 (Feb. 3, 2006) (case filed on March 14, 2003); *M.C.I. Power Grp., L.C. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, ¶ 3 (Oct. 19, 2009) (notifying parties that arbitration began on April 7, 2008).

<sup>230</sup> The *Duke Energy* case was filed on October 7, 2004. See *Duke Energy Electroquil Partners v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶ 76 (Aug. 18, 2008).

<sup>231</sup> The *EMELEC* case was filed on May 26, 2005. See *Empresa Eléctrica del Ecuador, Inc. (EMELEC) v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award, ¶ 6 (June 2, 2009).

<sup>232</sup> The *Occidental Petroleum (II)* case was filed on July 13, 2006. See *Occidental Petrol. Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶ 6 (Oct. 5, 2012); The *Chevron and Texaco (I)* case was filed on December 21, 2006. See *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 34877, Final Award, ¶ 90 (Aug. 31, 2011).

<sup>233</sup> See *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN3481, Award (Feb. 3, 2006).

<sup>234</sup> See *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Award (Feb. 20, 2004).

Rafael Correa	Jan. 15, 2007- May 24, 2017	PAIS Alliance	3 (2008) <sup>235</sup> 2 (2009) <sup>236</sup> 1 (2010) <sup>237</sup> 3 (2011) <sup>238</sup>	1 (2007) (filed in 2002) <sup>239</sup> 1 (2008) (filed in 2004) <sup>240</sup> 1 (2009) (filed in 2005) (in favor of State) <sup>241</sup> 1 (2009) (filed in 2003) (in favor of State) <sup>242</sup> 1 (2010) (filed in 2008) (in
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<sup>235</sup> See *Burlington Res., Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 55 (June 2, 2010) (noting case registration on June 2, 2008); *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Award, ¶ 51 (Sept. 27, 2019) (noting case registration on June 4, 2008); *Murphy Expl. & Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award, ¶ 3 (Dec. 15, 2010), (noting case registration on April 15, 2008).

<sup>236</sup> See *Ulysseas, Inc. v. Republic of Ecuador*, PCA No. 2009-19, Final Award, ¶ 1 (Jun. 12, 2012) (case filed on May 8, 2009); *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Claimants' Notice of Arbitration (Sept. 23, 2009).

<sup>237</sup> See *RSM Prod. Corp. v. Republic of Ecuador*, U.N. CTR. FOR TRADE & DEV. IV. POL'Y HUB, <http://investmentpolicy.unctad.org/investment-dispute-settlement/cases/370/rsm-v-ecuador> [https://perma.cc/2CBA-BXM7] (last visited Apr. 3, 2024) (noting that case was filed in 2010)).

<sup>238</sup> See *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012-2, Award, ¶ 1.11 (Mar. 15, 2016) (case filed on January 21, 2011); *Murphy Expl. & Prod. Co. – Int'l v. Republic of Ecuador*, UNCITRAL PCA Case No. 2012-16, Final Award, ¶ 6 (Feb. 10, 2017) (case filed on September 21, 2011); *Zamora Gold Corp. v. Ecuador*, JUSMUNDI, <https://jusmundi.com/en/document/decision/fr-zamora-gold-corporation-v-ecuador-pas-encore-disponible-saturday-1st-january-2011> (last visited Apr. 3, 2024) (case filed on July 7, 2011).

<sup>239</sup> See *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award (July 2, 2004). Ecuador challenged the award in U.K. courts, and the court of appeal issued its final order rejecting Ecuador's vacatur on July 4, 2007. See *Judgment, Republic of Ecuador v. Occidental Expl. & Prod. Co.*, [2006] EWHC 345 (Comm) (Apr. 4, 2007).

<sup>240</sup> See *Duke Energy Electroquil Partners v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008).

<sup>241</sup> See *Empresa Eléctrica del Ecuador, Inc. (EMELEC) v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award (June 2, 2009) (finding in favor of the State).

