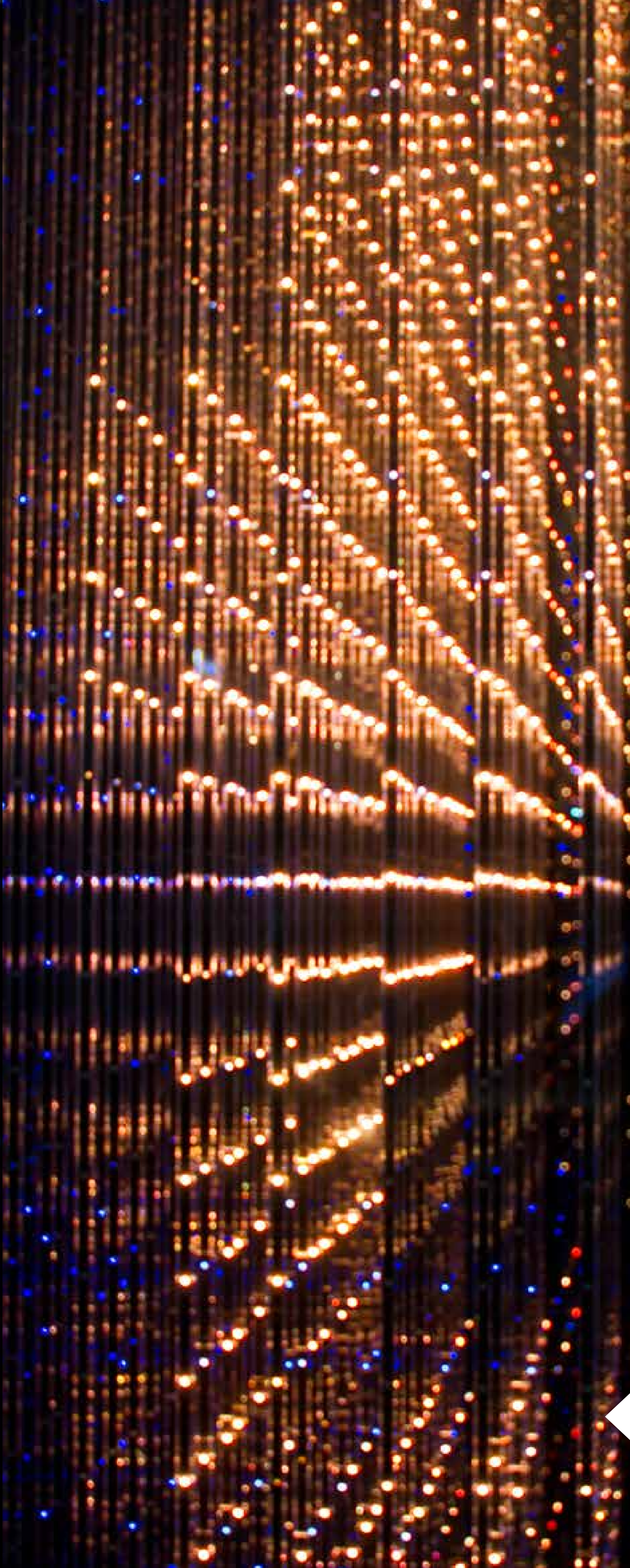
WHITE & CASE

2024

Latin America Focus

Forging a path through complexity

Contents



Cover: Light trail at El Chalten village (Fitz Roy Mountain), Argentina

Latin America 2024: Forging a path through complex dynamics

We have witnessed significant challenges and transformation in Latin America in the past year. Businesses across the region have grappled with political tensions, macroeconomic uncertainty, high interest rates and shifting regulatory landscapes—as well as the boom in AI.

The elections in Latin America in 2024 are now behind us, though, as expected, the results have led to as many questions about the future as they have to answers. We are particularly focused on Venezuela and are hopeful that the democratic aspirations of the people of Venezuela will be respected. The US presidential election has also now concluded, and its outcome could have significant consequences for many jurisdictions.

In this year's edition of *Latin America Focus*, we will explore some of these complex dynamics and consider how companies can adapt to changes and capitalize on trends to forge a path through this ever-changing environment.

We begin with a look at our extensive pro bono efforts in the region, which focus on promoting justice, equality and the rule of law. From upholding the fundamental human rights of children with incarcerated mothers to advocating for the rights of asylum seekers, our projects underscore the importance of legal awareness and access to justice. In 2023 alone, we logged more than 1,900 pro bono hours in Latin America, reflecting our dedication to making a meaningful impact.

As artificial intelligence continues to accelerate globally, Latin America is no exception. Our second piece examines how the region is navigating the balance between fostering innovation and implementing AI regulations to mitigate risk. Brazil, Mexico, Chile and Argentina are each exploring regulatory frameworks—with varying amounts of progress—aligned with their policy priorities. These efforts are crucial, as AI is projected to contribute significantly to the region's GDP, driving economic and social development.

Next, we provide an overview of investment and disputes trends. Foreign investment remains a critical driver of growth in Latin America, though political volatility often leads to investor-state disputes, particularly when investment-hostile policies replace more favorable ones. However, the region continues to attract robust investment in sectors such as mining, renewable energy and data centers. Navigating these complexities requires a well-integrated investment protection strategy to safeguard interests and foster long-term growth.

We then turn to the pressing issue of water security, with many regions facing scarcity and aging infrastructure. Brazil and Chile are leading the way in unlocking private investment to tackle these challenges through public-private partnerships (PPPs). These initiatives are essential to improving access to clean water and sanitation, which remain critical for sustainable development and public health. We are optimistic that meaningful reforms in other countries, including Mexico, will help PPPs or other structures gain similar traction there to ensure long-term water security.

Lastly, we consider the booming data center industry in Latin America, whose rapid growth brings challenges, particularly in securing necessary resources like power and water. Countries such as Mexico, Chile and Brazil are at the forefront here, addressing these issues through innovative financing and strategic planning. The expansion of data centers not only supports the digital economy but also presents significant investment opportunities in the region.

We look forward to discussing these and other issues with you.

Christian Hansen
Head of Latin America Practice

Matrix of a screen
made multiple LEDs

Children's hands on a wall, Guatemala

Lending a local hand: White & Case pro bono in Latin America

The Firm's extensive pro bono efforts in the region are united in their aim of protecting its most vulnerable individuals.

By Rafael Llano and Jack Pace

Legislation is usually designed to protect society's most vulnerable, yet those most at risk of human rights violations often have the least awareness of these laws and the most limited means to use them. In Latin America, White & Case's pro bono projects underscore our dedication to promoting justice, equality and the rule of law for all, in a region where these principles are often challenged by poverty, political instability and institutional barriers.

There is a healthy culture around pro bono at the Firm, with no shortage of partners and associates who want to get involved. In 2023, we logged 105,550 pro bono hours in total, with more than 1,900 hours in Latin America.

In recent years this has entailed, for example, upholding the fundamental human rights of children with incarcerated parents, providing constitutional protection for asylum seekers and ensuring access to justice for journalists.

The work of charitable organizations such as White & Case partner Appleseed México, the Vance Center for International Justice and the Thomson Reuters Foundation's TrustLaw is pivotal in either directly serving clients or connecting them with those who can.

There are tremendous tensions in Latin America, where people exhausted by inequality and crime—which worsened with the pandemic—are pushing back against inefficiency, excessive bureaucracy and arbitrariness. What connects all of our pro bono projects is the idea of making sure these people are heard and protected.

SETTING PRECEDENTS FOR MIGRANTS' RIGHTS

In January 2019, the Trump administration enacted the Migrant Protection Protocols—better known as the "Remain in Mexico" policy—which ruled that migrants from all over the world seeking asylum in the US must stay in Mexico until their application was approved. That's when Appleseed stepped in.

Local NGO IMUMI, or Instituto para las Mujeres en la Migración, had filed an "amparo"—a request for constitutional protection—on behalf of those thousands of migrants. Since the case was complex and required specialized attention, Appleseed worked with White & Case to get it before the country's Supreme Court and to obtain a favorable resolution. Many of these people were fleeing war and persecution in their home countries and had effectively been stranded at the US-Mexico border, with neither government taking responsibility for them.

This left these already vulnerable individuals at risk of extreme physical harm: During the two years that the policy was in place, NGO Human Rights First identified more than 1,500 publicly reported cases of kidnappings, murder, torture, rape and other violent attacks. More than 71,000 migrants were subject to the policy during this time.

"These people had come from all over the world—even from Asia-Pacific, Africa—and they had the right paperwork, but these asylum hearings can take months or even years," says Maru Cortazar, executive director at Appleseed México.

> "In 2023, White & Case logged 105,550 pro bono hours in total, with more than 1,900 hours in Latin America

Amparos typically protect an individual or company, but lawyers in this case innovatively argued that NGOs represented the collective rights of those affected by the controversial policy. That particular tool had not been used in this context before, and in a heavily precedent-based legal system, that was a great motivator: the idea of creating law to represent collective rights.

The Mexican Supreme Court ruled unanimously in favor of the amparo, agreeing with the plaintiffs that the existing system was a violation of migrants' human rights and obstructed their access to justice.

