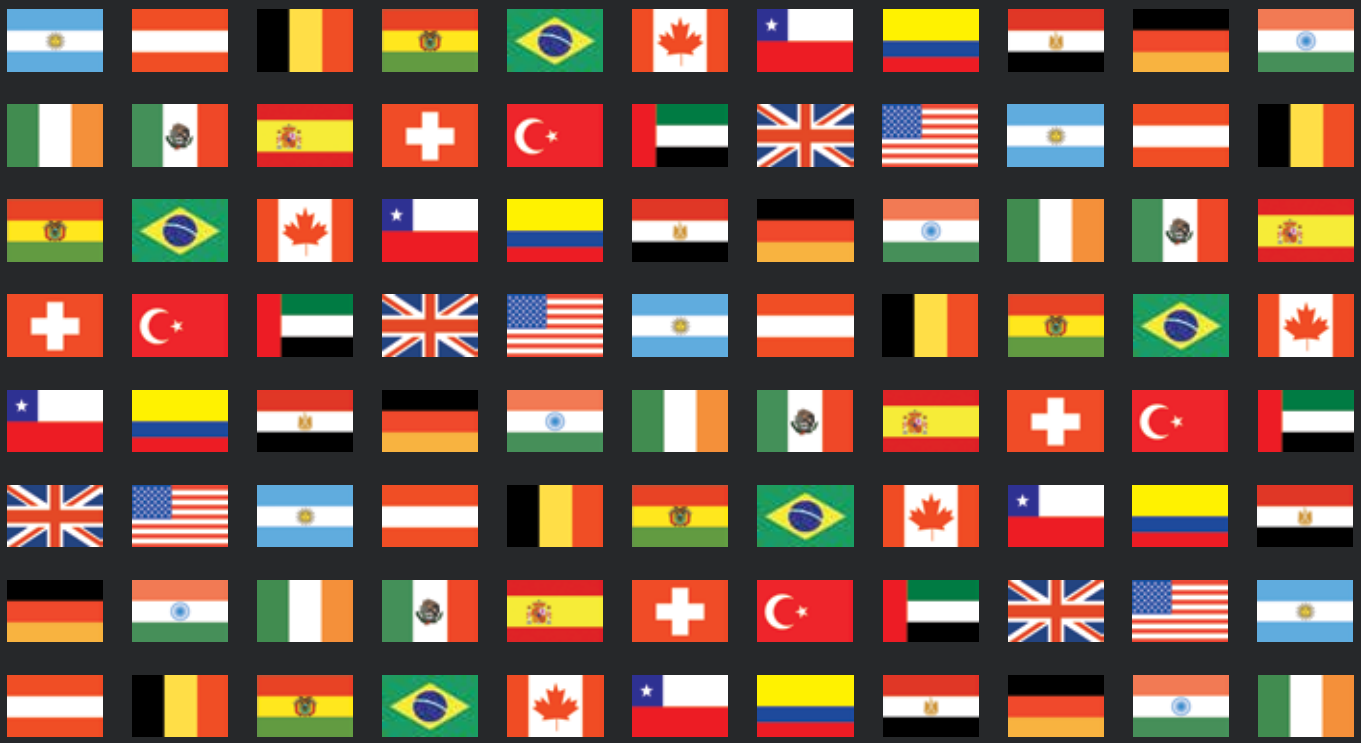
Energy Disputes

Contributing editors
William D Wood, Neil Q Miller, Holly Stebbing, Lauren W Varnado and Ayaz Ibrahimov



2018

GETTING THE DEAL THROUGH

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Norton Rose Fulbright

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Third edition

Getting the Deal Through is delighted to publish the third edition of *Energy Disputes*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on India.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, William D Wood, Neil Q Miller, Holly Stebbing, Lauren W Varnado and Ayaz Ibrahimov of Norton Rose Fulbright LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
January 2018

Argentina

Luis Erize

Abeledo Gottheil Abogados

General

1 Describe the areas of energy development in the country.

Argentina's energy matrix is highly diversified. Power sources include hydro (around 34 per cent), natural gas fired turbines (60 per cent), nuclear (5 per cent) and other (2 per cent). However, since 2003, Argentina has evolved from being an energy net exporter to a net importer, due to (a now abandoned) market interference by governmental policies that stalled investments. Twenty-five per cent of the natural gas aggregate demand is supplied by natural gas imported by the government from Bolivia, and from LNG sources to be regasified, at significantly higher prices than the domestic prices imposed on the local upstream offer, amid a maze of price differentials according to the supply source (existing production, 'new', or non-conventional production under specially approved programmes). The result of this was to contribute to the growing governmental deficit up until 2014, which has since started to be reduced because of the fall in international energy prices. Since 2013, crude oil production has been spared this interference (that had in previous years established an export withholding tax resulting in a price of US$42 per barrel for the domestic crude oil producer at times where the international price was at least double that), by the government deleting such export withholding, and sponsoring an 'agreement' between the downstream and the upstream oil industry ensuring US$67 per domestic barrel (though not entirely respected, as refineries reduced purchase price to lower values than those of the agreement, described below) until the end of 2016, passed through to a heavily taxed gasoline and gas oil price to consumers. In December 2016, convergence with international prices was sought by a renewal of such agreement between the upstream (supported by the oil producing provinces and the unions) and the downstream for establishing a floor of US$55 per barrel (47 for the heavier kind) for 2017, under the supervision of the government acting as an 'umpire' by means of loosening the grip on imports and, on the other side, allowing gasoline quarterly increases (to keep pace with inflation) to align them with those upstream crude oil prices on a netback basis. As is evident, such crude oil higher-than-import parity prices were sustained through an import control limiting the highly concentrated, four-refineries procurement of imported crude oil. Taking the profit on international prices increase trend in 2017, the government has announced that no prior control on crude oil imports (and its by-products) will be made as from the end of 2017 onwards (Decree 962/17, superseded Decree 192/17 and Res E 47/17, that had established the pecking order for importers according to accrued data) that had made official the, until then, hushed crude oil imports' control policy. At current prices, no incentives for secondary or other enhancement recovery techniques on existing conventional, predominantly oil producing fields seem in sight, to counter the decline of oil aggregate Argentine production of 7 to 8 per cent through 2017.

As for natural gas, the road has been bumpier. The government had set forth (Resolution of the Ministry of Energy and Mining 28/16) the upstream cost for the natural gas tariffs at circa US$5 per MMBtu, to be passed through to tariffs, thus reducing the gap of historic natural gas production depressed prices, depending on the different destinations (residential or large customers). The Resolution was, however, based, while attempting to correct them partially, on prior resolutions adopted by the former government in excess of regulatory powers. In a class action case, the Federal Supreme Court (although it was limited to residential customers) annulled the passing through of such upstream costs to tariffs (details of the case are discussed below). The government swiftly followed the criterion set forth in the award and, after calling public hearings to discuss these issues, reduced the increase for pass-through to a median price mix of US$3.5 per MMBtu (US$5.22 for the gas producer) with an increase price path (as from March 2017, US$4.72, and US$5.64 for the gas producer, as per Res E 74/17) for the next three years, up to US$6.8 per MMBtu to end-2019 (Res E 212/2016; now Res 474-E 2017). Both power and natural gas distribution tariffs continue to experiment increases to realign price subsidised values to market prices, and the gas upstream prices of conventional sources follow the same, while respecting the public hearings' procedures as per the Supreme Court guidelines that defused conflicts, while the value added feed-in tariff increases of distributors result from the Tariffs Reviews accomplished by the relevant governmental agencies, ENARGAS and ENRE.

The Gas Plans, rewarding non-conventional production (shale gas and tight gas, as well as the increased production beyond historic levels per basin and field, adjusted as per their natural depletion) with a differential guaranteed up to US$7.5 per MMBtu, were kept for 2017. Resolution of the Minister of Energy E 46/17, complemented with Resolution 419/17 (and Res E 447/17 reaching the Austral basin) has extended the US$7.5/MMBtu government's price support for non-conventional (tight or shale) gas to be continued in 2018 (Argentina is the second largest shale gas reserve in the world), and with a declining path until 2021, guaranteeing such floor (net of royalties) with respect to the median price of the aggregate natural gas (conventional or not) sales of the applicant. But such extension is now reserved for the incremental production of the fields (without computing the decline curve of the same), or for new ones, as from 2017 onwards, confirming the old adage that what is new today becomes old tomorrow in the eyes of a regulator; a source for conflicts.

Gas exports, forbidden for more than 10 years, are now being allowed provided they include interruptible supply clauses, with no penalisation for interruption, though coexisting with seasonal, substantial LNG imports and of the contract gas from Bolivia (Resolution 407/17 MEyM regarding swaps, followed by Res MEyM 962/17 for interruptible supply exports). Long-range planning and stable rules are also necessary.