<sup>242</sup> See *M.C.I. Power Grp., L.C. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (July 31, 2007); *M.C.I. Power Grp., L.C. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment (Oct. 19, 2009).

				favor of State) <sup>243</sup> 1 (2012) (filed in 2009) (in favor of State) <sup>244</sup> 1 (2014) (filed in 2006) <sup>245</sup> 1 (2015) (filed in 2006) <sup>246</sup> 1 (2016) (filed in 2011) <sup>247</sup> 1 (2017) (filed in 2011) <sup>248</sup>
Lenin Moreno	May 24, 2017-May 24, 2021	PAIS Alliance	1 (2019) <sup>249</sup>	1 (2017) (filed in 2008) <sup>250</sup> 1 (2019) (filed in 2009) <sup>251</sup>

<sup>243</sup> See *Murphy Expl. & Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award, (Dec. 15, 2010) (finding in favor of the State).

<sup>244</sup> See *Ulysseas, Inc. v. Republic of Ecuador*, PCA No. 2009-19, Final Award (Jun. 12, 2012) (finding in favor of the State).

<sup>245</sup> See *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 34877, Final Award (Aug. 31, 2011) (finding in favor of the investor); HR 26 September 2014, ECLI:NL:HR:2014:2837 (*Chevron Corp./Republiek Ecuador*) (Neth.) (upholding the award).

<sup>246</sup> See *Occidental Petrol. Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012) (finding in favor of the investor); *Occidental Petrol. Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment (Nov. 2, 2015).

<sup>247</sup> See *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012-2, Award (Mar. 15, 2016) (finding in favor of the investor).

<sup>248</sup> See *Murphy Expl. & Prod. Co. – Int'l v. Republic of Ecuador*, PCA Case No. 2012-16, Final Award (Feb. 10, 2017) (finding in favor of the investor).

<sup>249</sup> See *Worley Int'l Serv. Inc. v. Republic of Ecuador*, UNICTRAL, PCA Case No. 2019-15, Final Award, ¶ 8 (Dec. 22, 2023) (case registered on Feb. 14, 2019).

<sup>250</sup> See *Burlington Res., Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Award (Feb. 7, 2017) (finding in favor of the investor); *Burlington Res., Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Annulment (Dec. 8, 2017) (finding in favor of the investor).

<sup>251</sup> The *Chevron Corporation and Texaco Petroleum (II)* decision has been subjected to several annulment proceedings in many jurisdictions, but the last recorded decision confirming the award was issued on November 17, 2023. See HR 12 April 2019, ECLI:NL:HR:2019:565 (*Republiek Ecuador/Chevron Corp.*) (Neth.) The record shows that additional proceedings have been initiated against activists involved in the case.

Guillermo Lasso	2021-	Creating Opportunities		1 (2021) (filed in 2008) <sup>252</sup>

### Venezuela

Name	Year	Political Affiliation	Cases filed	Cases resolved
Rafael Caldera	Feb. 2, 1994- Feb. 2, 1999	National Convergence		
Hugo Chavez	Feb. 2, 1999- Mar. 5, 2013	Fifth Republic (1998-2000) United Socialist Party (2000-2013)	1 (2004) <sup>253</sup> 2 (2007) <sup>254</sup> 1 (2008) <sup>255</sup>	1 (2013) (in favor of State) <sup>262</sup> 1 (2010) (in favor of State) <sup>263</sup>

<sup>252</sup> See *Perenco Ecuador Ltd. v. Republic of Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Award (Sept. 7, 2019) (finding in favor of the investor); *Perenco Ecuador Ltd. v. Republic of Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Annulment (May 28, 2021).

<sup>253</sup> The *Vannessa Ventures* case was filed on October 28, 2004. See *Vannessa Ventures Ltd. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/04/6, Award, ¶ 3 (Jan. 16, 2013).