President Biden overturned the "Remain in Mexico" policy, but the amparo stays in place if it is reinstated in future, solidifying the Mexican government's obligations to asylum seekers. The precedent it has set is incredibly important and may be used in other cases, adds Cortazar. "We demonstrated that a nonprofit organization can speak on behalf of people who don't have the support or ability to defend themselves," she says.

PROTECTING CHILDREN WITH INCARCERATED MOTHERS

In Guatemala, our work has centered on the dozens of young children—most under the age of four, others as old as 12—who reside in prison with their mothers. Many more regularly visit a parent in prison. Jaime Chávez Alor, associate executive director at the Vance Center, says the treatment of these children can be abhorrent. In extreme cases, it may involve physical or sexual abuse, but more common is general neglect, particularly around health and nutrition.

"This was a hugely important, urgent matter—the consequences for the human rights of children residing in prison with their mothers were serious, and imminent," says Chávez Alor. "If these fundamental rights are not upheld in the first years of a child's life, you can't repair that."

Working with White & Case and the Guatemalan organization Colectivo Artesana, the Vance Center filed a request with the Inter-American Commission on Human Rights for precautionary measures to protect these children.

The initial work involved local and international research on the problem, which was extensive. Since 2021, 35 cases of malnutrition in children living in three Guatemalan prisons have been reported, despite the existence of legislation dictating that detention centers must provide adequate spaces for these women and their children. "Babies and toddlers have specific nutrition needs, and prison is not famous for providing the most nutritious meals, so that was one of the standards we recommended," adds Chávez Alor.

The result was a national protocol, established by the Guatemalan Court for Children and Adolescents, focused on nutrition and freedom from sexual violence. The requested precautionary measures seek to maintain this protocol and to prevent its cancellation.

ADVOCATING FOR FORMERLY IMPRISONED WOMEN

A further Vance Center project focused on women's right to reintegration following their release from prison. Formerly incarcerated women in Latin America face a multitude of obstacles: social stigma and discrimination, an absence of professional training and pre-release preparation, limited or no access to fairly paid job opportunities, financial and educational discrimination, and the loss of family ties.

"This was a hugely important, urgent matter—the consequences for the human rights of children residing in prison with their mothers were serious, and imminent."

– Jaime Chávez Alor, Vance Center

All of these factors make women more vulnerable—more likely to take on dangerous, exploitative work, less likely to report unsafe working conditions and more at risk of gender-based violence.

"When the man in a family goes to prison, the rest of the family modifies their lives around that," says Chávez Alor. "When the woman in a family goes to prison, she's forgotten." The Vance Center's Women in Prison project aims to raise awareness of the difficulties women face both during their incarceration and for years after their release, which these women call a "double sentence": one at the hands of a judge, another at the hands of society.

In a March 2024 hearing at the Inter-American Commission on Human Rights in Washington, DC—the first of its kind—affected women were able to speak freely about the issues they have faced. "We had a few women who had to participate remotely, because the fact that they are formerly incarcerated meant they couldn't get a visa, and that was so powerful—it really hammered home the point of it all," says Chávez Alor.

Speaking during the hearing, Colectivo Artesana's Andrea Barrios said that women face a double stigma upon completion of their sentences. She cited a survey of 200 formerly incarcerated women, which found that more than half were unable to find work after leaving prison, 26 percent were working in the informal labor market, and the remainder were considering migrating to the US to find work.

Latin American mother and son

30 out of 100k

Latin America's female prison population rate, the highest in the world

EDUCATING JOURNALISTS ABOUT THEIR RIGHTS

Another key judicial theme across Latin America is the treatment of journalists. Every year, hundreds of journalists around the world are attacked, imprisoned or killed while

simply doing their job, and so the Committee to Protect Journalists (CPJ) prepares and distributes essential guides for reporters.

The CPJ identified a particular risk to journalists in the run-up to the 2024 elections in Mexico, which has historically been identified as one of the most dangerous countries to be a journalist, particularly for those who cover political corruption, drug trafficking or human rights abuses. The heightened political tensions and involvement of criminal groups in the electoral process further increases the dangers journalists face.

TrustLaw, the global pro bono network of the Thomson Reuters Foundation, has worked with the CPJ on a number of these "know your rights" guides, most recently in Mexico, in collaboration with White & Case lawyers. It has previously published similar guides for journalists in Brazil, India and the US.

Sometimes the risks identified are physical or cyber-attacks, but legal threats and censorship are becoming more common, says María Candela Zunino, legal manager for Latin America at TrustLaw.

The guide offers essential information for journalists in case of arrest, advice on covering protests, contact details for local organizations that provide legal support, and a summary of the documents and devices police are legally allowed to seize. "It provides both practical steps to ensure journalists' safety during and after protests, and an outline of the legal procedures if a crime is deemed to have been committed," says Candela Zunino.

DOING OUR PART

White & Case lawyers have spent countless hours on these and many other matters, and we consider the ability to practice pro bono to be both an important responsibility and a significant perk of our careers. As a global firm, we have tremendous resources at our disposal to help us do as much good as we can, both in Latin America and wherever we work.

Person walking through strands of lights

Foster innovation or mitigate risk? AI regulation in Latin America

As AI regulations emerge around the world, Brazil, Mexico, Chile and Argentina explore the best approaches to regulating the technology according to their policy priorities.

By Andrés Mosqueira, Shaanty Rubio Gonzalez and Karla Silva Rodriguez

Artificial intelligence is probably the most popular discussion topic of our times. And it is certainly something that governments around the world are interested in regulating. Some jurisdictions have already enacted specialized AI statutes, while others are taking their time to examine the best approach to AI governance. A common objective across jurisdictions is to achieve an adequate balance between fostering growth of the AI sector and adequately mitigating risks associated with AI.

Latin America has recognized AI's potential as a catalyst for economic and social development while seeking to address the challenges it poses, particularly in the protection of human rights. As part of their respective legislative and regulatory processes to tackle AI regulation, Latin American countries have looked to regulatory frameworks in other regions. The EU AI Act—the first major comprehensive, mandatory AI regulation, which came into effect in August 2024—has so far been the most influential.

Governments in the region are currently reviewing and discussing bills or initiatives of specific AI regulation. Some jurisdictions, such as Brazil and Chile, already have highly detailed proposals, while the rest of the largest LatAm jurisdictions, including Mexico and Argentina, have more general proposals. The rate of progress is noticeably more advanced in some countries, while in others there has been scant progress in the legislative or regulatory process.

> **“According to *The Economist*, Latin America is expected to gain 5.4 percent of GDP—equal to US$0.5 trillion—as a result of AI by 2030**

Most of the largest jurisdictions in Latin America are following a risk-based approach for their proposed regulations, seeking to prohibit unacceptably risky AI applications, setting out specific requirements for high-risk AI applications—such as regulatory approvals or disclosure requirements—and allowing the use of low-risk AI technology, subject to no (or minor) requirements. Some jurisdictions, such as Argentina, are deliberately seeking to create a less regulated AI ecosystem to foster innovation and attract foreign investment.

BRAZIL: THE REGION'S LARGEST MARKET

Brazil's proposed law to regulate artificial intelligence, Bill No. 2,338/2023, is being discussed in its Senate and is probably the most advanced piece of proposed AI law in the region.

The bill aims to protect fundamental rights and ensure the implementation of secure systems for the benefit of individuals, democracy and technological development. It follows the EU AI Act's risk-based approach and imposes obligations on "AI agents"—namely developers, distributors and users—based on whether their AI system classifies as excessive or high risk. Similar to the EU law, AI systems that pose an excessive risk are prohibited, and high-risk AI systems must comply with additional operational and governance obligations to ensure transparency, reliability, safety and fairness. The proposal also contemplates special obligations for the use of AI in the public sector.

Developers of high-risk AI are required to prepare impact reports on individuals' fundamental rights. These reports must be public, constantly updated throughout the AI system life cycle and disclosed to regulators. All AI agents must notify authorities of serious incidents that may affect fundamental rights, critical infrastructure or individuals.

The bill also imposes specific obligations on developers of general-purpose AI systems, many of which are not included in the EU AI Act, such as requirements for AI systems to use energy efficiently, specific provisions regarding generative AI—including the need to indicate when content is AI-generated—and rules on the use of copyrighted works.

In terms of enforcement, the bill creates the AI National Regulation and Governance System, whose main objective is to coordinate regulatory authorities and application of sanctions. It will be led by the Brazilian Data Protection Authority and includes several sectoral public authorities. The bill also provides for a specialized AI Authority with substantial regulatory powers including issuing warnings, imposing fines, publicly disclosing violations of the law and prohibiting the use of certain databases.