The government was considering reinstating the 1990s natural gas spot market as from the second half of 2018, later on subject to new postponements, while interim fixing supply quotas are to be allocated to distributors at set prices and dispatch priorities, as in former times. This is reminiscent of the overregulated market of segregated gas prices that led to a stall of investments in the 2002 to 2009 period (a description of which can be found in 'Eminent Domain and Regulatory Changes' by Luis Erize, in *Property and the Law in Energy and Natural Resources*, Oxford University Press), now dampened by the price path for new investments in non-conventional exploitation and for gradual increase of well head prices. The transition to open market policies would demand a series of measures to make different priced gas sources (conventional/non-conventional/imported) to coexist, but that can only lead to a single priced market, at the level of net back, import parity price signals, to be passed through to tariffs for customers downstream, and for the market to set price to gas-fired generators. But this would require the leading role of a market of standardised

term contracts for distributors, large customers, and power generators, requiring as well similar reforms on the power sector, in order to avoid opportunistic behaviours that could jeopardise reliability of supply (which requires power capacity agreements and non-interruptible gas supply contracts to be put in place as well). Thus, the spot markets in both natural gas and power should be left to solve the shortfalls of contract suppliers, and not be established as the market through which the bulk of transactions would be effected. (Apparently, the government is starting to consider solutions for contract markets that were proposed in the Luis Erize paper 'Electric Power in Argentina: a Diagnosis of Regulatory Distortion, Investment Deficit and a Sustainable Development Proposal', published in *RADEHM, Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería*, No. 7, Nov-Dec 2015, pp 285-330.)

The current scenario anticipating a regulatory induced gradual increase of the renewables' share in the power generation matrix, to reach as from end-2017 8 per cent of the aggregate power supply, to increase in following years up to 20 per cent on a sliding scale (it is less than 3 per cent at present, excluding hydro, thus postponing in practice the target) has been attended by successive rows (the first one, later on extended, and a second one, by Resolution ME&N 275/17) of public bids by CAMMESA for 20 years supply agreements' offers (labelled as Joint Sales), at a price subject to escalation, to attempt to reach such targets in the supply side. The big consumers (industry, etc) over and above a capacity demand above 300 KW are forced to comply with the 8 per cent quota of renewables with respect to their own overall power demand. The regulation of the aggregate demand of renewables' sourced power allows some sort of competition with the power purchased by the government (the Joint Sales), with either the remaining renewables offers that may be installed for the industrial consumers, or renewables energy auto generated by large consumers. Such competition is subject to an iron fisted choice by the large customer, to be made once each five years, to decide if its 8 per cent renewables consumption quota will be filled either way, being unable to switch from one to the other source during such period.

In order to give some flexibility, it was further admitted that the large consumer might avoid making such a choice, thus both consuming renewables' sourced energy from the CAMMESA's Joint Sales pool and from other renewables' sourced energy, but then facing incremental costs for power reserve and other charges.

Thus a quota system segregating the renewables captive demand from the rest of the energy aggregate supply, and a forced choice between (i) government-backed (the Joint Sales) supply (at median price of all the bids referred above) and (ii) the supply obtained in a supposedly free market, or by auto generation by large consumers themselves, seems to be a confusing method to assure (by making the large consumer's bet of opting out quite risky) that the already acquired future production by the government from the winning bidders (the Joint Sales) will effectively meet their captive demand. In effect, the individual default of the yearly quota of renewables' consumption by each large industrial consumer, and ensuing power consumption to match such deficit, from other sources than the renewables contracted out of the governmental offer mentioned in (i) above, will be heavily penalised.

The intermittency of renewables, which were allowed to bid with no capacity commitment, pretends to be solved by the government through offering capacity back-ups for the pass-through of such contracts to great consumers, at a price that will be the subject of separate bids, with unpredictable results. The complexity of the system is compounded by the grid shortcomings, with a priority of dispatch adding to the uncertainty of making such choices in the medium to long term.

If, on the other hand, the natural gas (from any source) market were free from any remaining regulatory interference, it would reach an import parity price (at present oscillating around US$6/MMBtu for imported LNG regas sources), as Argentina is a net importer of up to 25 per cent of its aggregate gas consumption, thus freeing the government of the heavy burden for sustaining these programmes (as the price differential between the international price and the domestic market price would be substantially reduced). The import parity is the ironclad law of markets, washing away economically and technically wrong concepts of reference prices by computing Henry Hub prices plus transport costs into the country. The shale and tight gas projects expect a soft landing into market prices that, when freed from regulatory measures, would reach such import parity level, making them profitable. The significantly quick declining curve of shale fields' exploitation and the need for continuing, short term, investments, does not allow a forecast of long-term scenarios.

Argentina is currently one of the first world-ranking non-conventional (shale) resource countries (second in shale gas, fourth in shale oil) and one of the first countries to explore and develop these resources apart from the United States.

The prospect of further development can be expected despite the current low international energy prices as a result of the following:

- the law reforms (in 2014) extending current exploitation concessions – mainly to the benefit of the state-controlled YPF (the most significant oil and gas upstream and midstream player in Argentina) – and further renewals;
- the soft landing of the end (for the time being, depending on the satisfactory evolution of international crude oil prices) of the domestic price agreement of the oil industry for crude oil referred to above; and
- the need to reduce the governmental budget deficit (also requiring a significant reduction to power and natural gas consumption subsidies) and the aggregate trade deficit caused by significant energy imports, which will lead to higher overall price increases for gas and power as well, while narrowing gas and power consumption subsidies to well-focused social tariffs for the disadvantaged.

2 Describe the government's role in the ownership and development of energy resources. Outline the current energy policy.

Federal and provincial states have the eminent domain (and collect law-capped royalties on the produced hydrocarbons) of the subsoil and resources thereof in their respective territories. Federal legislation sets forth the legal framework for the oil and gas upstream, midstream and downstream, as well as for power, on account of its many inter-jurisdictional issues. The traditional legal framework under which the 1990s energy growth was ensured through deregulation (and the ensuing privatisation of previously government-held entities) and market-oriented policies is expected to be enforced again, by dismantling the maze of regulations from the 2000s that made for captive markets, segmentation of demand, price caps and subsidies to compensate the resulting stagnation of the energy sector. These regulations disfigured the legal framework they were supposed to be implementing in detail. However, the path shown by the current government (by fixing a natural gas price increase path for the next few years to reach import parity prices) is still to be defined, as solutions are taken on a provisional basis with no long-range plans allowing the oil and gas industry to forecast a return to open market policies. A selective reduction of the heavy taxes imposed indirectly on oil (by hitting gasoline prices) and gas production is necessary, to privilege non-conventional oil and gas exploration and production, as a more stable substitute for the Gas Plans and for the crude oil 'agreement', now left aside (or perhaps suspended). The confusingly dampening effect on tariffs of government-subsidised supply of imported natural gas (more than 25 per cent of the aggregate supply) at lower-than-cost prices alters the market signals with cheap energy, stimulating consumption and lack of efficiency. The gradual increase of prices described above is not sufficient to envisage a bold investment surge in the sector, which should be made on the basis of a forecast of stable rules. For more information on analysing the gas sector and its interaction with the power sector, see 'Electric Power in Argentina: A Diagnosis of Regulatory Distortion, Investment Deficit, and a Sustainable Development Proposal' by Luis A Erize, in *Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería*, No. 7, pp. 285–330. The maze of gas prices imposed by the body of regulations that Argentina is now getting rid of can be revisited in 'Eminent Domain and Regulatory Changes' by Luis Erize, in *Property and the Law in Energy and Natural Resources*, Oxford University Press. The interaction between both markets has been studied for a long time, as shown in our 'Proposal of Addendum to the Regulatory Framework of the Argentine Electric Sector', by Badaraco et al, prepared for submission to the First Latin-American and Caribbean Congress of Natural Gas and Electricity, organised by the Argentine Oil and Gas Institute, the American Gas Association and the Society of Petroleum Engineers (1997). In it, the interaction between both markets is analysed, and the proposal intended to show that a global approach on both is necessary,

closing the circle that had been initiated with two entirely separate legal frameworks, for natural gas and electric energy.

The present Minister of Energy and Mining eliminated Decree 1277/12, an all-encompassing framework that went far beyond the law that declared the expropriation of YPF's control. This decree aimed to regulate all the stages of exploration and exploitation of hydrocarbons as well as all other downstream activities, impose mandatory investment plans to the exploitation concession holders, ensure full disclosure of costs and prices, and other restrictions that run counter to the existing laws (among others, the disregard of the decrees under which the existing concessions were granted in former years). The government elected at the end of 2015 has therefore committed to a policy to return to the original legal framework.

It remains to be seen whether the significant effort by the federal government elected at the end of 2015 will restore market signals for attracting the needed investments, especially by: dismantling (and not merely by gradually increasing energy prices and tariffs) the price segmentation of natural gas and power generation prices, as well as the implied or express price caps; while building a market for medium and long-term contracts (both for power and for natural gas) allowing the passing-through of the resulting cost and the elimination of opportunistic behaviour, leaving the spot markets for the make-up of temporary supply deficits or producers themselves.

As regards natural gas, the current Resolutions of the Ministry of Energy and Mining, intending to positively respond to a gradual increase of natural gas upstream prices and tariffs, are, however, confusingly based on the resolutions of the former government that were issued in excess of powers and pretexted forced agreements with the industry, instead of clearly steering away from them and regulating in detail the effective transition steps towards the goals and principles set forth in the Gas Law. The doctrine emerging from the September 2016 Federal Supreme Court award that provisionally suspended a tariff and price hike, is that as long as the legal framework requires open market principles, the government should issue regulations that respect the same, at least as a goal to be achieved in the future, and set forth clear measures to achieve such passage, steering away from provisional measures establishing such levels on a day-to-day basis.

The current Hydrocarbons Law 27007, which granted extensions of exploitation concessions, caps to government take and promises of standardisation of terms thereof, should be accompanied by a transparent market for the farm-ins that will be the basis of the market renaissance of new investments, especially due to the dominant position of YPF regarding shale resources.