<sup>254</sup> See *Venez. Holdings B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/27, Resubmission Award, ¶ 6 (July 10, 2023) (noting case registration on October 24, 2018); see also *Case Details, ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/30, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/07/30> [https://perma.cc/X27J-VUK3] (last visited Apr. 3, 2024) (noting date of registration as Dec. 13, 2007).

<sup>255</sup> The *Nova Scotia (I)* claim was filed on October 1, 2008. See *Nova Scotia Power Inc. (Can.) v. Bolivarian Republic of Venez.*, UNCITRAL, PCA Case No. 32825, Decision on Jurisdiction, ¶ 1 (Apr. 22, 2010).

<sup>262</sup> See *Vannessa Ventures Ltd. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/04/6, Award (Jan. 16, 2013) (finding in favor of the State).

<sup>263</sup> See *Nova Scotia Power Inc. (Can.) v. Bolivarian Republic of Venez.*, UNCITRAL, PCA, Case No. 42538, Award (Aug. 30, 2010) (finding in favor of the State).

			1 (2009) <sup>256</sup> 1 (2010) <sup>257</sup> 3 (2011) <sup>258</sup> 1 (2012) <sup>259</sup> 1 (2013) <sup>260</sup> 1 (2014) <sup>261</sup>	
Nicolas Maduro	Mar. 5, 2013-	United Socialist Party	1 (2019) <sup>264</sup>	3 (2016) <sup>265</sup>

<sup>256</sup> The *Gold Reserve* case was registered on November 9, 2009. See *Gold Rsrv. Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 9 (Sept. 22, 2014).

<sup>257</sup> The *Tidewater* case was filed on March 5, 2010. See *Tidewater Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, ¶ 2 (Dec. 23, 2010).

<sup>258</sup> The *Nova Scotia (II)* claim was filed on January 26, 2011. See *Nova Scotia Power Inc. (Can.) v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/11/1, Excerpts of the Award of April 30, 2014, ¶ 6 (Apr. 30, 2014). The *Highbury International AVV* case was filed on January 5, 2011. See *Highbury Int'l AVV v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/11/1, Award, ¶ 5 (Sept. 26, 2013). The *Crystallex* case was filed on March 9, 2011. See *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/11/2, Award, ¶ 65 (Apr. 4, 2016).

<sup>259</sup> See *Rusoro Mining Ltd. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/12/5, Award, at 7 (Aug. 22, 2016) (noting date of registration as August 1, 2012).

<sup>260</sup> See *Venez. US, S.R.L. (Barb.) v. Bolivarian Republic of Venez.*, UNCITRAL, PCA Case No. 2013-34, Interim Award on Jurisdiction, ¶ 3 (July 26, 2016) (registering arbitration on March 22, 2013).

<sup>261</sup> The *Anglo-American* case was filed on April 10, 2014. See *Anglo Am. PLC v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/14/1, Award, ¶ 9 (Jan. 18, 2019).

<sup>264</sup> The *Williams* case was filed on October 16, 2019. See *Case Details, Williams Companies Int'l Holdings B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/19/3, ICSID, [https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB\(AF\)/19/3](https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB(AF)/19/3) [<https://perma.cc/G6V7-4L7Y>] (last visited Apr. 3, 2024).

<sup>265</sup> See *Tidewater Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/10/5, Award (Mar. 13, 2015); *Tidewater Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/10/5, Decision on Application for Revision (July 7, 2015); *Tidewater Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/10/5, Decision on Annulment (Dec. 27, 2015); see also *Rusoro Mining Ltd. v. Bolivarian*

				1 (2014) (in favor of State) <sup>266</sup> 2 (2019) (in favor of State) <sup>267</sup>
Juan Guaido (Disputed)	Jan. 23, 2019-	Independent		

### Bolivia

Name	Year	Political Affiliation	Cases filed	Cases resolved
Hugo Banzer	Aug. 6, 1997-July 1, 2001 (resignation)	Nationalist Democratic Action		
Jorge Quiroga (Vice President of Banzer)	July 1, 2001-Aug. 7, 2001 (interim) Aug. 7, 2001-Aug. 6, 2002	Nationalist Democratic Action		
Gonzalo Sanchez	Aug. 6, 2002-Oct. 17, 2003	Revolutionary Nationalist		