AI regulatory compliance mechanisms in Latin America

	Argentina	Colombia	Peru	Chile	Mexico	Brazil
Regulatory approval	□	□	□	□	■	□
Requirement impact assessments	■	■	□	□	□	■
Audits	□	□	□	■	■	■
Government reporting	□	□	□	■	□	■
Required disclosure/ Mandatory explainability	□	■	■	■	□	■
Obligation to pay royalties to IP holders of training data	□	□	□	□	□	■

AI regulatory framework in Latin America

	Argentina	Colombia	Peru	Chile	Mexico	Brazil
Institutionality (e.g., AI promotion bodies, committees)	■	■	■	■	■	■
Isolated bills presented by members of Parliament	■	■	■	■	■	■
Government-supported bills	□	□	□	■	□	■
Comprehensive, approved AI law	□	□	□	□	□	□

Source: White & Case

Palácio do Planalto in Brasília, the official workplace of the president of Brazil

Finally, the Brazilian AI bill also seeks to promote sustainable and responsible AI innovation, including through the creation of a regulatory sandbox, which authorizes experimentation with AI systems that would not be fully subject to AI regulatory obligations.

MEXICO: PROJECT UNDER CONSTRUCTION

While Mexico has actively participated in international forums on AI regulation, currently there are no specific AI laws or regulations in force, and its proposed AI regulation is less developed than in other LatAm jurisdictions. A few AI-focused bills have been introduced to Congress by individual legislators rather than by the government itself. Some of these are limited to very specific aspects of AI, such as prohibition of deep fakes, while others seek to create a more comprehensive regulatory framework.

The most relevant AI bill to date was submitted in April 2024 by a senior legislator. It aims to regulate the development and distribution of AI tools and to ensure the protection of human rights, and sets forth that both Mexican and foreign AI developers and deployers are subject to its provisions. Even though it mirrors some of the EU AI Act's main principles, Mexico's bill seems to be more restrictive. For instance, despite adopting a risk-based approach and categorizing AI tools according to three different levels of risk—unacceptable, high and low—the bill requires every AI system to obtain regulatory authorizations before being distributed in Mexico. Notably, the bill requires large language model developers to obtain prior consent from IP rights holders of the information used to train such models.

Despite Mexico's continually growing importance in the region's technology sector, the enactment of AI laws does not seem to be a priority for the new administration.

CHILE: LEADER IN THE REGION

Chile has been a regional leader in promoting AI regulations. Earlier this year, its government submitted to its Congress a bill to regulate AI systems, which is currently under review. The bill's purpose is to promote the development and implementation of AI systems while respecting democratic principles, the rule of law and human rights.

Interestingly, as proposed, the bill would apply not only to developers introducing AI systems into Chile or deployers domiciled in Chile, but also to foreign developers and deployers when the output data of AI systems is used in Chile.

Following the risk-based approach of the EU AI Act, the Chilean bill classifies AI systems into four categories:

- **Unacceptable risk:** AI that is incompatible with human rights—for example, social scoring or subliminal manipulative systems—and is consequently prohibited
- **High risk:** AI that may adversely affect the health and safety of people, but which is permitted under certain requirements, such as data governance rules for data model training or human supervision mechanisms
- **Limited risk:** AI that poses no significant risks of manipulation or error, and which is permitted provided it complies with certain transparency provisions
- **No risk:** AI that shows no apparent risk and is therefore unregulated

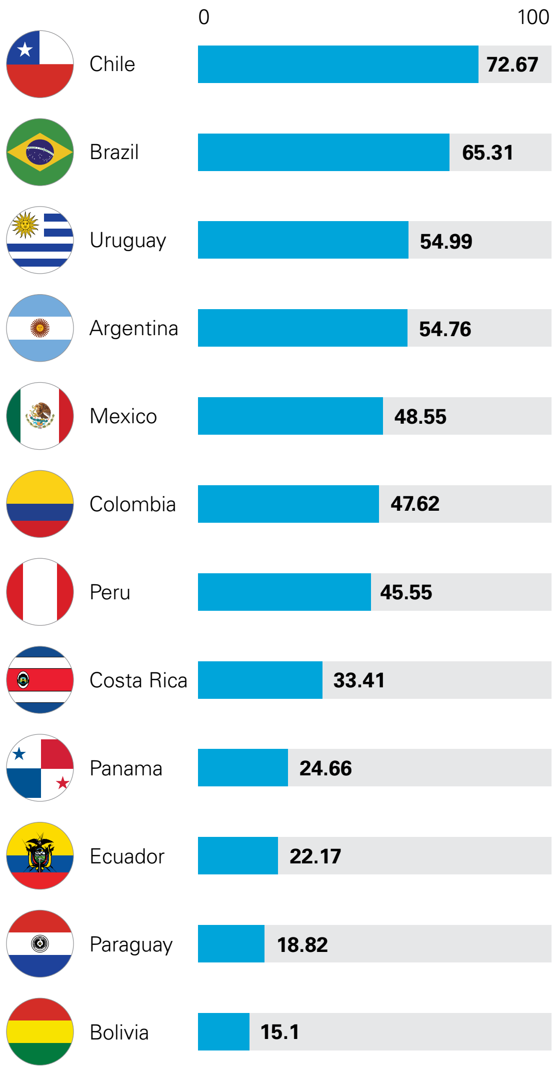
The bill mirrors several aspects of the EU AI Act and is aligned with the UNESCO and OECD AI guidelines. However, instead of requiring AI technologies to go through a certification process before entering the market, as required by the EU AI Act's "conformity assessment," the Chilean bill requires each subject person to classify its AI system in accordance with risk classification rules.

ARGENTINA: SEEKING TO BECOME AN AI HUB

Argentina is working toward regulating AI through various legislative proposals. These bills, also inspired by the EU AI Act, aim to establish guiding principles for responsible AI use, emphasizing transparency, accountability and human oversight. Additionally, they propose creating a regulatory authority to enforce these standards.

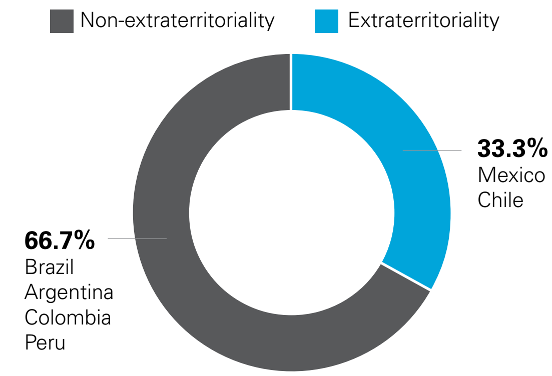
In 2023, prior to the EU AI Act, the Argentine government issued the

Leading Latin American countries in AI readiness



Source: Latin American Artificial Intelligence Index (ILIA), 2023

Territorial applicability of Latin American AI regulations



Source: White & Case

The Palace of the Argentine National Congress, in Buenos Aires

"Recommendations for a Reliable Artificial Intelligence," drawing upon internationally recognized ethical principles to ensure that AI is used in a manner that benefits society. A key component of the recommendations is a "graphic scheme of stages of AI projects" that promotes transparency and accountability throughout a project's development life cycle. While government bodies have issued non-binding directives on AI matters, there are currently no binding resolutions in place. The government also established the Interministerial Roundtable on Artificial Intelligence to address the growing influence of AI across various sectors.

Today, bills introduced in the Argentine Senate aim to establish a comprehensive regulatory framework for AI under a risk-based approach similar to the European model, categorizing AI systems into levels of limited, minimal, high and unacceptable risk. Notably, some of these bills mandate the creation of a national registry of AI systems, requiring all entities developing or using AI to register and undergo impact assessments. Furthermore, it proposes outright prohibitions on certain high-risk AI applications.

President Javier Milei has voiced strong support for AI, and his administration has announced initiatives to promote AI research and development to promote Argentina as an AI hub.

Pillars of salt in El Salar de Uyuni, Bolivia

Balancing investment opportunities and potential disputes amid unpredictable politics in Latin America

Growth opportunities abound, but political volatility often leads to investor-state disputes

By Silvia Marchili, Estefania San Juan and John Dalebroux

International disputes involving Latin America continue to emerge against a backdrop of significant economic, political and geopolitical shifts impacting the region. These disputes arise in a variety of contexts. Chief among them is volatility impacting a key sector or jurisdiction, particularly when an "investment-friendly" government is replaced by an "investment-hostile" one.

Key resources in the region continue to attract new investment in both long-established sectors, such as mining, infrastructure, and oil and gas, as well as in emerging regional sectors, such as renewable energy—including hydrogen—lithium mining and data centers. Shifting economic, political and geopolitical tides impact the attractiveness of these opportunities and often generate international disputes.

While investments in Latin America have historically been subject to some level of uncertainty, this has increased significantly in recent years, as regulatory and political changes become more frequent and more drastic. Moreover, governments are more sophisticated in managing relations with foreign investors, including in enacting long-term policies that are hostile to their investments. Indeed, the days where a state would expropriate an investment through an army takeover appear to be gone. More and more, states adopt approaches that enable them to seize an investment, but through means that seek to reduce their exposure to international liability. Thus, investors in Latin America must navigate increasingly complex circumstances to protect their investments.

> **"It is more important than ever before for investors in Latin America to have an integrated investment protection strategy at an early stage**

In this context, it is more important than ever before for investors in Latin America to have an integrated investment protection strategy at an early stage of the investment that will provide them with protections in a worst-case scenario.