Commercial/civil law – substantive

3 Describe any industry-standard form contracts used in the energy sector in your jurisdiction.

In the oil and gas upstream industry, the typical set of agreements is applicable, starting with the joint operating agreements ((JOAs), for which the choice is wide, as the AIPN models compete with AAPL, CAPL, AIPN (Australian version as well), OGUK, etc) that coexist in Argentina with its local version (Unión Transitoria), as a non-partnership, unincorporated agreement to be registered in the Public Registry of Commerce, updated under the new Civil and Commercial Law Code that has recently come into force. The extended exploitation concessions are still operated with JOAs as initially used during the 1990s, therefore as per the AIPN model of such time (and in many cases, with partial incorporation of uncomplete formulas to address, for example, rights of first refusal, balancing, etc, a source for continuing conflicts), and eventually, requesting a financial or economic carry of the title holder, or a negotiated price, and offering or not participation in the title as well, and with eventual sole risk provisions. Alternatively, production-sharing or services contracts may be entered into with the holder of the concession, mixed with a carry. Farm-in agreements do and will play a significant role for participating in the existing exploitation concessions and those to be extended, the holder of title to the concessions being the other party: YPF; the provincial entities that have emulated YPF's role under the redistribution of jurisdiction and eminent domain of the subsurface hydrocarbons to the provinces, even under the stricter terms imposed by the current Hydrocarbons Law 27007; and private oil companies.

As regards the oil services industry, the current international versions for seismics, drilling, workovers, etc, are adapted to local constraints that have to do with the market rigidities regarding labour and resulting lack of flexibility (the current lack of investments has given way to significant reforms of the collective bargaining agreements with the oil industry unions, to allow for the overall labour cost reductions, first in the Neuquén Basin Area, focused on shale exploration and exploitation, and then to other basins).

Natural gas term supply agreements are influenced by the many interferences of the regulated market and to a categorisation of each of them as per the source and even the historic layer to which they corresponded (in recent years, the government authority had established a priority of natural gas dispatch by each shipper, and exempted from such restrictions those supply contracts with incremental gas – exceeding a certain threshold, or of a non-conventional source – a source for disputes resulting from such restrictions and priority assignment). A wide dispersion of gas supply agreements followed, with numerous amendments to previously made gas supply agreements, and supply to CAMMESA, to deliver such natural gas to thermal power plants in its name. Term agreements between generators and large customers were banned in 2013 (Res SE 95/13), and must now be entered into exclusively with the dispatch centre, CAMMESA (the power dispatch centre and broker between supply and demand for power, described below), and for gas to be delivered to thermal power plants at subsidised prices.

CAMMESA was originally designated by law to broker the supply and demand of power, arbitrating between spot prices paid to power generators and seasonal tariffs paid by distributors, with the balancing contribution of a self-adjusted but now extinct (because of the tariffs freeze) compensation fund. CAMMESA receives subsidies and imported gas from the government for supply to thermoelectric generators so that the latter are able to meet demand. This role of CAMMESA is further strengthened by making it the purchaser agent of renewable energy long-term contracts under the Renovar plan, for new gas-fired power projects called in the second quarter of 2016, and as the counterpart for the new integrated projects it has invited interested parties to present. All these programmes make CAMMESA the monopolistic purchase agent that will have to pass through such energy acquisition costs to distributors and large customers, in a still-undefined energy matrix that instead should have to respect open market practices to find the economic equilibrium of aggregate supply and demand.

The regulations that have accumulated over the years are now being changed in order to eliminate the burden of energy-related price distortions. This should, however, provide a new opportunity to develop state-of-the-art, standard-term agreements for both gas and power supply, as the reconstruction of the energy balance will require open-season bidding for firms to supply long-term commitments at posted prices in order to obtain investments to cover the current gap (which until now has been filled by imported natural gas supplied at a loss by the government) and restrictions on gas and power demand. Such term contracts system should supply the aggregate demand of distributors, and additionally should be used for medium-term contracts supply to large customers, eventually traded in a term contracts trade market.

Natural gas shipping agreements and power supply transmission agreements are of a more standard nature, though open access should be ensured to enable the grid's future expansion. This expansion will give new opportunities to sign contracts with third parties to make enhancements and ancillary extensions in order to optimise the current network of pipelines, gas distribution and power transmission. As seen in the answer to question 1, the until-now open question on markets to be mainly driven by term contracts, in both gas and power, is being analysed, but both the transition path and the final legal framework are pending. As for pipelines to be built for shipment of shale hydrocarbons, Decree 589/17 has extended the exclusionary rule of pipelines built by hydrocarbons concession holders (freeing them from the regulated framework of the gas pipelines licensees), to agreements to be reached by groups of producers with the gas transportation licences for the expansion of the pipelines network at freely agreed prices and economic arrangements between them.

4 What rules govern contractual interpretation in (non-consumer) contracts in general? Do these rules apply to energy contracts?

The new Civil and Commercial Law Code has updated the general guidelines for the interpretation of contracts:

- article 1,061: the common intention of the parties and the principle of good faith (the rather novel distinction of a traditional subject, now made express, is clear support to such principle as a supplementary requirement to be considered when interpreting the contract's language and the performance of a contract party);
- article 1,063: the precise meaning of the words employed, as per their usual meaning;
- articles 1,064/5: the circumstances and preliminary negotiations, the behaviour of the parties before and after the agreement;
- article 1,066: the useful effects interpretation principle; and
- article 1,067: ensuring trust and loyal behaviour.

5 Describe any commonly recognised industry standards for establishing liability.

In Argentina, it would be difficult to identify whether there is a fiduciary duty obligation of the operator towards the other contract parties. It is, however, subject to a general duty of care, of common reliance, and of loyalty (the above-mentioned new Code establishes this duty for administrators in general – article 159). The conduct must be at least negligent in order to be subject to compensation for damages (article 160). As per article 1,743, an anticipated waiver is not valid if it is against good faith or if there is a deliberate attempt to cause prejudice to the other party (article 1,743).

In general, the parties under their agreements can establish limitations to otherwise liability standards which could make them liable to the other parties, by exempting negligence to the extent no gross negligence is excluded, as it is deemed to be similar to wilful behaviour and hence not waivable. Knock-for-knock clauses can be set forth to delineate the effects of each party's defaults or assumption of risks. A good practice should make for a careful forecasting of the effects of regulatory changes in the economic equilibrium of the parties, especially in areas prone to be hit through such changes, such as can be the case for supply agreements (both international – as could be the case for the renaissance of international export gas supply agreements and their limitations – and domestic, transportation and transmission (ie, dispatch regulations altering existing shipping agreements, interruptible or non-interruptible conditions, third party access rules, effect of offtake agreements altered by market regulations, declaration of emergency and urgency measures by the governments, etc)). The general question of who is to blame for allocation of risks is of paramount importance, as well as definitions regarding these events, extraordinary circumstances, the dividing lines between direct and indirect, and consequential damages, and rules for guidance in case of conflicts with the regulatory agencies or government whenever a joint venture is affected (taxation matters, royalties determination, environmental standards and litigation, supply duties or price caps imposed through new laws, access restrictions, etc). Mitigation duties are also of the essence, and are seldom considered as a part of the contractual duties between parties of the variety of contracts and associations, while these aspects should be addressed in detail.

6 Are concepts of force majeure, commercial impracticability or frustration, or other concepts that would excuse performance during periods of commodity price or supply volatility, recognised in your jurisdiction?

The definition of force majeure resulted from reference to sections 513 and 514 of the Civil Law Code of Argentina (now article 1,730 of the Civil and Commercial Law Code), together with events that may be captured by a contractual definition.

According to common law, 'force majeure' means any event or circumstance (other than financial inability to perform) that is beyond the reasonable control of the party claiming force majeure. The circle of events so labelled as force majeure under common law coexist with the concept of force majeure that results from the Civil and Commercial Law Code provision, also identified as an unforeseeable event and will rule either expressly or by default (if there is no clause to the contrary, as the parties may shift the burden of such events between them) in any contract.

Under this section, both unforeseeable events and force majeure concepts are considered jointly. The other Civil and Commercial Law Code provisions refer to both concepts as if they were one, by using the terms interchangeably.

The doctrine does not fully agree on the differences between one and the other case, the majority considering that one addresses unforeseen circumstances, while the other concept addresses the impossibility of avoiding such events that do not allow the performance under the contract.

The effect of such force majeure is expressed under section 1,732 of the Civil and Commercial Law Code, whereby the debtor will not be liable for damages and interests caused to the creditor because of lack of performance of the obligation, when these result from an objective and absolute impossibility, not attributable to the obliged party, unless (article 1,733) the debtor would have committed performance regardless of such force majeure or, if this event would have occurred because of its fault or would have occurred when already in default, if this default had not been motivated by such fortuitous event or force majeure.

Doctrine and court precedents do not agree on the events that can be classified as force majeure, and several sections across the former Civil Law Code and Commercial Law Code did make reference, in specific contracts, to it by defining some of the consequences of a particular application of such concept. In order to clarify the concept, the doctrine refers to comparative law, and thus includes acts of God, similar to those defined under English law precedents; acts of the enemy, such as war and blockade; and sovereign acts, meaning a governmental resolution prohibiting, for example, foreign trade.

It is less clear whether the doctrine and court precedents support the idea that, in order for the concept to apply, extraordinary diligence should have been applied by the party claiming force majeure.