Republic of Venez., ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016) (finding in favor of the investor); *see also* Order, Gold Rsrv. Inc. v. Bolivarian Republic of Venez., Case No. 14-2014 (D. D.C. Jan. 20, 2016), <https://www.italaw.com/sites/default/files/case-documents/italaw9057.pdf> [<https://perma.cc/8YXG-BKV5>]; Judgment, Gold Rsrv. Inc. v. Bolivarian Republic of Venez., [2016] EWHC 153 (Comm) (Feb. 2).

<sup>266</sup> *See* Nova Scotia Power Inc. (Can.) v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/11/1, Excerpts of the Award of April 30, 2014 (Apr. 30, 2014).

<sup>267</sup> *See* Highbury Int'l AVV v. Bolivarian Republic of Venez., ICSID Case No. ARB/11/1, Award (Sept. 26, 2013); Highbury Int'l AVV v. Bolivarian Republic of Venez., ICSID Case No. ARB/11/1, Decision on Annulment (Sept. 9, 2019) (finding in favor of the State); *see also* Anglo Am. PLC v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/14/1, Award (Jan. 18, 2019) (finding in favor of the State).



de Lozada	(resignation)			
Carlos Mesa (vice president of Sanchez de Lozada)	Oct. 17, 2003-June 9, 2005 (resigned)	Independent		
Eduardo Rodríguez Veltzé (President of the Supreme Court)	June 9, 2005-Jan. 22, 2006	Independent		
Evo Morales	Jan. 22, 2006-Feb. 7, 2009 (new constitution) Feb. 7, 2009-Nov. 10, 2019 (resigned)	Movement for Socialism	1 (2006) <sup>268</sup> 1 (2010) <sup>269</sup>	1 (2014) <sup>273</sup> 1 (2018) <sup>274</sup> 1 (2019) <sup>275</sup>

<sup>268</sup> The *Quiborax* case was registered on February 6, 2006. See *Quiborax S.A. v. Plurinational State of Bol.*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶ 6 (Feb. 26, 2010).

<sup>269</sup> See *Guaracachi Am., Inc. v. Plurinational State of Bol.*, UNCITRAL, PCA Case No. 2011-17, Notice of Arbitration (Nov. 24, 2010).

<sup>273</sup> See *Guaracachi Am., Inc. v. Plurinational State of Bol.*, UNCITRAL, PCA Case No. 2011-17, Award (Corrected) (Jan. 31, 2014); *Guaracachi Am., Inc. v. Plurinational State of Bol.*, UNCITRAL, PCA Case No. 2011-17, Letter from Tribunal to Parties on Correction of Award (Mar. 3, 2014).

<sup>274</sup> See *Quiborax S.A. v. Plurinational State of Bol.*, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015); *Quiborax S.A. v. Plurinational State of Bol.*, ICSID Case No. ARB/06/2, Decision on Annulment (May 18, 2018); *Quiborax S.A. v. Plurinational State of Bol.*, ICSID Case No. ARB/06/2, Bolivia's Press Release on the Settlement Agreement (June 7, 2018).

<sup>275</sup> See *S. Am. Silver Ltd. (Berm.) v. Plurinational State of Bol.*, PCA Case No. 2013-15, Award (Nov. 22, 2018); Complaint for the Recognition and Enforcement of International Arbitral Award, *S. Am. Silver Ltd. (Berm.) v. Plurinational State of Bol.*, Case No. 19-540 (D. D.C. Feb. 28, 2019), <https://www.italaw.com/sites/default/files/case-documents/italaw10389.pdf> [<https://perma.cc/T8RQ-MJR7>]; *S. Am. Silver Ltd. (Berm.) v. Plurinational State of Bol.*, PCA Case No. 2013-15, Press Release Settlement Agreement (Aug. 29, 2019).

