

## COVID-19 | Latin America Energy, Mining and Infrastructure Podcast Series

### Latin America Infrastructure amid COVID-19

April 27, 2020

---

COVID-19 has put Latin America in a challenging situation. The energy, mining and infrastructure sectors, which are facing new government regulations, amending private and public contracts, and reshaping their strategy and continuity plans due to this outbreak.

Now that we are dealing with this crisis, can we anticipate what would be the new normal in our sectors? We invite you to listen to our Latin America Energy, Mining and Infrastructure Podcast Series in which we aim to explain and facilitate discussions about what we are seeing in each sector and what trends we can anticipate for the steadiness of our businesses.

#### What is the current regulatory landscape (have there been changes) in Infrastructure in your jurisdiction, and how are they affecting companies in the sector?

##### ARGENTINA



On March 19, 2020, the Argentine government set forth a mandatory isolation regime, which is still in force. The Isolation Regime prohibits the circulation of most individuals on routes, roads and public spaces, but individuals related to "essential" activities are exempted from this regime. Activities related to public infrastructure are considered essential and individuals related to such activities were exempted from the Isolation Regime. In addition, as of April 2, activities related to the sale of construction materials are exempted and the same occurred as of April 7 for the activities related to private energy infrastructure.

Although no other specific regulations were issued in relation to infrastructure in Argentina, considering the fact that public infrastructure activities were allowed, many companies are still operating with some reduction in their activities.

##### BRAZIL



- At this time, no major changes are expected in the regulatory landscape of Brazil's infrastructure sector.
  - However, most activities in the sector are considered "essential services" by the norms being edited at the federal, state and municipal levels. This means that those companies are allowed to continue operating, while many "non-essential services" are currently shut down.
  - Although the federal government's intention is to soften the current restrictions on activities, as COVID-19 advances, it is possible for the list of "essential services" to be further reduced, since restrictions are mostly determined by states and municipalities.
-

# LATIN AMERICA INFRASTRUCTURE AMID COVID-19

## CHILE



- There have been no major developments other than the exemption of essential services from curfews and lockdowns as decreed.
- Roadworks have had no significant updates, although the Chilean PPP regime establishes that infra companies have assured revenues, so in the event that investment doesn't profit as expected, the government will supplement the outstanding part. If lockdowns remain in place, governmental money may end up flowing to investors, which may cause severe political distress.
- In the water & power sector, there have been some state-aid agreements with distribution companies to suspend service shutdown in case of nonpayment.

## COLOMBIA



- The Colombian government declared a mandatory lockdown of the whole country, starting on March 25 and ending on April 12 (first lockdown period). The government extended the lockdown measure from April 13 through April 27 (second lockdown period). The measure excluded 32 essential activities from the lockdown.
- During the first lockdown period, only essential works to address road emergencies and stability of buildings were exempted from the measure, leaving the construction of most of the country's infrastructure projects on hold.
- During the second lockdown period, transport infrastructure projects were expressly excluded from the measure, as well as their supply chain. This means that most public works could be resumed, implementing higher standards in terms of health, safety and bio-security in the workplace to mitigate exposure to COVID-19 infections.
- Nevertheless, during the second lockdown period, the National Infrastructure Agency (ANI) allowed the resumption of only critical works, and ordered the suspension of certain contractual obligations of all the concessionaires that have a concession contract currently in place with such entity. This means that, while the national government allowed all public contractors of infrastructure works to resume activities, the ANI imposed a more restrictive measure for its own contractors, which will certainly have impacts on the construction stages of many concessions.
- In addition to the foregoing, the government suspended the collection of highway tolls in the national territory during both lockdown periods and prohibited the entry of international flights until May 30, 2020. This will translate to a significant decrease in collection and income of highway and airport concessionaires.

## MEXICO



No major changes in the regulatory framework of infrastructure projects in Mexico.

There have been important reductions in non-essential activities that affected certain sectors in the construction industry in Mexico.

Presidential projects, such as Maya Train, Dos Bocas Refinery and Santa Lucía Airport (as published by the Mexican federal government in a decree on the federal official gazette), state projects with federal budget and those that have private investment, have not been suspended, on the contrary.