In general, it can be said that some elements have been identified as requirements under Argentine law for force majeure. The event in question must:

- have been unforeseeable, taking into account the nature of the expected performance, the parties' intentions (representations) and relevant circumstances;
- be irresistible, which means a total, unexpected impossibility of reasonable performance, either by action of law or of the facts that have occurred;
- be insurmountable and currently occurring, therefore excluding potential facts; and
- be 'exterior', which means that it must not be connected in any way with the party claiming force majeure.

In the many court precedents that refer to this concept, the case-by-case approach has been preferred, allowing for different rulings, depending on the set of circumstances under judgment. One of the typical matters for disagreement is if the impossibility or irresistibility of the force majeure case has to be 'absolute' rather than 'relative', barring any possibility of performing, excluding the application of force majeure if the performance could have been achieved by extraordinary means and costs. Court precedents have instead used the concept of unforeseability of extraordinary circumstances, which have substantially changed the economic equation of the contract (a matter that has been largely addressed during periods of hyperinflation in Argentina, or substantial exchange devaluations, pegged with rigid exchange controls, if the price was quoted in, or adjusted by, foreign currency).

In general, it is requested that the set of circumstances be such as to be easily evidenced as constituting a notorious event.

As regards the concept of a fact 'exterior to' a non-performing party, it requires an absolute lack of connection with the latter in order to qualify. For example, it has been considered that a strike restricted to the personnel of the non-performing party cannot be an excuse, while a general strike or a revolutionary strike does qualify for such an excuse.

A shortage of supplies necessary to perform the obligation committed has also been considered as not qualifying, as has an extraordinary increase in costs (except for the theory of unforeseeability, under section 1,198 of the Civil Law Code) with respect to the effects of sudden devaluation and hyperinflation, allowing the contract to be terminated. This theory was able to be called in any case in which a fixed price has been destroyed by sudden hyperinflation or extreme devaluation. Article 1,091 of the Civil and Commercial Law Code rules the matter in a similar way, but now expressly grants the right to request a court's adjustment of the contract's balance.

With the agreement of the other party, instead of a termination the court may adjust such price.

In general, war or civil war, acts of God resulting from nature such as a tornado or an earthquake, and sovereign acts have been accepted. Article 1,091 allows the party invoking such unforeseeability to request an adjustment.

Instead, floods, extraordinary rain and extreme winds have or have not been accepted according to the possibility of the parties to foresee such occurrences with due consideration of past statistics. Fire is generally accepted as a reason when it is started outside the premises, and when due diligence was applied in establishing preventive measures before the fact. However, if the fire originated in the premises of the non-performing party, it is generally not accepted as force majeure.

Several court precedents have established that, in principle, fire is not an unforeseeable event, unless special circumstances exist.

As it is assumed that lack of performance in a contract is by itself evidence of the non-performing party's guilt, the party calling for force majeure has the burden to prove its occurrence and its qualification as such.

Setting aside the theory of unforeseability that has allowed the revision of contracts regarding pricing, or its termination when there is a promise by one of the parties to deliver a product or a property at a posted price, always related to episodes of hyperinflation or extreme devaluation, the court precedents in Argentina have been very strict about allowing events to be considered as force majeure.

In the case of natural gas supply, the issue to consider is whether the restriction of international supply has been imposed on the seller by the authorities and new regulations, or if it is a result of the general natural gas supply agreement signed by the government with an aggregate of the majority of natural gas producers of 2004, more likely a kind of a forced choice (see the *Compañía de Aguas del Aconquija SA and Vivendi SA v Argentine Republic* case discussed below), given the threat under which consent was to be given, or else face the discrimination against the non-signing parties, redirecting their natural gas to local consumers at prices considerably lower than the price admitted for the other suppliers that would have signed the general agreement.

In *Compañía de Aguas del Aconquija SA and Vivendi SA v Argentine Republic* (ICSID Case No. ARB/97/3) award of 20 August 2007, where we were the co-counsel for the claimants, Argentina was found to have expropriated a water services concession through regulatory taking. The arbitrators determined that renegotiating in a transparent, non-coercive manner is appropriate, but it is wrong (and unfair and inequitable in terms of the relevant bilateral investment treaty) to bring a concessionaire to the renegotiation table through threats of rescission (paragraph 7.4.31, p. 215 of the award). In the case *Total SA v Argentina*, the lack of choice was evidenced when the Acuerdo de Gas proposal of 2007 was completed by forcing those that would not sign it to have their natural gas output diverted from their contracted destination, and delivered instead to other consumers at substantially lower prices in order to satisfy local aggregate demand, relieving instead the signors from being subject to supply at lower prices.

The Secretariat of Energy called the general agreement with natural gas producers that had committed a certain level of supply to the domestic market under a gradual price increase path, to instead divert the supplies intended for export to the domestic market consumers or, if not sufficient, to further force supply to domestic consumers that would not have reached a supply agreement. Given such experience, it is advisable to define these events and other governmentally imposed restrictions in new gas supply agreements, determine which party is to bear such risk, and their consequences. The contractual provisions should thus consider the end of hardship, the reduction of the restrictions, the sharing of the economic effect of the alternative benefits the natural gas producers might obtain in the case of a later increase in domestic prices, levelling them with international prices, with the idea of sharing losses and negotiations to mitigate the damage caused, or of the profits from a later upswing in the economic situation.

How government interference with the international gas supply agreements would be interpreted by international arbitrators is case-dependent, and results primarily from the wording in the agreements for such events, as well as the applicable law, and the arbitrators may have to review and decide on the effects of public policy in the duties assumed by the parties.

The new Civil and Commercial Law Code has set forth in section 1,011 that in the case of long-term contracts, a special duty of cooperation must be observed, with respect to the reciprocal commitments, by giving the chance to the other party to renegotiate the same in good faith.

One of the most significant arbitration cases in recent times, besides the cases for international treaty arbitration addressed by me in the sister publication of the *Getting the Deal Through* series, *Investment Treaty Arbitration*, 2017, is the CCI No. 1632/JRF/CA *YPF v AESU & TGM* (2016, continued in 2017). As informed by YPF to the Stock Exchange, the arbitral award imposed a significant amount as damages compensation for liability implied by an anticipated termination of export gas supply and in relation to a delivery or pay provision, and for anticipated termination of a gas transportation contract. The case has been commented on by Diego Fernández Arroyo in *Arbitration International 2017,0,1-28*, and court resolutions can additionally be found online. Therefore, the information from the facts involved can be discussed. Nullification requests by different parties involved in the multi-party arbitration were filed in two different countries, the courts of Uruguay and Argentina, with conflicting views. The case involved a gas-by-wire scheme ending up with a power supply agreement to Brazil under a grid of related contracts starting in Argentina with the export gas supply and shipping and transport contracts to Uruguay as delivery point, for gas firing a power plant in that country to sell power to Brazilian utilities. The case is a good example to address the current subject of FM, frustration and government regulatory changes stopping short of prohibitions, because the issue was, always following said publication, related to the two-step restrictions on gas exports by means of removal of export permits or the imposition of absurd export withholdings with the effect of more than doubling the market price. The description of the facts adds the condiment of an anticipatory breach and, with respect to arbitration clauses, separate choice of law provisions for annulment litigation. The cross claims were addressed by means of a voluntary consolidation in a single multiparty, bifurcated (splitting liability and quantum phases), arbitration under ICC rules, and diverging arbitral awards annulment court procedures (based on conflicting views on *lex arbitri*, the law governing the arbitration procedure itself) in Uruguay and Argentina.

Showing that fiction anticipates reality, the case is strikingly similar to the moot arbitration case prepared by this author for a session in the IBA Annual Conference in Dubai, in 2011, in which the study of a hypothetical interruption of power supply from country B to country C due to a feedstock agreement (natural gas supply) interruption by a natural gas supplier from country A (the A,B, C countries have become, in the real case, Argentina, Uruguay and Brazil) was proposed. In the moot arbitration, the gas supplier was invoking FM, caused by country A, considering in addition that it was a source of international liability of the country causing the regulatory changes. Some of the questions referred to in Dubai were: what would the effect be of FM defences in the ICC arbitration or litigation due to country A's actions; if the rejection of FM excuses by the gas supplier bore consequences on the defence by the power producer in the power supply interruption claims (and on ancillary transport agreements), and the effects of cross arbitration with an ICSID case for the government interferences with the legitimate expectations of the foreign investors. The temptation exists to add a subtitle as used in films: any relation to reality is mere coincidence.

7 What are the rules on claims of nuisance to obstruct energy development? May operators be subject to nuisance and negligence claims from third parties?

The principal obstacles for the operation of fields under granted exploitation concessions do not derive from the owners of the property where the exploitation occurs, as by law they have to admit such activities to be performed by the exploitation concession holder, limiting themselves to receiving a statutory compensation for the nuisances provoked, and eventually claiming for proven damages if such compensation does not suffice.

The main obstacles result from claims related to the environment involving claims of aquifers' pollution (largely unproven), the remediation of open pools, etc. There is a significant caseload of claims pretending to request either restitution of the soil conditions, or damage compensation to adjacent surface owners or villagers (though such exploitation is generally made in scarcely populated areas, a fact that minimises the impact).

8 How may parties limit remedies by agreement?

The predetermination of damages estimate and the setting forth of caps or liquidated damages' lump sums is admissible to the extent they do not make the party acting with gross negligence substantially exempt from the consequences of the same, as a party may not be exempted from performing what it had committed to do, by giving it the chance to deliberately omit its duty of care, or acting with gross negligence that could be assimilated to such deliberate omission.

