

the liability of the brokerage firm turned on the reasonableness of the customers' belief that the broker was the agent and the brokerage firm was his principal when the broker convinced the customers to invest in the fund.

The court surmised that the arbitrators inferred from the affidavit that the customers were not reasonable in believing that the broker acted under apparent authority of the brokerage firm. From the affidavit, the arbitrators learned that the customers were clients of the broker when he worked for Merrill Lynch, and followed the broker to Wachovia. The affidavit did not, however, acknowledge that the customers knew that the broker was acting without authority from the brokerage firm. The court went on to note that "arbitrators, like judges and jurors, are allowed to use their common sense and background to draw inferences from what the evidence shows. And from what it omits". While the broker was at Wachovia, he convinced the customers to close their account at Wachovia and reduce their investments to cash and to transfer the cash to the fund. The transfer took place the day after the broker left the brokerage firm. The fund turned out to be a sham and the customers lost the entire value of their investment. The affidavit did not expressly negate the existence of apparent authority.

The appellate court concluded that the evidence before the arbitrators supported the inference that it would not be reasonable for the customers to believe that the brokerage firm cloaked the broker with apparent authority and therefore found no brokerage firm liability.

Since no statutory basis was found for vacating the award, the appellate court affirmed the lower court's denial of the customers' motion to vacate the award notwithstanding the failure of the brokerage firm to file evidence in support of its dispositive motion. Support for the inferences drawn by the arbitrators was found in the evidence filed by the customers, the losing parties in the arbitration.

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SOUTH AMERICA

Bolivia

SUPREME DECREE NO.28701 ("THE NATIONALISATION DECREE")

President nationalises all aspects of production and sale of hydrocarbons in Bolivia

 keywords to follow

On May 1, 2006, the President of Bolivia, Evo Morales Ayma, promulgated Supreme Decree No.28701 to nationalise all aspects of the production and sale of hydrocarbons in Bolivia. On the same date, the Bolivian army took possession of the hydrocarbon facilities in Bolivia.

The Terms of Supreme Decree No.28701 ("the Nationalisation Decree")

Supreme Decree No.28701 consists of a Preamble and nine Articles. The Preamble establishes the political framework of the nationalisation, referring to provisions of the Bolivian Constitution, a national referendum and illegalities in the existing contracts in the oil and gas sector, and asserting Bolivia's sovereign right to its natural resources. The operative provisions of the Nationalisation Decree read as follows:

"Evo Morales Ayma
Constitutional President of the Republic

Considering:

[Preamble]

In the Council of Ministers,

Decrees:

Article 1.- In the exercise of national sovereignty, obeying the mandate of the people of Bolivia expressed in the binding Referendum

of July 18, 2004 and strictly in accordance with constitutional precepts, the natural resources of hydrocarbons⁵ of the country are nationalised.

The State recovers the property, the possession and the total and absolute control of these resources.

Article 2.- I. From May 1, 2006 the oil companies presently engaged in the production of gas and petroleum in national territory are obliged to deliver full rights to all the hydrocarbons production to Yacimientos Petrolíferos Fiscales Bolivianos—YPFB.

II. YPFB, in the name of and in representation of the State, in the full exercise of rights to all the hydrocarbons produced in the country, takes responsibility for its sale, defining the conditions, volumes and prices both for the internal market as well as for export and industrialisation.⁶

Article 3.- I. Only those companies that immediately carry out the terms of the present Supreme Decree shall be able to continue operating in the country, until in a period of no more than 180 days from its promulgation their activity is regularised by means of contracts that comply with legal and constitutional prerequisites and conditions. At the end of this period, the companies that have not signed contracts will not be able to continue operating in the country.

II. In order to guarantee continuity of production, YPFB in accordance with the directives of the Ministry of Hydrocarbons and Energy will take charge of the operation of the fields of the companies that refused to carry out or impede the performance of the provisions of this Supreme Decree.

III. YPFB shall not execute Hydrocarbon exploitation contracts that have not been individually authorised and approved by the Legislature in full compliance with the requirements of clause 5 of the Article 59 of the Political Constitution of the State.⁷

Article 4.-I. During the transition period, for the fields whose daily average certified production of natural gas during the year 2005 has been in excess of 100 million cubic feet, the value of the production will be distributed in the following form: 82% for the State (18% for royalties and participations⁸, 32% for the Impuesto Directo de los Hidrocarburos IDH⁹ and 32% through an additional participation for YPFB) and 18% for the companies (which covers operating costs, return on investment and utilities).

II. For the fields whose certified annual daily production of natural gas has been less than 100 million cubic feet, during the transition period the present distribution of the value of the hydrocarbons production shall be maintained.