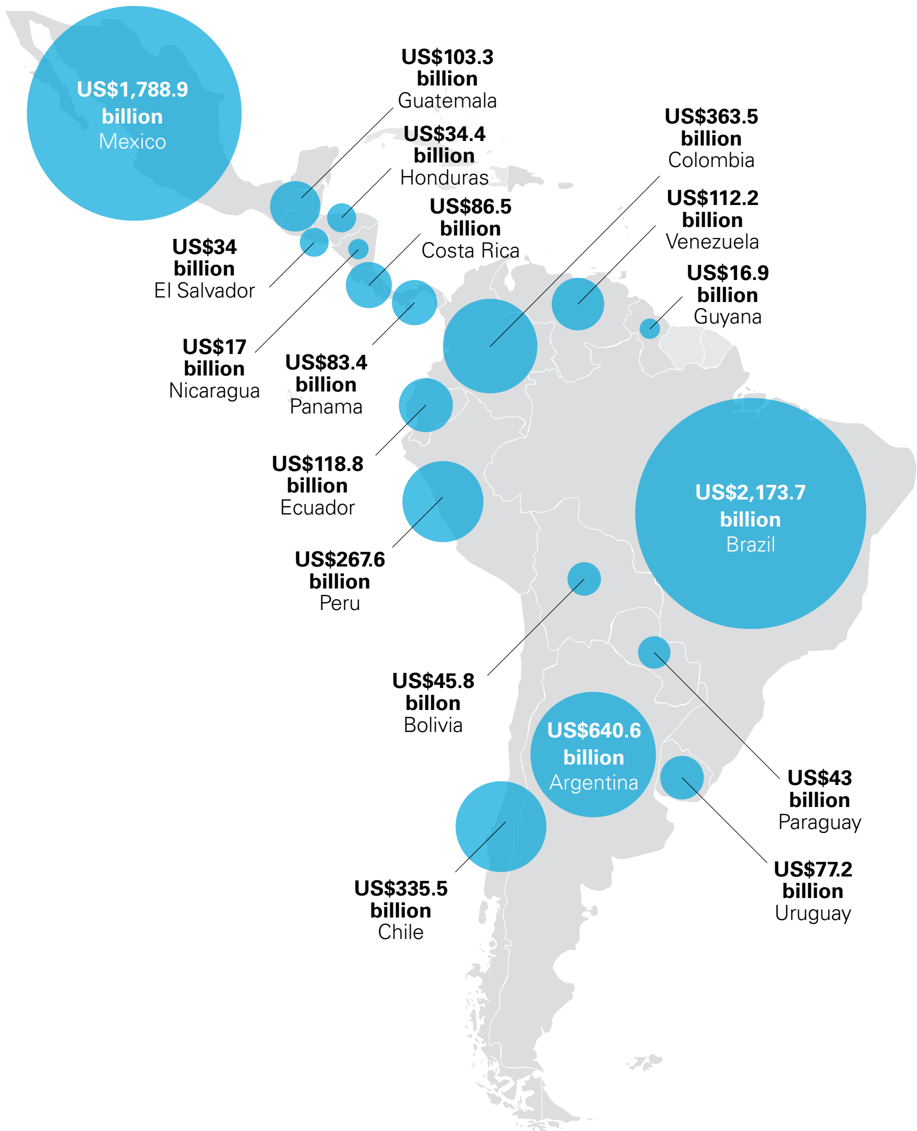
INVESTMENT TRENDS IN LATIN AMERICA

Growth remains robust across many key Latin American jurisdictions, catalyzed by strong investment opportunities in key sectors and jurisdictions.

Investment opportunities have tended to emerge when there is both a market opportunity to invest in a particular sector and a relatively stable and predictable legal framework where the opportunity is located. Some recent trends include:

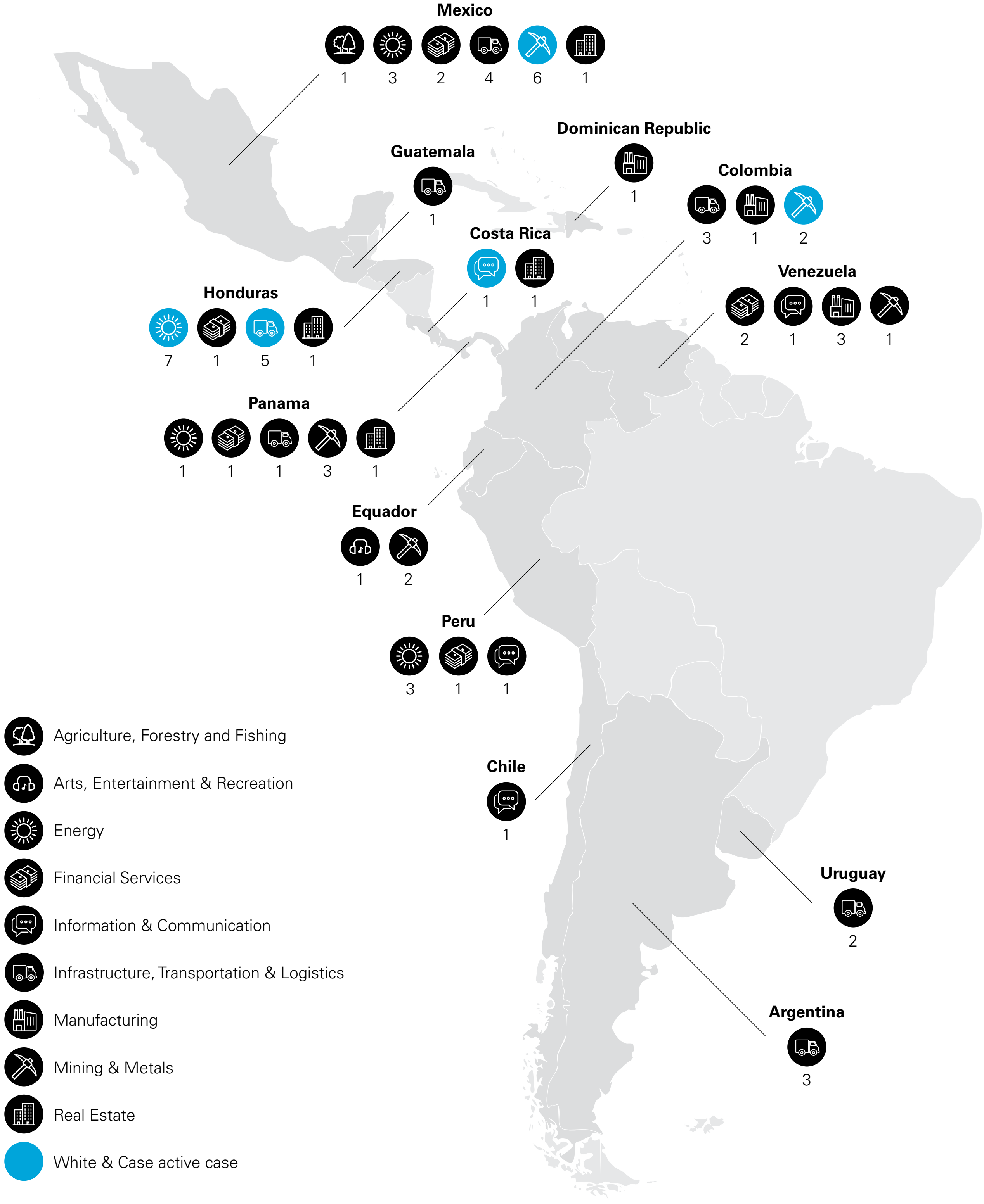
- **Nearshoring in Mexico and Central America**. Nearshoring has become more prevalent in recent years, as foreign companies target growth in the US and seek to maximize economic efficiency and minimize production costs.
- **Lithium in Argentina, Chile, Bolivia and Mexico**. With demand for batteries booming, lithium has emerged as a vital commodity. Argentina, Chile and Bolivia are home to the "Lithium Triangle," a region containing nearly 56 percent of the world's known lithium. Mexico also has significant lithium reserves, currently ranking ninth globally.
- **Mining in Ecuador and elsewhere.** Mining, which has historically accounted for 13 to 19 percent of Latin America's foreign direct investment (FDI), continues to present major investment opportunities across key jurisdictions. Recently, Ecuador, in particular, has seen an increase in mining investment under the administration of President Daniel Noboa following various state acts that have encouraged mining investors, including supporting the easing of certain social requirements and the allowance of investment contracts to be signed with the state.
- **Renewables in Chile, Brazil, Colombia and Mexico.** Investment in the renewable energy sector continues to grow and evolve in Latin America, as investment has expanded from hydro projects to include other renewable projects, such as photovoltaic, eolic and hydrogen projects, in key jurisdictions, in response to government calls to encourage investment aligned with the energy transition. While the market has grown, so has volatility toward these projects in key jurisdictions, including Chile, Mexico and Colombia, increasing uncertainty for investors.
- **Oil and gas in Guyana.** Guyana has seen a massive increase in FDI in recent years, largely driven by the enormous oil and gas reserves located there.
- **Data centers in Brazil, Chile and Argentina.** Digital transformation and greater internet penetration across Latin America requires more technology investment in the region, including constructing data centers to enhance local cloud services, data storage and processing capabilities. Data centers tend to be energy-intensive, which can cause friction in local and national markets, including around potential environmental concerns and in effectively managing electricity demand.