Each time more caution has to be considered in farm-in agreements, in agreements for an adequate carve out of environmental risks arising from the past, allotting liability for farmers on non-disclosed contingencies, to attempt to solve issues that are well known in other countries.

9 Is strict liability applicable for damage resulting from any activities in the energy sector?

Yes, strict liability is applicable in the case of contractual liability for lack of performance, to the extent that damage is a consequence of a performance default, or in the case of tort liability.

The oil and gas industry is considered a risky sector, whereby a rule of balance of risks and benefits is implied to conclude that full compensation is due unless the event causing the damage was caused by the victim itself or by a third party for which it is not answerable.

Commercial/civil law – procedural

10 How do courts in your jurisdiction resolve competing clauses in multiple contracts relating to a single transaction, lease, licence or concession, with respect to choice of forum, choice of law or mode of dispute resolution?

The 2015 enacted Civil and Commercial Law Code considers the case of a contracts' network under sections 1,073/5, by which direct claims from subcontractors to the main contractor and the owner of the works are admitted (section 1,071), and from the latter against the former, reciprocally (section 1,072). Consolidation of arbitral claims is admissible to the extent consent by the relevant parties is granted, at the time the agreement is made or later on.

Parallel proceedings can occur, and we have been acting in one case regarding an oil and gas producer involving, for the same series of events, separate US court proceedings (in Texas and New York), international arbitration, local exequatur court proceedings, local anti-suit injunction court procedures and Chapter 11 collective court proceedings. Argentinian courts and legislation are hospitable to international commercial arbitration, and their rulings are regularly applied and enforced unless there is a jurisdictional issue at stake. Resignation of appeal remedies is admissible, while requests for annulment cannot be waived beforehand. When several parties are involved, multiparty arbitration may only result from consent stemming from the agreements themselves, while in court litigation a complex set of rules is applicable for extending claims to third parties, and for notification of the litigation to later extend the effects of the award to the same, or for voluntary participation of such third parties when a common interest is present.

Consolidation of arbitration with non-signors is a much-discussed issue. In Argentina, the issue has been raised for the opposite purpose, as defence for lack of jurisdiction (the Argentine National Commercial Court of Appeals holds that a third-party guarantor may invoke an arbitration clause, 2 March 2011). In a decision rendered on 19 October 2010 and published on 10 February 2011, the National Commercial Court of Appeals, chamber C, seated in the city of Buenos Aires, confirmed that a guarantor could invoke and benefit from the negative effect of an arbitration agreement even though the guarantor is not a party to the underlying contract.

In *Cemaedu SA y otro v Envases EP SA y otro s/ ordinario*, the Circuit Court dismissed a claim filed against the guarantor of a stock purchase agreement, holding that it lacked jurisdiction due to the fact that the stock purchase agreement included a binding arbitration agreement. The claimant appealed the decision, arguing that the arbitration agreement was only binding upon the parties to the contract. The National Commercial Court of Appeals upheld the decision of the Circuit Court, confirming that a contract in which the parties agree to submit every dispute concerning 'the contract, its existence, validity, qualification, interpretation, scope, performance or termination' to arbitration had to be construed in the broadest terms possible. Furthermore, the court held that, under the Argentine Civil Code, where a guarantor undertakes an obligation equal to the one taken by the secured party, unless the parties agree otherwise, the guarantor may exercise every right of the secured party by virtue of statutory subrogation, including the right to settle the dispute through arbitration. The decision in this case is particularly important because it extends the terms of arbitration clauses to non-signatory parties on the basis of the statutory subrogation rules set out in the Argentine Civil Law Code, and now reaffirmed through the Civil and Commercial Law Code in force as from 2014.

11 Are stepped and split dispute clauses common? Are they enforceable under the law of your jurisdiction?

Two-tier dispute clauses are generally adopted in construction cases, and less so in oil and gas supply or transportation agreements. In a long-term agreement, the virtues of avoiding an escalation of the conflict, and using a negotiation process to isolate the conflict, are recognised. Dispute resolution boards are not as common. The theory underlying arbitration clauses considers an agreement for arbitration as a contract, giving such arbitral awards the effect of an undisputed contract. As per section 1,656 of the new Civil and Commercial Law Code, arbitration clauses must be respected by the parties that agreed to it, as well as by the courts, and the arbitral awards as well, provided there are no causes for nullification (such review may not be waived in advance, unlike the appeal, which may have been waived in such clause) and the award is not contrary to the legal order as a whole (a notion that may be assimilated by public policy or basic principles set forth in the National Constitution, and that may also be stretched to consider imperative, non-waivable provisions in the laws generally).

12 How is expert evidence used in your courts? What are the rules on engagement and use of experts?

Evidence production is ordered by the courts at the request of the parties in the dispute, provided it has a close connection to the disputed facts and is considered by the court to be relevant to the issuance of an award on such matters. Among the different means proposed by any of the parties, experts with the necessary expertise on the matter can be called to report on the various areas in conflict. These are generally chosen by the court from lists of registered experts, and each of the parties may designate their own consultant to follow the investigation of facts by the court-appointed expert. Technical experts range from economists, engineers, geologists, public accountants and others, and in some cases include a specialist in the regulations of the relevant sector. In the case of arbitration, it is more common to see expert witnesses proposed by each of the parties, in which case arbitrators may use any of the techniques admissible in international arbitration for debate between such experts.

13 What interim and emergency relief may a court in your jurisdiction grant for energy disputes?

Under Argentine law, precautionary measures are those preliminary remedies granted by the court at the commencement of the proceedings or thereafter in order to ensure that the judgment to be entered in the case will not be frustrated. Therefore, precautionary measures pursue a preventive role by making sure that the subject matter of the proceedings is not damaged while the proceedings are being conducted. By carrying out the precautionary measures, the courts are also fulfilling the purpose of the judicial proceeding, which is to fairly decide a specific dispute by means of a judgment capable of producing practical results.

The requirements of the most important precautionary measures under Argentine law in accordance with the Federal Civil and Commercial Procedure Code are described below.

Characteristics

All precautionary measures under Argentine law are characterised for the following features:

- They are ancillary to the proceedings. They are granted considering that the rights of the parties will be finally determined during the proceedings conducted observing the forms required by due process.

- They are issued without giving notice and requesting the appearance of the other party (inaudita parte, ex parte proceeding) because otherwise the purpose thereof may be frustrated.
- The judge's jurisdictional determination of whether the requirements of these measures have been satisfied is conducted by means of a summary proceeding that focuses on the appearance of right, not on its certainty.
- They are provisional in nature, because they will be effective only as long as the facts upon which they were based continue to exist.
- They are changeable and flexible. In order to avoid unnecessary damage or encumbrance to the owner of the goods being attached, the owner may at all times offer to substitute the attached goods with new ones. They are flexible because the creditor may request to augment the scope of the measure, its amendment or to extend such measure to other goods.
- They do not produce res judicata effects, nor, if denied, preclude the party from requesting the same measure again in the future before the same judge, nor should they directly affect the substance of the claims being decided in the main proceedings.
- They are urgent.

Conditions

In order for the judge to issue a precautionary measure under Argentine law, the following three requirements or conditions precedent must be satisfied.

Appearance of truth of petitioner's right

The petitioner must demonstrate that he or she is the holder of a 'credible right' (ie, that he or she is prima facie entitled to the remedy being claimed). This is largely the equivalent of showing that the petitioner is likely to succeed on the merits.

Danger that harm may result from the delay

The petitioner must show that, unless the measure is granted, there would be a danger that a harm to or a frustration of remedy may result during the pendency of the proceedings. It is enough to show that there is a possibility of danger. Danger resulting from the delay exists where the petitioner has a grounded motive to be afraid that he or she will suffer an imminent and irreparable harm. Obviously, to invoke the sole duration of the proceedings is not enough to satisfy this requirement. This condition has been liberally construed by the courts.

Posting of bond

Because precautionary measures are issued ex parte, without the appearance of the other party, the judge must determine the type of bond and its amount. The bond is set as a security for the petitioner's liability for damages caused to the other party by a precautionary measure that should not have been issued. The bond may be any of the following:

- an 'oath bond', which consists of a promise under oath to pay any damages cased by the measure;
- a personal bond, consisting of the bond posted by a bank, surety or a person with sufficient wealth; and
- a real estate or personal property bond. The other party may always object to the type or sufficiency of the bond posted by the petitioner.

There have been ICSID cases where the issue on preventive measures has been addressed. In *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA (claimants) and The Argentine Republic (respondent)* (ICSID Case No. ARB/09/1), Decision On Provisional Measures (8 April 2016), it was:

> *(a) ordered that Respondent refrain from publicising the Complaints or the criminal investigation and any relation they may have to this arbitration, whether by communications to the press or otherwise; (b) it deferred its decision in respect of Claimants' Application for Provisional Measures as it relates to the suspension of the criminal proceedings in regard of counsel for Claimants and Claimants' court-appointed receivers, with liberty to Claimants to bring this Application back before the Tribunal in this respect should it become necessary; (c) reminded the Parties that they are obligated to refrain from aggravating the dispute; and (d) denied the remaining aspects of Claimants' Application for Provisional Measures.*

14 What is the enforcement process for foreign judgments and foreign arbitral awards in energy disputes in your jurisdiction?