# LATIN AMERICA INFRASTRUCTURE AMID COVID-19

## PERU



The Peruvian government was among the first to declare a state of national emergency, establishing mandatory nationwide isolation for 15 calendar days, beginning on March 16, 2020 — a period that has been extended twice and is now in force until April 26, inclusive. The country is waiting for the executive branch to issue a decision on lifting the isolation measure and its corresponding procedure, or, conversely, to establish a third extension of the isolation period.

The government excluded certain essential activities from this restrictive measure, which naturally include those related to the following sectors: health, water supply, sanitation, electricity, natural gas, oil, telecommunications, cleaning and solid-waste collection, funerary services, financial services, mass transit, cargo transportation, and the production and supply of food and drugs. Regarding infrastructure, the measures seek the continuity of all services that are necessary to ensure the availability of urban networks and those activities related to it. This entails maintenance and upkeep costs but not construction. Thus, the construction industry is also suspended. The national government has inclined toward remote work in all activities that allow such method.

## How are companies facing the issues related to public and private contracts and the relationship with suppliers, in particular, on force majeure, delays, and other contractual and legal considerations?

## ARGENTINA



In general, infrastructure projects are suspended and companies are working on the renegotiation of current contracts with suppliers.

## BRAZIL



- Until now, most contractual discussions are based on the concept of force majeure, as determined by Brazilian legislation.
- Companies are also engaging in discussions and negotiations with business partners in order to avoid judicial disputes.
- There is still no relevant caseload of judicial decisions on force majeure issues caused by COVID-19, but those should begin to consistently occur in the next couple of months.

## CHILE



- Courts have not yet started issuing rulings determining whether the effects of COVID-19 could be construed as FM events or not. However, we have been required to prepare settlements and other forms of agreements in which parties recognize some of the COVID-19 events as FM. In this regard, solutions have been:
  - In realty related contracts: To lower or postpone (or a mixture of both) rents, progressive payments and hire-purchase installments.
  - In construction contracts: To extend contract terms, to waive penalties/liquidated damages but NOT to impose additional costs.
  - In supply contracts: To suspend service and to waive penalties/liquidated damages.

# LATIN AMERICA INFRASTRUCTURE AMID COVID-19

## COLOMBIA



- At least during the first lockdown period, it is clear that public and private infrastructure projects were under a force majeure event that prevented the parties from continuing the performance of non-essential activities. As a result, the majority (if not all) of these projects were suspended, either in whole or in part, during the said period and will face a displacement of the works schedule equal to the suspension period.
- In the case of 4G PPP concession contracts granted by ANI, ANI is typically obligated to compensate stand-by costs during a force majeure event so concessionaires have this remedy available. In other types of contracts, generally a force majeure event is considered a liability exemption event under applicable law so parties should not be obligated to the compensation of damages, unless they so agreed in the contract.
- During the second lockdown period, infrastructure projects in general were able to resume works, so in this case the performance of the contract should go back to normal. However, in the case of concession contracts granted by ANI, this entity has been prevented from resuming works fully, so in this case companies shall assess what legal or contractual remedies are available to them to claim any stand-by costs generated by ANI's suspension order.
- In addition to the foregoing, and in the context of the current national state of emergency, the government issued a decree whereby it declared that any default by the government's infrastructure contractors in the payment of invoices to their providers, which qualify as small or medium-sized companies, will constitute an anticompetitive action subject to sanctions pursuant to the antitrust regime.

## MEXICO



Other than companies working on the presidential projects, such as Maya Train, Dos Bocas Refinery and Santa Lucía Airport, and the ones described in answer I, they are negotiating with their suppliers and the contractual discussions are based on the concept of force majeure, as determined by Mexican legislation.

## PERU



In view of the foregoing, public and private infrastructure projects are facing a force majeure event regarding those activities that cannot be done remotely. However, most contractual clauses dealing with this matter tend toward suspending activities but not the contract. As long as the activities suspension is partial, the parties will have to diligently provide services that are unaffected by the force majeure event and that can be provided by remote work, as established in the Government's Executive Orders. Thus, a scenario of construction schedule extensions without acknowledging expenses is foreseen. Since a force majeure event waives all responsibility, the parties should not be compelled to acknowledge or provide compensation for damages, unless otherwise agreed in writing — a situation we have not seen yet.