GDP in select Latin American and Caribbean jurisdictions



Source: Fitch Solutions, Nominal GDP Data (2024)

Investor-state cases in select Latin American and Caribbean jurisdictions



Source: ICSID and UNCTAD, 2024

Crude oil pipelines

DISPUTES TRENDS IN LATIN AMERICA

The significant volatility in Latin American markets is a direct consequence of more extreme political cycles. This leads to increased uncertainty among investors. Indeed, the most persistent trend leading to disputes in the region remains: When a jurisdiction undertakes a radical and unanticipated policy shift from a pro-investment legal framework to a more hostile one, it can expect to face disputes from investors.

For example, Argentina and Ecuador, where investors have historically faced certain volatility—including, at times, investment-hostile policies—recently elected more investor-friendly administrations. Colombia and Chile, by contrast, had more investor-friendly administrations in the past, but recently became more hostile. The challenge of navigating this oscillation is particularly acute for investors with long-term investments, as they often are subject to multiple political regimes with significantly different foreign investment policies. Moreover, recent elections and political transitions in other key Latin American jurisdictions, including Mexico, Peru and Brazil, highlight the region's unpredictability.

To mitigate risks stemming from these trends, investors must protect their investments through a variety of tools, including the protections afforded by international investment treaties, which form a key component of an integrated investment protection strategy. This strategy should be developed and implemented at an early stage of the investment to maximize its effectiveness and provide the investor with protections in a worst-case scenario. The strategy should include the following key pillars:

- **Investment treaty planning.** Foreign investors may be entitled to certain protections for their investments if they hold them through a jurisdiction that is a party to an investment protection treaty with the state in which they plan to invest. Such protections are generally considered quite strong, because they allow the investor to bring claims directly against the state before an international and neutral arbitral tribunal for any breaches of a variety of substantive protections. Investors may be able to secure these protections even if they already invested without having them. The key to obtaining coverage involves (re)structuring the investment to secure investment treaty protections, and doing so before a dispute is foreseeable.
- **Contractual and domestic protections.** Investors may secure key contractual protections—including in concession contracts and investment agreements—and certain protections under domestic law. These protections may include rights to bring claims against the state (or entities thereof) outside of its home courts, as well as securing substantive investment protections. However, to the extent that they do not provide the investor with the same ability to bring claims directly against the state under the same, or very similar, terms as an investment treaty, these protections may not be as strong and may be more at risk of state recalcitrance.

  But they are particularly helpful in situations where investment treaty protections may not be available for foreign investors. For example, present investors in Ecuador, Bolivia and Honduras are unlikely to secure investment treaty protections, as these countries do not currently offer many investment protections to foreign investors. Some investors in these jurisdictions,

however, have been able to secure additional protections in relevant contractual instruments, such as investment agreements between mining, investors and the Ecuadorian state and similar agreements between lithium investors and the Bolivian state.

- **Creating a record.** Creating a robust record of contemporaneous state acts in support of an investment, such as in a contract or correspondence, is crucial and can provide an investor with significant leverage against the state, should it change its position. Indeed, most Latin American states are sophisticated and highly competent parties to international disputes and will likely seek to undermine any attempts to establish the reasonableness of the investment by highlighting past volatility. Having an established record that shows support for the investment can undercut these efforts. For example, in various disputes related to investments in Colombia's mining sector, investors relied on such records to undercut post hoc state attempts to attack the investment's reasonableness.

CONCLUSION

Key resources and market opportunities continue to attract robust investment into Latin America. Nonetheless, these investors face increasingly complex economic, political and geopolitical issues that provide fertile ground for disputes to arise. To best protect their investments, investors should develop and implement an integrated investment protection strategy at an early stage of the investment. This is particularly important considering Latin American states' growing sophistication in managing international disputes and the underlying state actions that lead to them.

Such a plan will focus on structuring investments to secure investment protections under international treaties, as well as maximizing potential rights under contractual and domestic law— including potentially insisting on robust dispute resolution clauses that include a right to bring an international arbitration in contracts with state entities, such as concession contracts, investment agreements and legal stability agreements. Even if such a dispute does not materialize, an investment protection strategy maximizes an investor's leverage and improves its position in any future negotiations.

Dam in municipal park,
Paraná, Brazil

Under pressure: Latin American water sector turns to private investment

With strained water resources and infrastructure across the region under increased pressure, Brazil and Chile lead the way in unlocking private investment in the water sector

By Evelyn Balassiano | John Guzman

The World Bank has reported that Latin America holds nearly a third of the world's water resources and is the world's largest hydropower producer. With these credentials, one could easily overlook the challenges the region's water sector faces.

Water security and scarcity

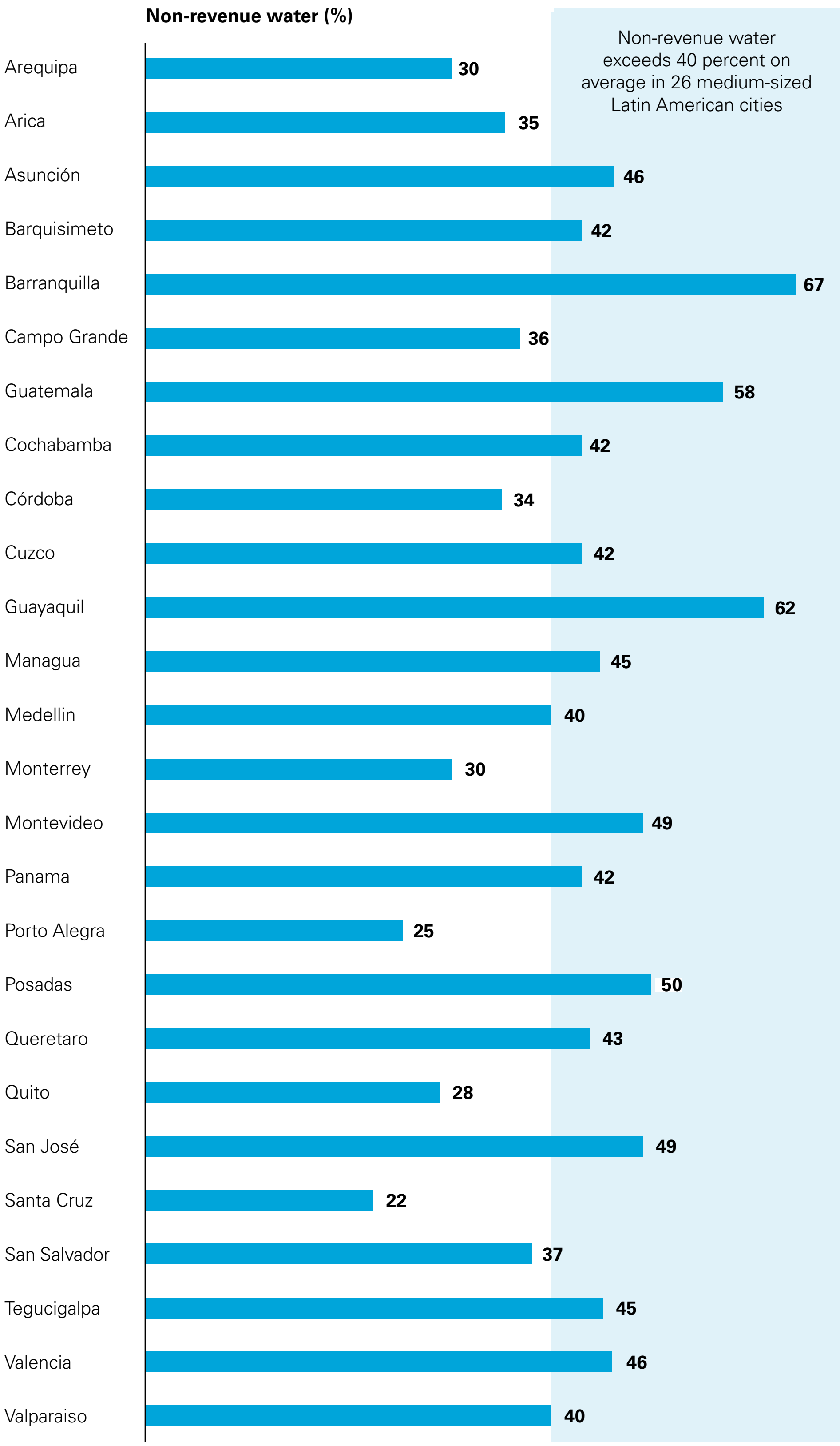
Also, according to the World Bank, 166 million people lacked access to safely managed water supply services in Latin America in 2017, and 150 million people lived in extremely water-scarce areas in 2019. Water scarcity is further exacerbated by climate variability and extreme weather events, the discharge of untreated effluents into water resources, and decreasing water storage capacity from natural resources. Economic development in Latin America has also historically relied on two water-intensive industries: agriculture and mining.