Section 1 of the Code of Civil and Commercial Procedure admits the extension of jurisdiction to foreign judges and arbitrators in international matters, which are defined by identifying foreign connection items: the different nationality of the co-contracting parties, the existence of an international trademark, the reference to a local and international market, in which case the foreign award, to be acknowledged and enforced in Argentina, shall be subject to an exequatur process (section 519, Code of Civil and Commercial Procedure) or summary proceeding in which the judge considers whether the rules of due process have not been violated and whether a public policy regulation has not been infringed by means of it.

Regarding the procedure to enforce foreign judgments and arbitral awards in Argentina, if no special treaty applies, an exequatur process has to be followed, where the Argentina-competent judge will examine the foreign judicial order to review if it complies with the requirements set forth in the National Civil Procedural Law Code, mainly consisting of due process of law and public policy requirements. Section 517, subsection 1 provides that the foreign judgment must be issued by a court with appropriate jurisdiction over the case. Such jurisdiction is to be determined under the Argentine rules on international jurisdiction of the courts. Likewise, it requires that the foreign judgment has the authority of res judicata, which should be analysed under the rules in force in the state in which the foreign judgment was issued. This is shown by means of a statement to be included in the foreign judgment itself or in a court certificate or any other acts showing that the foreign judgment has such authority (section 528). Section 517, subsection 2 requires that the party against whom enforcement is sought has received a personal summons of process, and that due process has been respected.

Section 517, subsection 3 sets forth that the judgment must meet all necessary requirements to be considered as such in the place where it had been issued and that it is authentic pursuant to the provisions of Argentine law. This item is shown pursuant to the provisions of the judgment itself, by the corresponding consular report, and in accordance with the rules in force in Argentina.

Section 517, subsection 4 requires that the foreign judgment does not affect public policy rules under Argentine law. That is to say, the court must examine whether the foreign judgment affects principles set forth under the Argentine Constitution, international treaties with constitutional hierarchy and the respective procedural laws.

Finally, under section 517, subsection 5, if there is another judgment by an Argentine court affecting the same parties and regarding the same subject matter, that has the authority of res judicata, the enforcement of a foreign judgment in Argentina becomes inadmissible. Once the exequatur proceeding has a final judgment (so that the foreign award is assimilated by a local ruling), the enforcement procedure (basically for the seizure or attachment of goods or property) may be started. Once the exequatur process is successfully approved, the foreign decision is equivalent to a local decision.

Interim or precautionary measures are flexible and may adopt many methods (from the classical attachment or embargo, court-appointed observers or interventors, to the more sophisticated of prohibition to innovate or change the status quo, and in some extreme cases can be similar to antisuit injunctions).

In Argentina the Federal Court of Appeals on Contentious-Administrative Matters, Panel IV, upheld a precautionary measure requested by the Argentine government. It suspended arbitration until the challenge of an arbitrator would be judged. The International Court of Arbitration of the International Chamber of Commerce (ICC) had rejected the challenge, and such rejection was contested with the local courts. In *Argentine Republic v International Chamber of Commerce*, Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal, 3 July 2007, a stay of proceedings was ordered under the UNCITRAL Rules, but administered by ICSID, pending a decision on a request to annul an ICC decision rejecting Argentina's challenge of one of the arbitrators.

In *EN–Procuración del Tesoro v International Chamber of Commerce*, the Federal Contentious Administrative Law Appeals Court, panel IV (17 July 2008) ordered the suspension of the arbitral procedure, pending the challenge of one of the arbitrators by the Argentine Republic (on the basis that the rejection of the challenge by the International Court

of Arbitration, of the ICC, had not made the grounds for such decision public).

These cases were preceded by *Entidad Binacional Yaciretá v Eriday et al* (lower court judgment, in contentious administrative matters, 27 September 2004, where a sort of antisuit injunction was issued on account of a lack of agreement by the parties – the binational hydroelectric plant, and a construction company – to the terms of reference and the following procedural decisions).

In the 2007 *National Grid* decision, the Argentine National Court of Appeals annulled a decision of the International Chamber of Commerce. The latter had rejected Argentina's challenge to the arbitral tribunal in the National Grid's arbitration against Argentina. The Court of Appeals ordered the arbitral tribunal to suspend the proceedings. In 2008, a new interim measure followed suit. The Court of Appeals quoted *Cartellone*. The case has been settled.

It is important to determine the exact scope of admissible claims that arbitration may have competence to decide on, especially because the new Civil and Commercial Law Code states, in addition to the classical exclusion of non-arbitrable matters in section 1,651, that awards contrary to the juridical order may be set aside, and it could be that under such warning a renewal of discussions of whether arbitrators can have competence to decide on issues where public law review is involved, such as the ones where public policy law (ie, antitrust, fair competition, administrative law – see CNCom, panel C, 5 October 2010, *CRI Holding Inc Sucursal Argentina v Compañía Argentina de Comodoro Rivadavia Explotación de Petróleo SA*) and if they can exercise a constitutional law control is applicable.

Nullity has also been declared of an international arbitration award in *EDF International SA v Endesa International (Spain)*, 12 December 2009, National Appeals Court in Commercial Matters (commented on by Julio César Rivera, *La Ley*, 1 December 2010), as it found it dealt with public policy law matters reserved for the exclusive jurisdiction of the courts and out of the scope of matters subject to waiver by the parties, and had resolved on the issue without applying the substantive applicable Argentine law.

Nullity of ICSID appointed tribunals awards regarding investment arbitration under BITs has been sought in foreign jurisdictions. In the United States District Court for the District Of Columbia, in *Republic of Argentina, Petitioner v AWG Group Ltd, Respondent* (30 September 2016), where the parties agreed that the case was governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), and which gave jurisdiction to such US court, Argentina's petition to vacate the arbitral award was denied and AWG's petition to confirm the award was granted, as 'Argentina failed to demonstrate evident partiality and excess of powers' by one of the members of the arbitral tribunal.

15 Are there any arbitration institutions that specifically administer energy disputes in your jurisdiction?

The most-used arbitration forum selected to resolve energy disputes in Argentina is the one resulting from the International Court of Arbitration Rules. There are local arbitration centres as well, such as the Centro Empresarial de Mediación y Arbitraje, the Centro de Mediación y Arbitraje de la Cámara Argentina de Comercio (CEMARC), and the Arbitration Court of the Buenos Aires Stock Exchange (with permanent arbitrators), under their respective arbitration rules, but it cannot be said that they are specialised in energy disputes. The International Centre for Dispute Resolution (of the American Arbitration Association) has a list of specialised energy arbitrators. Section 1,657, CCC, does refer to arbitral institutions as suitable administrators of arbitration carried on under their respective rules, deemed incorporated in the arbitral agreement.

16 Is there any general preference for litigation over arbitration or vice versa in the energy sector in your jurisdiction?

Arbitration is almost always chosen in the energy sector. The complexity and specificity of the disputes thereof, which require arbitrators with experience in such fields, are the reason for this. Moreover, if the arbitration clause requires the arbitrators to be chosen by the parties as well as the chairman of the arbitrators tribunal, they must have experience in both energy and arbitration law. In the case of litigation in court, the reliance of the system on court-appointed experts previously listed and registered with the judiciary under broad incumbency qualifications is a significant obstacle to obtaining the necessary expertise and in-depth knowledge.

17 Are statements made in settlement discussions (including mediation) confidential, discoverable or without prejudice?

The rules under which the mediation or arbitration shall be carried out govern the issue of confidentiality, as far as the parties will have agreed. Professional secrecy duties apply, and a breach of the same may constitute a crime, provided certain elements are met. Argentine courts are generally hospitable to arbitral procedures, and furthermore section 1,656 of the new Civil and Commercial Law Code declares the lack of competence of the judiciary (the courts) on the disputes subject to arbitration as per arbitration clauses that are not blatantly null and void. However, if a motion for nullity of the arbitral award is filed by one of the parties, the files will be brought as evidence, which, besides their being kept reserved for the exclusive scrutiny of the court, will not preclude such court from being in the knowledge of the same.

18 Are there any data protection, trade secret or other privacy issues for the purposes of e-disclosure/e-discovery in a proceeding?

The general principle contained in Argentine Data Protection Law 25326 is that personal data may only be processed if the data owner has given his or her prior consent in writing. As an exception, consent is not necessary where such data is processed within the scope of a contractual or professional relationship with the data owner. According to the Law, personal data must be processed fairly and lawfully, and collected for specified, explicit and legitimate purposes, of which the data owner must be informed.

E-discovery is seldom admitted by courts if requested to be practised on the opposing party's premises and data centre (unless ordered by a criminal law court in the process of investigating a crime). This naturally does not extend to the accounting files (annotations in commercial books or electronic files requested by law, generally, and its supporting documents), which may be ordered to be shown to the court-appointed expert in order to reach conclusions on the financial statements of such party or on transactions booked by the same. Law 26388 made it a crime to have undue access to electronic telephone communications.

Discovery is limited under the procedural law codes, and there is a general principle that the party subject to a request for documents production order may refuse to deliver confidential documents and working papers. This refusal could, however, be seen by the court as confirmation that the allegations by the other party in this respect are credible, if supported by other evidence, or if there is a refusal to deliver the documents by the party better suited to filing them, this being a breach of cooperation in establishing the facts at issue.