			1 (2013) 270 1 (2016) 271 1 (2018) 272	
Jeanine Áñez (interim, President of the Senate)	Nov. 12, 2019- Nov. 8, 2020	Social Democratic		
Luis Arce	Nov. 8, 2020-	Movement for Socialism		

### Peru

Name	Year	Political Affiliation	Cases filed	Cases resolved
Alberto Fujimori	July 28, 1995- July 28, 2000 July 28, 2000- Nov. 21, 2000 (resigned)	Fujimorism		
Valentin Paniagua	Nov. 22, 2000- July 28, 2001	Popular Action		

<sup>270</sup> See *South Am. Silver Ltd. (Berm.) v. Plurinational State of Bol.*, PCA Case No. 2013-15, Notice of Arbitration (Apr. 30, 2012).

<sup>271</sup> See *Glencore Fin. (Berm.) Ltd. v. Plurinational State of Bol.*, UNCITRAL, PCA Case No. 2016-39, Claimant's Notice of Arbitration (July 19, 2016).

<sup>272</sup> The *Estate of Julio Miguel Orlandini Agreda* case was filed on February 5, 2018. 1. See *Estate of Julio Miguel Orlandini Agreda v. Plurinational State of Bol.*, UNCITRAL, PCA Case No. 2018-39, PERMANENT CT. ARB., <https://pca-cpa.org/en/cases/204/> [<https://perma.cc/6HL6-XPSS>] (last visited Apr. 3, 2024).

(Temporary -President of Congress)				
Alejandro Toledo	July 28, 2001- July 28, 2006	Possible Peru	<sup>1276</sup>	
Alan Garcia	July 28, 2006- July 28, 2011	APRA	<sup>1277</sup>	<sup>1278</sup>
Ollanta Humala	July 28, 2011- July 28, 2016	Peruvian Nationalist Party	1 (2011) <sup>279</sup> 1 (2012) <sup>280</sup> 1 (2014) <sup>281</sup>	1 (2013) <sup>282</sup> 1 (2015) <sup>283</sup>
Pedro Pablo Kuczynski	July 28, 2016- Mar. 23, 2018 (resigned)	Peruvians for Change		1 (2016) <sup>284</sup>

<sup>276</sup> The *Duke Energy* case was filed on October 24, 2003. See *Case Details, Duke Energy Int'l Peru Inv. No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, ICSID <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/03/28> [<https://perma.cc/3QTX-58LQ>] (last visited Apr. 3, 2024).

<sup>277</sup> *Renco Group* was filed on April 4, 2011. *Case Details, Renco Grp., Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/13/1> [<https://perma.cc/FXC9-MFWA>] (last visited Apr. 3, 2024).

<sup>278</sup> See *Duke Energy Int'l Peru Inv. No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment (Mar. 1, 2011).

<sup>279</sup> The *Carabeli Contaruse* case was filed on April 15, 2011. See *Case Details, Caravelí Cotaruse Transmisora de Energía S.A.C. v. Republic of Peru*, ICSID Case No. ARB/11/9, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/11/9> [<https://perma.cc/B6EX-QSND>] (last visited Apr. 3, 2024).

<sup>280</sup> The *Pluspetrol Peru* case was filed on September 11, 2012. See *Case Details, Pluspetrol Perú Corp. v. Perupetro S.A.*, ICSID Case No. ARB/12/28, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/28> [<https://perma.cc/SKR5-JCDT>] (last visited Apr. 3, 2024).

<sup>281</sup> The *Bear Creek Mining* case was filed on August 18, 2014. See *Case Details, Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/14/21> [<https://perma.cc/G7CM-BW9K>] (last visited Apr. 3, 2024).

<sup>282</sup> See *Caravelí Cotaruse Transmisora de Energía S.A.C. v. Republic of Peru*, ICSID Case No. ARB/11/9, Award (Apr. 15, 2013).