Unsustainable systems, aging infrastructure and non-revenue water

Many small state-run water utilities struggle to fully recover their operating costs from tariff revenue. High levels of water losses from inadequate operations further increase the cost of treating and delivering water. With financially unsustainable operations, deferred maintenance occurs, and capital investments are a challenge. Additionally, research from 2023 forecasts public budgets for infrastructure development over the next 12 months will remain the same or decrease.

> **166 million people in Latin America lack access to a safe water supply, and 150 million live in water-scarce areas**

Non-revenue water in Latin American cities



Source: World Bank, 2022

Institutional fragmentation

A 2012 OECD study found that in all Latin American countries, there is significant decentralization of water functions. Services are delivered by local governments and resource management is performed by higher-tier governments, which results in uncoordinated water policies, regulatory uncertainty, reduced accountability and funding gaps.

But the cost of not investing in water is too high to ignore. In Colombia, for example, the World Bank estimates water scarcity reduces the country's GDP by 1.6 percent to 2.3 percent due to the decline in agricultural crop yields, employment contraction and reduction in production, among other factors.

To achieve the 2030 UN Sustainability Development Goals despite these challenges, a concerted effort from governments and the private sector will be needed to change how water is regulated, sourced and consumed. In this spirit of partnership, countries are increasingly turning to public-private partnerships, or PPPs, to bolster investment in water infrastructure. More than 40 water and sanitation projects were underway in July 2023, covering wastewater treatment plants, desalination facilities, dams and irrigation systems, and representing US$9.2 billion of committed investments.

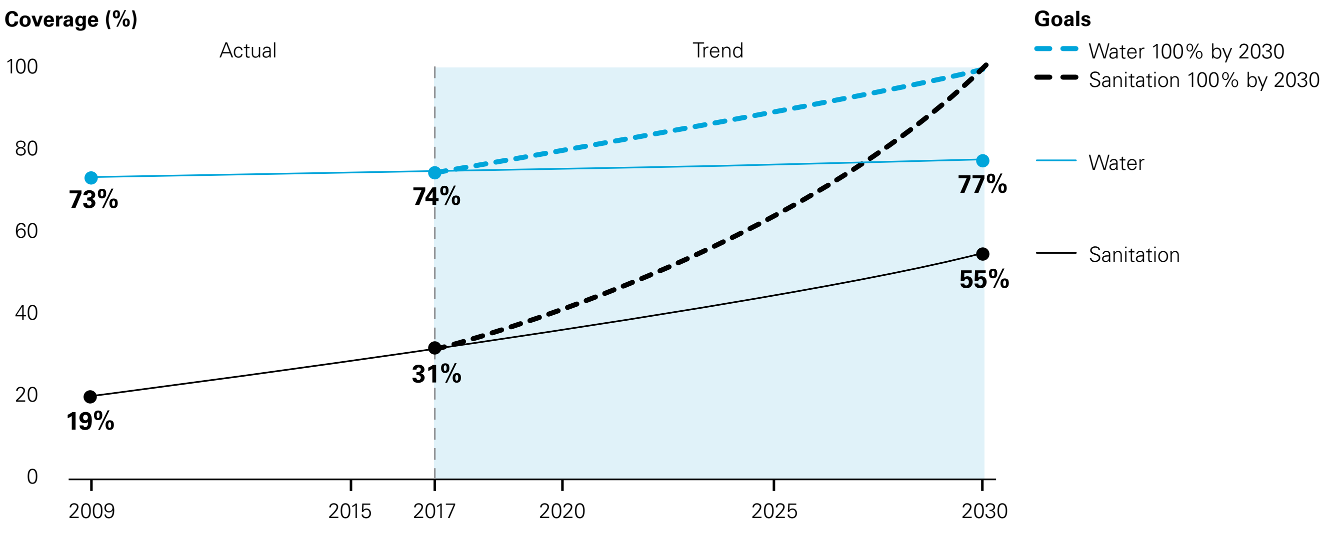
BRAZIL: ACCELERATING CHANGE WITH PPPS

In Brazil, the federal government reports that in 2022 approximately 32 million people lacked access to treated water and 89 million to basic sewage collection. In 2020, Brazil enacted a new legal framework mandating that, by 2033, 99 percent of the population must have access to drinking water and 92 percent to sanitation. The Brazilian Association of Water and Sewage Services Concessionaires estimates that this requires a US$168.7 billion investment that is expected to result in a US$264.4 billion increase in Brazil's GDP by 2033.

The new legal framework opened the water market for PPPs, with the number of municipalities served by private concessionaires quadrupling between 2019 and

Global progress toward achieving Sustainable Development Goals for water and sanitation

SDGs 6.1 and 6.2 target achieving access to drinking water and to sanitation and hygiene



Source: World Bank, 2022

2023. In Rio de Janeiro—the poster child of the benefits of private investment in water infrastructure—the concessionaire's investments are expected to universalize water and sanitation services in 12 years, while CEDAE, the prior, state-owned operator, was projected to need 140.

But faster investment is needed everywhere, as at the current rate, some studies suggest Brazil's universalization goals would only be met in 2070.

In 2023, Brazil established the Sustainable Regional Infrastructure Development Fund to finance the structuring costs of PPPs in various sectors, including water and sanitation, which small municipalities often cannot afford. There are plans to expand the fund's mandate so it can act as guarantor in availability payment-based PPPs where state or local credit is a concern.

Further, recent procurement processes have focused on the underdeveloped north and northeast regions, and on ensuring asset monetization proceeds are recycled into additional water and sanitation investments. In the state of Amapá, for example, the concessionaire must apply a portion of the concession fee toward investments in sewage and water supply outside of the concession area, and hand over operation of these assets to municipalities.

This new direction is expected to accelerate the pace toward service universalization. Brazil currently has 48 water and sewage projects in the structuring phase, with combined investments of at least R$64.7 billion.

48

water and sewage projects in the structuring phase in Brazil

CHILE: WATER SCARCITY DRIVES DESALINATION AND REUSE

Unlike Brazil, Chile's water sector is privatized, which has helped the country achieve 95 percent of population coverage in both drinking water and sanitation, and rank among the top 20 water sectors in the world. The main stress factor here is water scarcity.

Chile has faced drought conditions for the past 15 years. Northern Chile suffers from severe water scarcity, further exacerbated by intensive mining and continuous population growth, with demand in some regions exceeding supply by more than 20 cubic meters per second. This issue will only grow as demand for copper—one of Chile's most important exports—is predicted to double in the next ten years.

Chile's mining and agricultural industries generate significant economic and social friction as a result of competition for an increasingly limited resource. Agriculture accounts for 88 percent of water usage, while in the northern region of Antofagasta, mining accounts for 51 percent of water use.

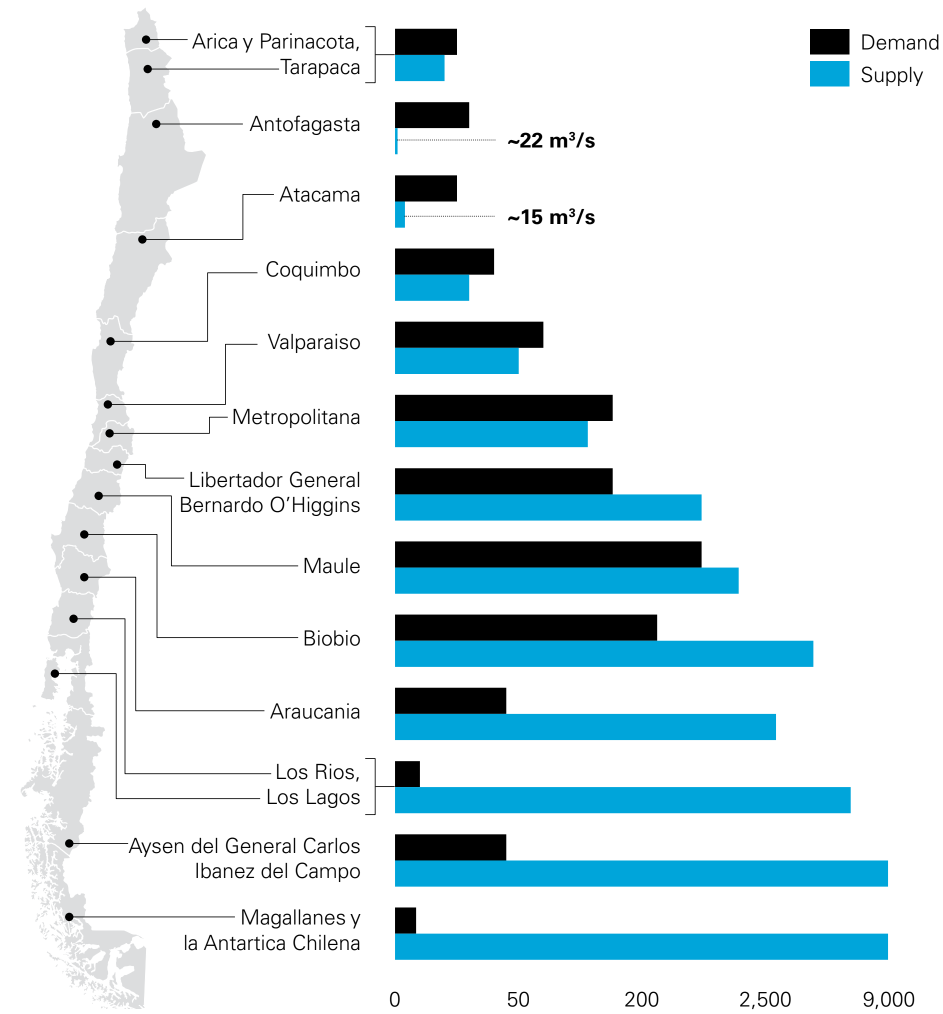
To secure sustainable water supplies, Chile has taken action to boost desalination. In 2021, the government launched a long-term mining policy mandating a reduction in freshwater use to 10 percent by 2030 and 5 percent by 2050, and in 2023, Chile enacted a law allowing the Ministry of Public Works to procure water treatment infrastructure for potable use.