19 What are the rules in your jurisdiction regarding attorney–client privilege and work product privileges?

Attorney–client privilege is granted as the constitutional guaranty of due process of law so requires. Article 7,c of Law 23187 sets forth such privilege. In the rare cases where there has been an attempt to make such counsel be a witness, the counsel has the right to refuse to answer based on the duty to maintain professional secrecy and the judge may not insist on such enquiry.

20 Must some energy disputes, as a matter of jurisdiction, first be heard before an administrative agency?

In the case of disputes regarding access to transport of natural gas, or of power, through the grid, and any other dispute between the different agents of the respective markets, the specific control entities, ENARGAS (articles 66 and 70, Law 24076) and ENRE (article 25, claimant customers can opt out and go directly to the courts, and articles 72 and 76, Law 24065) must receive such claims and decide on them, and such administrative rulings are subject to appeal with the Federal Appeal Court on Contentious Administrative matters (article 66, Law 24076), but such appeal must ensure full access to justice and review of facts and law (*Angel Estrada & Co v Secretary of Energy, Federal Supreme Court*, 5 April 2005).

In the case of challenges to laws and regulations, and not to specific administrative acts addressed to the plaintiff, claims can be filed for

lack of respect of constitutional provisions (ie, Federal Supreme Court, *Enap Sipetrol Argentina SA v Provincia de Tierra del Fuego, Antártida E Islas del Atlántico Sur s/ acción declarativa de inconstitucional*, 23 August 2016, LA LEY 21 September 2016, 7 online: AR/JUR/57236/2016, where royalties computation on a notional price, and not on the actual price, were rejected).

Regulatory

21 Identify the principal agencies that regulate the energy sector and briefly describe their general jurisdiction.

See question 20. The issue of the limits of such competence has been a matter for discussion and the aforementioned case has set forth the standards of the review of appeals. As relates to the licensees or concessionaires (both for transportation and distribution) and customers and producers, the government authorities mentioned above have the role of regulating and controlling compliance with the respective legal frameworks, through a considerably extensive number of regulations. As a consequence, such authorities have the power to grant authorisations and permits, impose penalties, and conduct public audiences to allow the public to participate in the authorisation process for the activities regulated under such legal frameworks.

22 Do new entrants to the market have rights to access infrastructure? If so, may the regulator intervene to facilitate access?

The legal framework for gas transmission and distribution has been largely distorted by regulations against the letter of the law. Thus, the open access principle set forth in article 2,c,f of Law 24076, which was set forth under a system of a free market for natural gas as a result of the unbundling in the 1990s of the state monopoly, operates differently from how it was intended to operate under the resolutions described below.

Resolution ENARGAS 419/97, which regulates the resale of transportation capacity, originating from the principles on which Resolution 267/95 is based, had been opposed by several natural gas distribution licensees. By such resolution, any new transportation capacity on a firm basis offered by a natural gas transmission licensee should be awarded by an open bidding system, while the holders of existing contracts that grant transportation capacity on a firm basis may directly assign such contracts to third shippers, provided such assignment is the result of an open bidding made by the first shipper itself. The exception for these open bidding systems is for the case of bundled – supply or transportation – sale or a transport sale to a distributor in case of emergency of supply according to the regulations.

Resolution Enargas 1483/00 revisited these issues to allow non-discriminatory third parties open access to transport and distribution networks to the extent not reserved, already contracted, looking for a fair allotment of available capacity, subject to the precedence of firm capacity already contracted, but with no obligation to contract other, bundled, services. Open bidding was chosen for such purposes. Roll-in or incremental costs methods had to be chosen beforehand by the transporter for the expansion that may be requested. Resolution Enargas 1748/00 further provides for access by customers over 5,000 cubic metres a day.

In theory, the system provides open access, at least on an interruptible basis, to unbundled transportation services by the natural gas distributors to make the resale of transportation capacity (at the level of the transmission licensees) possible. The idea was to create an electronic bulletin board for resale of spare transportation capacity contracted by shippers, by means of a bidding with an award based on the combination of price, term and volume requested by the offeree. Resolution Enargas 289/00 requested the distributor and the customer to contract under interruptible distributor transportation, but anticipated Enargas would regulate that large customers would then have to prove that they have equipment and installations that can be switched to alternative fuel consumption.

The first come, first served attitude that informed the open access transportation system came to an end, due to the mismatch between supply and demand resulting from frozen prices imposed by the government. Rationing, and its first manifestation being a limitation of volumes of natural gas as per the history of each consumer's demand, came as the first answer. It was a new form of making ration coupons. The rerouting of export natural gas supply for domestic uses was one of the ways to cope with such mismatch, and with it followed a dispatch system on a discretionary basis by the Secretary of Commerce.

Under a stretched 'agreement' forced by the government under a Resolution SE 599/04, as from 2011 Resolution SE 1410/10 (afterwards complemented by Resolution 89/16 and resolution ENARGAS 3833/16 that set forth the procedure of nomination and re-nomination of daily gas for emergency reasons, which supposedly is a transition solution until open market policies are again put in place) set forth a dispatch priority procedure to administrate scarcity, establishing a priority demand and a first rank in the dispatch to incremental gas, gas plus (under programmes that have now expired) and non-conventional gas production (that are now reserved for new production).

The present Minister of Energy and Mines has anticipated that the many regulations distorting the legal framework still in force, though not respected, will be revoked in order to restore the articulate system set forth in Laws 24076 and 24065, which includes a non-distorted open access principle.

23 What is the mechanism for judicial review of decisions relating to the sector taken by administrative agencies and other public bodies? Are non-judicial procedures to challenge the decisions of the energy regulator available?

See questions 20 and 21. Challenges to the decisions of the energy regulator have been frequent, the most significant ones being the international investment arbitration cases under bilateral investment protection treaties, whereby the international standards of international rights are deemed to have been breached by the regulations implementing energy policies by the past government. This began with *Total v Argentina*, in which we were co-counsel for the claimant, related to the oil and gas upstream (prohibition and redirecting of the natural gas supply, retroactive taxation of crude oil exports, freeze on gas transportation tariffs) and power (thermal and hydroelectric generation destruction of the price structure through governmental regulations) where an award determined the state responsibility and damages compensation. The award is now final as the annulment request was rejected by the Ad Hoc Committee in February 2016. A settlement was reached as for the enforcement of the award on the second quarter of 2017, through a payment of marketable, government-issued foreign currency bonds at a discount. The following companies have now filed claims against Argentina under the International Centre for Settlement of Investment Disputes: National Grid, Sempra Energy, Enron, Repsol, Compañia General de Electricidad, Mobil, Wintershall, BP, Saur International, EDF, Enersis, El Paso, Gas Natural, Camuzzi, CMS, Endesa. The last development in ICSID has been the rejection of the annulment request by Argentina of the arbitral award issued in favour of claimant, Saur.

The tariffs freeze and price differentials have produced a number of challenges at the time of the establishment of increases and charges imposed on certain sectors of the energy markets, due to the inconsistency of such regulations with the legal framework or even between themselves.

24 What is the legal and regulatory position on hydraulic fracturing in your jurisdiction?

Law 27007 has specifically considered fracking as one of the non-conventional exploitation methods that are subject to special privileges, as it has incorporated the benefits previously set forth in Decree 929/13, and described it in article 5, as the article 27-bis, to be a part of the Hydrocarbons Law. The provision grants the existing exploitation concession holders shale in their concession area, the right to request new exploitation concessions with non-conventional techniques for 35 years (subject to renewable 10-year extensions) to non-conventional hydrocarbons exploitation concession in such areas where there are shale formations.

Subdivision or unitisation of exploitation concession blocks is permitted, the title being held by the former holders of the concession, thus granting an option to request a non-conventional exploitation concession, by way of committing a pilot project, and such rights may coexist with a conventional exploitation in the adjacent field. Transport concession rights are granted for the same periods for those concessionaires. A minimum US$250 million investment commitment in a three-year period is required.

Update and trends

A threefold scenario should be considered.

As explained in questions 1 and 2, the current energy regulations are still in transition, because:

- as for crude oil price signals, both: the subsidies granted that dampen the downstream net back effect of international prices of the same and of its by-products; and the restrictions to import them, have been recently discontinued;
- as for natural gas, different prices coexist for new and old natural gas for some years to come, waiting for a free market of natural gas at import parity prices; and
- power also has different price signals, as renewables' offer and demand are made out of auctions of long-term contracts with a single purchaser, a governmental agency, for it to resell this contract power supply to a captive aggregate demand of large customers and distributors (forced to buy such renewable-sourced electric energy for increasing percentages of their overall power consumption, 8 per cent of it being the present target).

These regulations are kept to make for government-originated reference prices of energy while correcting blatant interferences, under the declared end of the state of emergency rules, yet to be enacted. The general view is that prices will converge into a single one based on a near future, import parity equivalent, leading to a reduction of the distortion of relative prices, and that successful fracking experiences will keep their attraction after the current price enhancement ceases to have continuing support.

Though being a sound purpose, the 'how to' seems full of pitfalls, still to be solved, which makes for investments to be cautious, and effected mainly by already-existing players in Argentina.

The second subject of concern is environmental claims, and the third one is native title.

There is a general trend to consider climate change prevention a matter exceeding state actions, and to make the soft-law commitments of the national governments under the Paris Agreement to be complied with through individual litigation and conflict.