<sup>283</sup> See *Pluspetrol Perú Corp. v. Perupetro S.A.*, ICSID Case No. ARB/12/28, Award (May 21, 2015).

<sup>284</sup> See *Renco Grp., Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Final Award (Nov. 9, 2016).

				1 (2017) <sup>285</sup>
Martin Vizcarra (Vice president succession)	Mar. 23, 2018-Nov. 9, 2020 (removed)	Independent	1 (Dec. 2018) <sup>286</sup> 2 (2019) <sup>287</sup> 5 (2020) <sup>288</sup>	
Mauel Merino (President of Congress, temporary)	Nov. 10, 2020-Nov. 15, 2020 (removed)	Popular Action		

<sup>285</sup> See *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017).

<sup>286</sup> *Hydrika* was filed on December 28, 2018. See *Case Details, Hydrika 1 S.A.C. v. Republic of Peru*, ICSID Case No. ARB/18/48, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/18/48> [<https://perma.cc/PN36-ML2G>] (last visited Apr. 3, 2024).

<sup>287</sup> *IC Power* was filed on June 27, 2019. See *Case Details, IC Power Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/19/19> [<https://perma.cc/FTE5-EP2F>] (last visited Apr. 3, 2024). The *Latam Hydro* case was filed on September 19, 2019. See *Case Details, Latam Hydro LLC v. Republic of Peru*, ICSID Case No. ARB/19/28, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/19/28> [<https://perma.cc/NEM8-BT84>] (last visited Apr. 3, 2024).

<sup>288</sup> The *Oderbrecht* case was filed on February 4, 2020. See *Case Details, Odebrecht Latinvest S.à.r.l. v. Republic of Peru*, ICSID Case No. ARB/20/4, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/4> [<https://perma.cc/8HY9-4ZZD>] (last visited Apr. 3, 2024). The *Freeport-McMoRan Inc.* case was filed on March 16, 2020. See *Case Details, Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/8> [<https://perma.cc/LQP2-LY8Q>] (last visited Apr. 3, 2024). The *SMM Cerro Verde Netherlands B.V.* case was filed on May 13, 2020. See *SMM Case Details, Cerro Verde Netherlands B.V. v. Republic of Peru*, ICSID Case No. ARB/20/14, ICSID <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/14> [<https://perma.cc/T8FE-8RRU>] (last visited Apr. 3, 2024). The *Lupaka Gold Corp.* case was filed on October 30, 2020. See *Case Details, Lupaka Gold Corp. v. Republic of Peru*, ICSID Case No. ARB/20/46, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/46> [<https://perma.cc/L2ED-LTJ9>] (last visited Apr. 3, 2024). The *Bacilio Amorrotu* case was filed on February 13, 2020. See *Bacilio Amorrotu (U.S.A.) v. Republic of Peru*, PCA Case No. 2020-11, PERMANENT CT. ARB., <https://pca-cpa.org/en/cases/244/> [<https://perma.cc/N84A-M576>] (last visited Apr. 3, 2024).

Francisco Sagasti (President of Congress, temporary)	Nov. 17, 2020- July 28, 2021	Purple Party	1 (2020) <sup>289</sup>	
Pedro Castillo	July 28, 2021-	Free Peru		1 <sup>290</sup>

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<sup>289</sup> See *Case Details, Worth Cap. Holdings 27 LLC v. Republic of Peru*, ICSID Case No. ARB/20/51, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/51> [<https://perma.cc/36L9-M4LQ>] (last visited Apr. 3, 2024) (registering arbitration on December 15, 2020).

<sup>290</sup> The *Hydrika* case was decided on August 17, 2021. *Case Details, Hydrika 1 S.A.C. v. Republic of Peru*, ICSID Case No. ARB/18/48, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/18/48> [<https://perma.cc/PN36-ML2G>] (last visited Apr. 3, 2024).