Two desalination projects to serve the Coquimbo region—which has been severely harmed by Chile's water crisis—have already been conceived, with one to be tendered by the Ministry of Public Works and another by utility Aguas del Valle.

According to the Chilean Association of Desalination and Reuse, in 2023 Chile had 24 operating desalination plants, seven under construction and five that had secured environmental approval and were expected to begin construction. Eighty-five percent of desalinated water production was used by companies, and the remaining 15 percent was intended for human consumption.

Coastline in La Araucanía region, Chile

Regional supply and demand for fresh water in Chile



Source: Arthur D. Little, 2023

However, desalination is not a one-size-fits-all solution. The process itself, and the transportation of water from the coast to mountain regions, is energy-intensive and costly. This challenge is leading to the emergence of new models for developing desalination plants—on a merchant basis or as a shared facility of multiple mining companies.

Water reuse is another solution Chile is expected to embrace. For example, Econssa, the state-run sanitation company, is looking to tender a water reuse plant in the city of Antofagasta to supply nearby mining companies. Codelco, Chile's national mining company, has committed to reducing make-up water by 60 percent by 2023, with 27 percent of the reduction coming from using desalinated water and 18 from recycled water. Further, in 2023, Chile enacted a law to allow the use of reuse water for agriculture.

In contrast with popular desalination, only 6 percent of wastewater in Chile is currently being reused.

THE FUTURE OF WATER IN LATIN AMERICA

Investment in the water sector has been deferred for too long. With climate change forecasted to stress water security in the region, public policy and private investment are expected to see a renewed focus on the industry, with an influx of opportunities. While Brazil and Chile lead the way today, we are optimistic that meaningful reforms in other countries, including Mexico, will come into play and help PPPs or other structures gain similar traction there.

São José dos Campos bridge, better known as the "Innovation Arch," in Brazil

Data center boom in Latin America calls for accelerating infrastructure investment

In the race to increase the region's digital capacity, power and water supply pose particularly novel challenges for developers and financiers

By Martin Menski, James Johnson and Amaury de Feydeau | Raquel Szomstein, a 2024 White & Case summer associate, contributed to this article.

As the demand for artificial intelligence (AI) accelerates, governments and private investors in Latin America have made big strides in recent years to ramp up investments in digital infrastructure to keep up with the so-called "Fourth Industrial Revolution." One type of infrastructure asset has, in particular, led this build-out of digital infrastructure: data centers. As dedicated facilities designed to house thousands of servers and related computing equipment in an optimal environment, data centers have been around in industrialized economies for decades.

Today, however, data centers are one of the fastest-growing asset classes in commercial real estate, and especially in emerging markets. A large portion of this growth is now concentrated in so-called "secondary markets" such as Latin America, where the larger data center companies are expected to invest more than US$2 billion in 2024 alone. The increased use in cloud computing in the digital economy, combined with data localization rules and "nearshoring" to the US economy, has spawned near exponential growth in their construction in Mexico and other "trusted" Latin American countries.

Data centers are extremely resource-intensive, requiring large amounts of power, water and land. More off-site space close to urban centers—as well as reliable water and power supply—is needed than ever before to support the large amount of computing and processing capabilities for AI and 5G technology. This unprecedented, rapid growth has necessitated careful infrastructure and finance planning from governments and private investors. This article examines the nature of the demand for data centers in Latin America, the challenges they pose for project developers and sponsors, and how this may impact investment and financing approaches.

EXPONENTIAL GROWTH IN LATIN AMERICA

The data center market in Latin America is expected to double over the next five or so years, from roughly US$5 to US$6 billion in 2023 to anywhere from US$8 to US$10 billion by 2029. The market is dominated by the usual countries—Brazil, Mexico and Chile—with Colombia, Peru, Costa Rica and Panama as emerging centers for investment. The most active data center companies in the region include Scala, Equinix, Cirion, Ascenty, Kio and Odata. Since 2022, there have been approximately 30 new data centers built or under construction (11 in Brazil and ten in Chile) and 90 active projects.

The vast majority of these projects are located in major urban centers such as Rio de Janeiro, Santiago and Bogotá—cities that have an established, stable power and water infrastructure. Interestingly, though somewhat as an outlier, Mexico has seen data center projects emerge largely in Querétaro rather than Mexico City due to the lower cost of land as well as concerted local and state government efforts to create a stable power supply. As land becomes more expensive and local entities step up to fill the increasing demand, we expect to see more remote data center "cities" emerging across Latin America outside of the common urban agglomerations, which will mean greater demand for greenfield water and power infrastructure requiring investment and financing.

> "The LatAm data center market is expected to double by 2029, with a value of up to US$10 billion

INCREASING POWER AND WATER DEMANDS

The rapid development of data centers has placed increasing demands on energy consumption in developing countries' infrastructure. In a context of climate change where temperatures rise to unseen levels, the cooling systems of the data centers and over-consumption of water and electricity has become a technical, ecological and financial issue. In Brazil, for example, already 0.5 percent of the national energy demand is due to data centers. Data centers consume as much as 100 to 200 times more electricity than standard offices in the US, and the world's data centers in aggregate are consuming more electricity than the entire countries of Colombia and Argentina.

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Data centers are one of the fastest-growing asset classes in commercial real estate

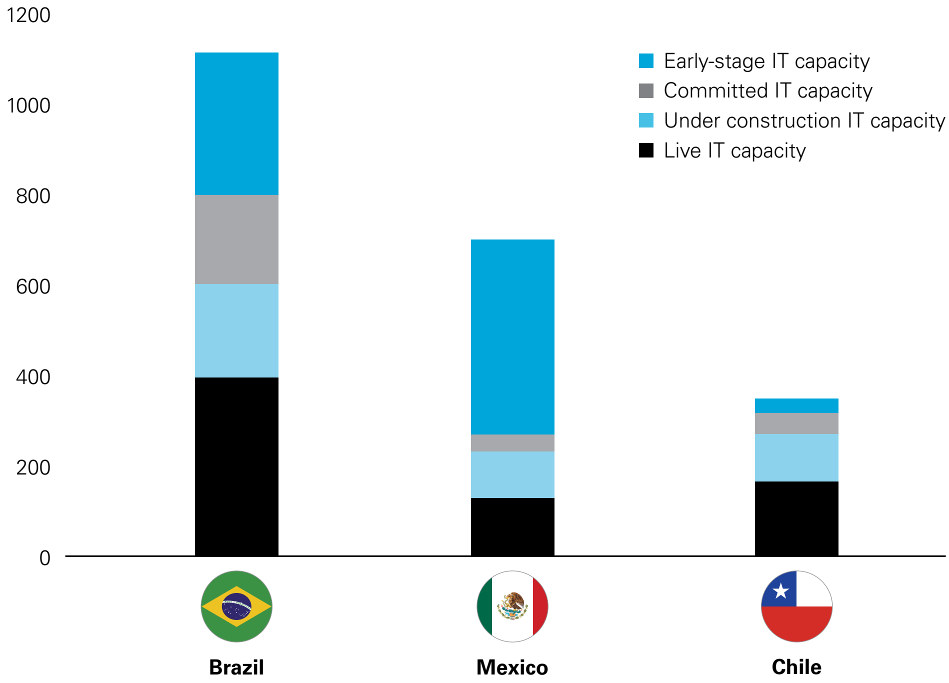
A large, reliable and consistent power supply is essential for the smooth operation of data centers. In Brazil, for example, 750 MW of power capacity is used by data centers, with “hotspots” in Barueri and Campinas, which have in effect become mini data center cities. All other areas are, by comparison, “emerging markets,” with less than 100 MW of power capacity currently utilized by data centers. There is considerable potential for growth in these emerging markets if there is sufficient investment in the necessary infrastructure.

A major challenge remains to securing enough reliable power. Hyperscale customers, particularly following the recent developments in AI, require ever-larger data centers to house their computing. Any loss of power to a data center during operations will expose a data center operator to significant claims due to breaches in power continuity service levels. Given many areas in rural Latin America have limited power access, the current trend is for data centers to be built near large cities that have a relatively stable power source. As data centers expand to other areas, they will have to not only secure energy, but also connect to the grid and work on transmission needs.