## VENEZUELA



All contracts are suspended except for certain sectors, i.e., oil & gas, health, power, food and beverages.

# LATIN AMERICA INFRASTRUCTURE AMID COVID-19

## What are the continuity plans amid service interruptions? Any game changers for PPP projects?

**ARGENTINA** No specific changes here up to now.



**BRAZIL**



- Most infrastructure companies are still conducting their activities despite being affected by COVID-19.
- Companies that hold contracts with the public sector, particularly concessionaires of public services, will probably resort to force majeure claims (even if they are still able to conduct their activities). This is because, under Brazilian legislation, the recognition of force majeure related to the performance of public contracts gives the affected party the right to conduct an economic-financial rebalance of such contracts.
- On the other hand, we can expect a long list of infrastructure concessions/privatizations currently on the pipeline to suffer some delay (though not a complete interruption). However, once the emergency situation ends, these projects may speed up greatly, as private investment and job creation become a matter of urgency for governments.

**CHILE**



- There are some ideas to pass regulation considering that the effects of COVID are - by default - FM. Should any law in that regard be passed, we may face substantial impacts to PPP projects, as courts tend to exclude the application of FM for PPPs (and follow the trend that the contractor must develop strategies to prevent FM from happening to almost all events).

**COLOMBIA**



- -Service (meaning operation and maintenance) was never interrupted; only the works plan and related obligations (i.e., acquisition of lands, relocation of utilities networks, etc.).
- The government indicated through an emergency decree that both PPP projects and traditional infrastructure concessions that suffered a decrease in collection and income shall be extended in time in order to compensate such reduction, without considering any statutory limits to the extension of government contracts.
- In principle, this measure could be read as a unilateral modification of concession contracts, which is problematic because each contract contemplates a contractual remedy to compensate the concessionaire for the risk of traffic and collection decrease caused by the government's decision, which is not necessarily a time extension but generally a monetary compensation.
- In our opinion, the current situation does not give the government the right to unilaterally modify these contracts. We consider that contracts shall be extended only if concessionaires agree to this modification. Otherwise, concessionaires still have available the contractual remedies originally agreed with the government entity. If the government were to unilaterally enforce such extension, we consider that the concessionaires could have a valid claim against the government for invalid modification of contractual rights.

# LATIN AMERICA INFRASTRUCTURE AMID COVID-19

## MEXICO



In Mexico, the current administration does not like to implement PPPs (*Asociaciones Público Privadas* or APPs), and those implemented by prior administrations are not likely to have more considerations, even during this uncertain period.

This administration is structuring all the big projects through federal budgeting and public works schemes, concessions and services agreements or CPS/PPS.

---

## PERU



Road infrastructure preservation (operation and maintenance) has not been suspended. Notwithstanding the foregoing, the government has not issued any rule to guarantee the income of self-sustainable transport concessions, to remedy the impact the pandemic has had on them, or to acknowledge the costs incurred by this sector in order to handle the services provided. In this regard, parties to the concessions are looking for an alternative that meets both their needs. On the other hand, a bill already approved by the Congress is pending to be passed. This bill aims to suspend toll collection in roads across the country during the state of emergency. If this rule is passed, the concessionaires will have a chance to file a claim against their corresponding grantors for the contracts' economic imbalance, provided that the damage caused by it was covered by the provisions of the contract. It is important to consider that, in Peru, concession contracts contain a clause that acknowledges the restoration of economic balance, where the contract was affected by a rule issued by a competent authority. In this case, such rule would be the one establishing the suspension of toll collection.

---

## VENEZUELA



No special continuity plans are known to the public.

---

# LATIN AMERICA INFRASTRUCTURE AMID COVID-19

## How are infrastructure companies dealing with COVID-19

### ARGENTINA



Currently, most infrastructure companies are reviewing the possibility of obtaining bank loans to pay wages or seek extensions to pay taxes. In public infrastructure agreements, parties are considering the suspension of fines and sanctions due to COVID.