The establishment of general objectives (that can only be achieved by the coordinated action at the level of sovereign states) as specific, enforceable commitments of any extractive or any industrial or commercial activity, to be the subject of individuals or group claims to be enforced by the judiciary (of every country, or by international courts to be created) does not only run counter to the basis of international law, but may in addition affect economic activity in ways that are not those that were expected to be achieved. The quest to ensure the judiciary (as a consequence of claims) may by itself influence economic incentives and penalties for choosing and discarding sources of energy, may end up aggravating the system dysfunctions to end up increasing levels of GHG (greenhouse gas) and affecting reliability of supply, altering the necessary mix of renewables and non-renewable sources of energy, and with it the entire economic system by making for global losses and abrupt changes in the value of the investments made and to be made.

The trend is also permeating to taxation: a CO_2 contribution tax is being considered in the tax reform in analysis, with economic effects yet to be calculated, posing a difficult allocation problem amidst the chain of CO_2 generation: producers (though apparently exempting natural gas), processors, consumers. The project seems to be completely ignorant of the contribution to pollution by each stage from upstream to the downstream, looking for a green footprint, and instead focuses on a direct tax on the fuels at the consumption stage.

At present, however, court cases are focused on soil and acquifer pollution, with land owners, users or occupants (whether alleging native title or not), going beyond the statutory relief granted by law for above-the-surface rights, with occasional abuse of the extent of damages claimed and causation stretched to the extremes.

As for native title, law 26160's stay period for the indigenous (recognised by the government as such before such law's enforcement date, through an enquiry process) eviction regarding provisional occupancy rights has been extended to end in 2021. These are traditional, sparsely populated, communities, but 'new' settlements are being added by land occupation and confrontation in, among others, zones adjacent to, or in, oilfields, as hierarchy tribal authority unifying the discussion is not present in those new cases, making the dialogue between parties difficult. The government is making a distinction between the former cases and their peaceful solution, with the new ones that are neither protected by the stay order of pre-2006 settlements nor have roots in the area.

In Argentina's legal system, owners have surface rights but under-the-surface resources are for the government to grant them in concession. Landowners may not oppose the granting of such concessions (article 49 of the Hydrocarbons Law (HCL)), and instead are entitled to statutory compensation (article 98 h, HCL, grants the Executive the right to fix them), or higher compensation damages if proven (article 100 HCL), while the concessionaire has the unrestricted rights to make all necessary infrastructure as per approved investment plans to meet its duty to exploit rationally the field under concession.

The territory where oil and gas exploration and exploitation is made is sparsely populated, and the conflicts regarding such activity should limit confrontation of land uses to issues on compensation, a subject that is however put in discussion by indigenous communities' de facto actions. In *Petrolera Piedra del Águila SA v Curruhuinca, Victorino et al*, of 17 February 2011, the Superior Court of Justice of the Neuquén Province rejected a writ of mandamus for the ceasing of actions by an indigenous community impeding the concessionaire to set up the infrastructure needed for the field development. The tribunal held that a prior consultation (not expressly referred to in the Argentine legislation) should have been made, by recalling the power of the Legislative to respect the individuality of indigenous communities and their communal property or possession, with a right of the latter to participate in decisions regarding natural resources.

The matter, however, is entirely different from environmental impact statements or licences for such activities, which frequently request at the provincial level for consultations to be made, an issue that was not at stake in the case here mentioned.

No export withholding tax will be assessed on the exported part of the production; a 20 per cent import duties exemption on capital goods (offshore 60 per cent) is also granted.

Royalties are capped at 12 per cent on market price (increasing to 15 per cent for the first extension, 18 per cent for the second), and tax and royalty stability is ensured (and up to a 50 per cent reduction of the royalties is promised depending on the kind of field involved and on the committed works).

The 10-year extension will be granted at the end of the concession, if the investment plan is approved, and compliance with the concession duties is proven, plus a bond of 2 per cent of proven reserves remaining in the exploitation concession to be paid to the holder of the eminent domain (the relevant province or the federal state, depending in which territory the concession is granted) at an average two-year median price-basin price; to be reduced to 2 per cent if the exploitation concession is transformed into a non-conventional exploitation concession, calculated on proven reserves (applying conventional exploitation methods) together with an increase of up to an 18 per cent royalty. Rights of way are granted for performing the relevant activities, and reporting duties are established, together with the duty to submit yearly plans, etc. No sovereign new areas are reserved for national or provincial government-controlled oil companies (provincial), but 2.5 per cent of such amounts are to be paid to the province towards, for example, social contributions and infrastructure. An Environmental Uniform Act will be enacted, as a guideline for best practices, thus preserving the sharing of federal and provincial jurisdictions. The provincial excise tax is capped at 3 per cent, while the stamp tax on financing documents is to be defined.

Decree 929/13 benefits are granted for non-conventional exploitation concessions (tight sands, tight gas, coal bed methane, shale gas and shale oil, low permeability rocks). Free export of the resulting hydrocarbons is admitted, up to 20 per cent of the production (60 per cent offshore), with no export withholding tax or foreign exchange repatriation duty (if such benefit is curtailed in the future, there is a guaranty to assure international prices, and access to foreign exchange is committed to by the government).

Import rebates or import tax-free treatment are granted for capital goods (listed in Decree 927/13). The existing Natural Gas Plus and Incremental Gas regimes (regimes expiring at the end of 2017) have now given place to incentives, above described, for new non-traditional oil and gas exploitation which have set a threshold (backed by the government) of US$7.5/MMBtu, confirmed the government has

committed itself to pay the difference between such amount and the median price obtained for the natural gas from the aggregate production of such concession holder, from traditional and non-traditional sources.

25 Describe any statutory or regulatory protection for indigenous groups.

Law 23302 declared the support of the aboriginal and indigenous communities existing in the country to be in the national interest, along with their protection and development for their complete participation in the social, economic and cultural process of the nation. There is a registry of each of the communities, and they are granted a right to sufficient land for agricultural and livestock farming. The principle of consultation to indigenous communities in relevant hearings is considered. Article 18 of the new Civil and Commercial Law Code reaffirms their right to communal property.

26 Describe any legal or regulatory barriers to entry for foreign companies looking to participate in energy development in your jurisdiction.

In the case of investments in areas near to the frontiers, a special law states that prior approval is required. In the past, there have been no specific requests that could be considered as a barrier to entry in the energy field. Regulatory barriers are only relevant for assuring the unbundling of the different sectors, but are clear cut and defined in terms of avoiding vertical integration and influence in the market. The current government, elected at the end of 2015, is thought to dismantle any and all barriers to trade and investment, by freeing the foreign exchange market, eliminating export withholding duties, reducing taxes for the import of capital goods, etc. Many of such goals have been achieved by now (free exchange rate and remittances, exports freed from foreign currency proceeds' remittances, etc). It should be expected that the red tape and delays for the Antitrust Commission to approve concentration through acquisition or new investments should now be considerably reduced up to international standards, in the same way that it is expected that some irrational taxation (such as collecting income tax on the capital gain artificially recorded by considering profit, the differential between acquisition and sale value of non-current assets on nominal currency) should be adjusted. The current tax reform in analysis is partially addressing capital gains taxation by a one-shot tax to allow for assets revaluation to market levels, leaving aside the historic cost at nominal levels.

27 What criminal, health and safety, and environmental liability do companies in the energy sector most commonly face, and what are the associated penalties?

Resolutions SE 105/92 and 25/04 set forth the procedures and guidelines on environmental protection to be observed by the upstream industry, including the necessary environmental impact statements. Resolutions SE 341/93 and 201/96 regulate the remediation of hydrocarbon ponds; Resolutions 342/93 and 24/04 handle contingency plans; Resolution 236/93 NS 143/98 regards gas venting restrictions; abandonment and decommissioning of wells is dealt with by Resolution SETyC 5/96 and midstream and downstream regulations also cover such sectors. Because jurisdiction on environmental matters is shared between the federal state (for interstate effects, and for guidelines in this general framework) and the provinces, each of them has developed an entire body of regulations on the subjects above, as well as enforcement authorities for the licensing, permitting and penalisation of infringements. The Federal Law of Hazardous Waste imposes penalties ranging up to prison terms for infringements of the entire process of disposal and elimination of the same.

Other

28 Describe any actual or anticipated sovereign boundary disputes involving your jurisdiction that could affect the energy sector.

There are currently no conflicts with neighbouring countries related to common reservoirs or territorial disputes. There are laws imposing prohibition of hydrocarbon exploration and exploitation offshore or in Argentine territory, specifically reaching the Falkland Islands, and imposing heavy penalties on companies developing such activities.

29 Is your jurisdiction party to the Energy Charter Treaty or any other energy treaty?

No. Protocols were signed with Chile and later terminated, when Argentina unilaterally curtailed and finally closed the natural gas supply to Chile and, similarly, Uruguay.

30 Describe any available measures for protecting investors in the energy industry in your jurisdiction.

In addition to the international access by foreign investors to investment arbitration, there is an array of remedies that the investors may call on for the protection of the property rights or acquired rights, depending on the kind of breach, ranging from summary proceedings, claims for unconstitutionality, outright administrative law recourses and appeals with the Federal Chamber of Appeals in Contentious Administrative Matters, and others (replicated, for example, in provincial jurisdictions). Injunctions and other preliminary measures may be requested autonomously or within such proceedings, the most typical being the suspension of the effects of the measure causing a definitive prejudice to the investor or the local company, after a scrutiny of the standing to sue of each of them.

31 Describe any legal standards or best practices regarding cybersecurity relevant to the energy industry in your jurisdiction, including those related to the applicable standard of care.

See question 18 on the Data Protection Law.

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