Data center operators are also encouraged to not only comply with increasing government calls for renewable energy—sometimes procured from local utilities or government—but also to invest in creating their own energy on site, i.e., to generate or self-source their own power. This has operational and project cost considerations. Data centers’ increasing power requirements will necessitate coordinating with regulators of grid and power rules. Chile has

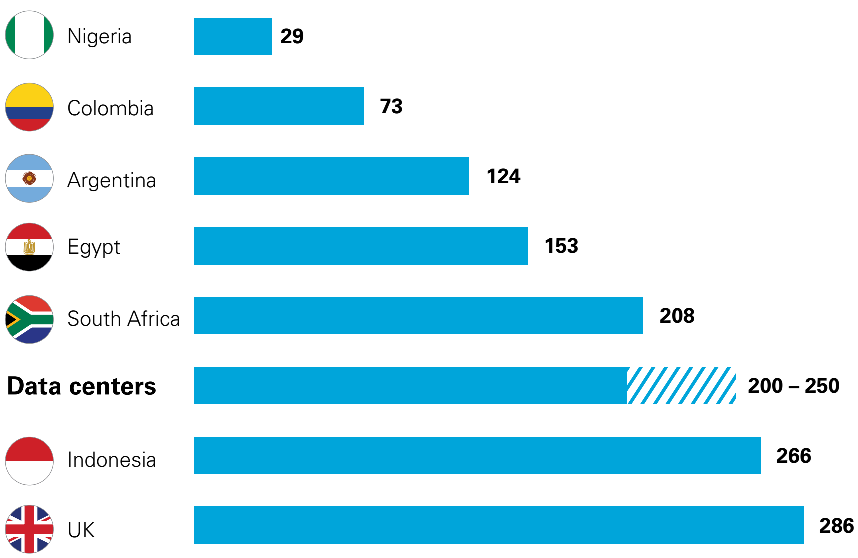
Comparison of IT capacity between Brazil, Mexico and Chile

Observing total capacity (live, under construction, committed and early-stage), Mexico is the second-largest market in LatAm after Brazil, which has over 1 GW of total capacity. Chile is the third-largest, with a total capacity that is half of Mexico's. The Mexican market is growing steadily, which will eventually bring it closer to Brazil.



Source: DC Byte, 2024

Domestic electricity consumption (TWh) of selected countries vs. data centers in 2020



Source: Enerdata, IEA 2020

Server room rack panel

encouraged massive investment in renewables, for example, by committing to shift 100 percent of the power supply currently made to Microsoft data centers to renewable energy by 2025. Brazil's push for renewables signals a similar intent. Meeting the energy demand has not been easy, and the investment needs remain a challenge, especially given the need to show that the power source is "green."

Similarly, data centers' water-cooling needs pose infrastructure challenges in areas that suffer water shortages. By 2030, data center water usage will be 1.7 billion liters daily—more than double the known consumption in 2017. The average data center uses 300,000 gallons of water a day to keep cool.

This is especially troublesome in certain Latin American areas that are water-scarce and have rapidly emerging data center hubs, such as Chile, Uruguay and Mexico. Chile has been in a drought since 2010, and we have seen lawsuits commenced that have forced Google to rethink its cooling methods and adopt air rather than water-based cooling systems. Data centers have also had to reconfigure their water consumption plans. For example, planned data centers in Canelones, Uruguay would use 7.6 million liters of water daily, the equivalent of water consumption for 55,000 people in Montevideo. Following significant protests, the original project was scrapped in order to be re-worked for a more efficient plan. As mentioned above, while Querétaro has to date attracted larger investments in data centers than Mexico City itself, and has become in effect the hub for data centers in the country, it is also increasingly at high risk of facing droughts.

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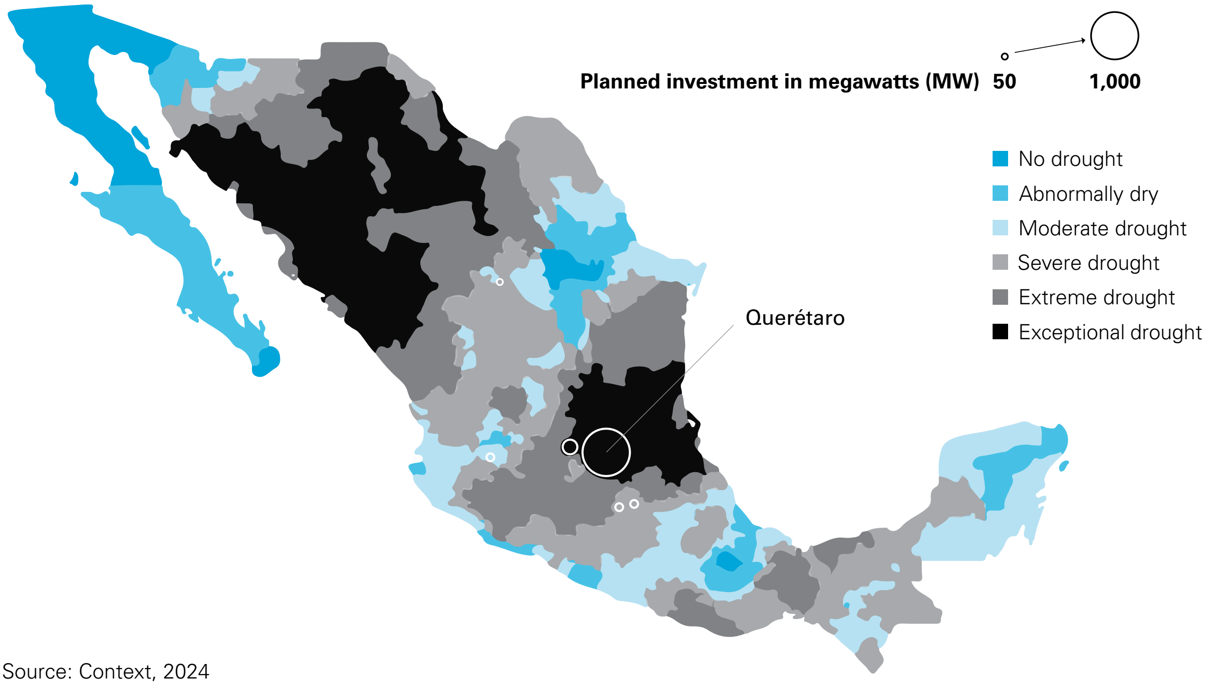
1.7 billion

estimated liters of water used by data centers daily, with the average data center using 300,000 gallons a day to keep cool by 2030

FINANCING TRENDS

Given the increasing demand for data centers, the question for investors and financiers has been how to efficiently finance the development of such data centers and their infrastructure needs. Data center financings can take a number of forms, from project financing to real estate financing, corporate or leveraged financing. While a range of financing models can be used, the method employed will largely depend on what sector the lenders come

Data center investment planned in Mexican states under drought



Source: Context, 2024

from. Until recently, most financings of data centers have been corporate or lease-based financing structures and are mostly owned or developed for large technology investors such as Google, Oracle or HP.

Today, while companies like Microsoft and AWS are still investing actively in the region, investments now come from a greater variety of stakeholders including private equity, funds and development finance institutions. New-build data centers in Latin America are increasingly owned by regional data center operators who operate data centers for hyperscale customers. The regional players have continued to grow. Ascenty is the largest co-location company in Latin America in terms of number of sites, with 34 projects including data centers either in operation or under development. Odata received investments from the International Finance Corporation, the private sector arm of the World Bank, to expand operations in Brazil, Colombia and Mexico.

In Latin America, data center and hyperscaler companies are quickly developing and improving upon their business models given the rise in demand. The most typical form in which a data center financing may occur is by way of a loan to a data center operator that requires funds to construct a dedicated space for its customers whether on a shared basis (co-location model) or build to suit for a single customer, such as a hyperscaler. A large part of these investments to date involve equity rather than debt financing. For example, Ascenty relies on equity investments alongside a recently announced credit facility—arranged by Citibank, ING, Itaú, Natixis and Scotia Bank—of US$925 million to accelerate operations, and Equinix has expanded its presence in Latin America through acquisition of existing data centers, mostly financed by a combination of equity and leveraged debt. However, given the increased scale of the data center developments and the demands of AI technology, there is an increased need for further financing as opposed to sole equity investments.

The high upfront costs of constructing large capital assets with long-term revenue streams mean that these projects could lend themselves to limited or non-recourse financing structures. However, the fact is that very few of the data center financings have been done on a non-recourse or limited-recourse basis in the region. For example, Scala is now using green debentures to raise money instead of sustainability-linked bonds. The growth in the sector is so strong that companies are beginning to diversify their investment and financing sources, especially as projects become problematic to develop, due to constraining power and water supplies.

CONCLUSION: TOWARD INTEGRATED INFRASTRUCTURE DATA CENTERS?

While there has been a steep upward trajectory of acquisitions and developments in the data center space in Latin America, this is only set to further grow based on the great potential for expanding capacity. However, as the size of these data centers increases, so do the constraints in terms of power and water resource inputs. The time is ripe for the industry to look beyond current equity-focused investments and explore whether there are financing options beyond real estate transactions. Given the vast greenfield infrastructure needs of data centers in Latin America, project financing solutions—whether through loans or bonds—may be viable methods to support the capex needs of the digital infrastructure growth of Latin America.

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