### BRAZIL



- At this moment, the main concerns of infrastructure companies have been the continuation of their activities, contractual issues, and how to prepare for and deal with potential labor situations.
- There is still no relevant news about major companies in the sector needing to deal with insolvency matters. One exception has been the airline sector, for which the federal government is preparing an incentive package.

### CHILE



- We are not aware of infra companies already on the brink of insolvency. In Chile, insolvency is threatening retail and commerce, but hasn't escalated to the level that it impacts infra yet.
- That said, the Government is proposing regulation to treat the finances of insolvent companies as preferential creditors (this is still under discussion). Should that occur, infra companies may receive a lifeline in case they face financial risks.

### COLOMBIA



### MEXICO



Other than the companies working on presidential projects and the ones described in answer 1, the major issue that infra companies are dealing with has been the continuity of their activities (other than essential), contractual negotiations, and how to prepare for and deal with potential labor situations. There is still no relevant news from big companies in the infra sector about needing to deal with insolvency matters, restructuring or bankruptcy. The exception has been the airline sector, for which the federal government is preparing an incentive package.

### PERU



There has been a major impact on the mass transit industry, since the executive orders issued by the national government establish that this sector must provide fleet services consisting of 50% of its total capacity. However, this still causes the industry to incur costs as if they were working at full capacity. Therefore, due to both the impact of providing services with half of their fleet and the fact that the flow of transported passengers has diminished considerably, they are requesting the State to inject capital so that they may continue their operations without their workers, providers or payment chain being affected.

In the infrastructure industry, there has been an increase in claims for losses suffered, finding arguments in facts other than the Force Majeure event. Therefore, there are attempts to build arguments on contract suspension, applicable laws variations or hardship in the provision of services.

# LATIN AMERICA INFRASTRUCTURE AMID COVID-19

**VENEZUELA** There are plans to resort to force majeure under general contract law.



## How is the current financing environment in your jurisdiction?

**ARGENTINA** There is no good financing environment. The national government is working with local banks on the issuance of low-interest loans to deal with the current situation.



**BRAZIL**



- Although there has been no major news in this area, financing is expected to become more challenging for Brazilian infrastructure companies.

**CHILE**



- Financing has slowed down significantly. Interest rates are escalating at an alarming rate.
- The Central Bank has reacted to this and lowered the base rate to a novel rate of 0.50%, which is the lowest in Chilean history. Likewise, it increased the % in which pension funds may invest in alternative assets (such as infra and projects), up to 13% of the AUM (13% only for A class funds, which have the highest volatility; on the contrary, E class remains at 5%; and those in between escalated by around 2% each).

**COLOMBIA**



**MEXICO**



There have been no major announcements on this matter; however, financing is expected to become tougher for Mexican infrastructure companies, except for those working on presidential projects.

Currently we are advising a Mexican development bank on the financing of a state road, and it seems that we are going to close any time soon.

**PERU**



To leverage companies without disrupting the payment chain, the financial environment tends to protect small and medium businesses by granting them loans and financial aid.

**VENEZUELA** Uncertain.





# LATIN AMERICA INFRASTRUCTURE AMID COVID-19

## Key Contacts



**Carolina Duque**

Partner, Bogota  
Banking and Finance  
+57 1 634 1590  
[carolina.duque@bakermckenzie.com](mailto:carolina.duque@bakermckenzie.com)



**Henrique Frizzo\***

Principal, Sao Paulo  
Projects  
+55 11 3048 6905  
[henrique.frizzo@trenchrossi.com](mailto:henrique.frizzo@trenchrossi.com)



**Rodrigo Diaz de Valdes**

Partner, Santiago  
Disputes  
+56 2 2367 7066  
[rodrigo.diazdevaldes@bakermckenzie.com](mailto:rodrigo.diazdevaldes@bakermckenzie.com)

*\*Content prepared in cooperation with Trench Rossi Watanabe, a Brazilian law firm*

[www.bakermckenzie.com](http://www.bakermckenzie.com)

©2020 Baker McKenzie. All rights reserved. Baker & McKenzie International is a global law firm with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner or equivalent in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.