III. The Ministry of Hydrocarbons and Energy shall determine, on a case by case basis and by means of audit, the investments made by the companies as well as their amortizations, operating costs and profits obtained in each field. The audit results shall serve as the basis for YPFB to determine the payment or participation of the companies in the contracts to be signed in accordance with Article 3 of this Supreme Decree

Article 5. I. The State takes the control and the direction of the production, transportation, refinery, storage, distribution, sale and industrialisation of hydrocarbons in the country.

II. The Ministry of Hydrocarbons and Energy shall regulate and establish rules for these activities with new regulations are approved in accordance with Law.

Article 6.-I. In accordance with Article 6 of the Hydrocarbons Law N^o 3058, full rights shall be transferred to YPFB, free of charge, to the shares of the Bolivian citizens in the capitalised oil companies Chaco S.A., Andina S.A. and Transredes S.A. forming part of the Fondo de Capitalización Colectiva.¹⁰

⁵ "Hydrocarbons" are defined in Art.138 of Hydrocarbons Law No.3058, of May 17, 2005, as "The carbon and hydrogen compounds, including associated elements, that appear naturally, in or below ground, whatever their physical state, that comprise Natural Gas, Petrol and their derivative products, including Liquefied Petroleum Gas produced in refineries and liquification plants.

⁶ "Industrialisation" is defined in Art.138 of the Hydrocarbons Law No.3058 of 2005 as "The chemical transformation of hydrocarbons, and the thermoelectric and industrial processes with the objective of adding value to Natural Gas: Petrochemicals, Gas to Liquids (GTL), production of fertilizers, urea, ammonium, methanol and others".

⁷ Cl.5 of Art.59 of the Political Constitution of the Republic of Bolivia attributes to the Legislature (Congreso Nacional) the power to authorise or approve certain contracts, including contracts "relating to the exploitation of national wealth".

⁸ "Participations" (*participaciones*) is a general term to describe the rights to payments of parties in the extraction or production process: see Art.138 of the Hydrocarbons Law No.3058 of May 17, 2005.

⁹ Direct Hydrocarbon Tax, set at 32% by the Hydrocarbons Law No.3058 of May 17, 2005 (see Arts 53-57).

¹⁰ Hydrocarbons Law No.3058 of 2005, Art.6, re-establishes Yacimientos Petrolíferos Fiscales Bolivianos. YPFB is the state entity in the Bolivian energy sector. Established in 1936, its oil exploration, extraction and commercialisation divisions were re-capitalised through being opened up to private investment (*capitalización*) in the mid-1990s by virtue of Capitalisation Law No.1544 of March 21, 1994 and related legislation, constituting Andina SA, Chaco SA and Transredes SA.

II. In order that this transfer does not affect the BONOSOL,¹¹ the State guarantees the replacement of the contributions by way of dividends that these companies make annually to the Fondo de Capitalización Colectiva.

III. - The shares in the Fondo de Capitalización Colectiva that are in the names of the Pension Fund Administrators in the companies Chaco S.A., Andina S.A. and Transredes S.A. shall be endorsed to the name of YPFB.

Article 7. I. The State recovers its full participation in the entire productive chain of the hydrocarbons sector.

II. The shares necessary for YPFB to control a minimum of 50% plus one in the companies Chaco S.A, Anđina S.A, Transredes S.A, Petrobras Bolivia Refinación S.A and Compañía Logística de Hidrocarburos de Bolivia S.A are nationalised.

III. YPFB shall nominate immediately its representatives to the respective directorates, and will sign new constitutive and administrative by-laws in which the state control and direction of the hydrocarbons activities in the country are guaranteed.

Article 8. - Within 60 days from the date of the promulgation of this Supreme Decree and within the process of re-establishment of YPFB there will be a complete restructuring to convert it into a corporate entity, transparent, efficient and with shareholder control.

Article 9. - The laws and regulations presently in force will continue in their application insofar as they are not contrary to the provisions of the present Supreme Decree, until modified in accordance with law.

The Ministers of State, the President of YPFB and the Armed Forces of the Nation are charged with the execution and performance of this Supreme Decree.

Done in the Government Palace in the city of La Paz, the first day of May of the year two thousand and six.

[Signatures]"

The extent of the Bolivian nationalisation

The Nationalisation Decree nationalises (or confirms state ownership of¹²): (1) the Bolivian "natural resources of hydrocarbons" (Art.1), and (2) the production of hydrocarbons in Bolivia (Art.2); as well as (3) nationalising the controlling interest in five named oil companies (Art.7); (4) asserting state control over the entire chain of production, transportation, refinery, storage, distribution sale and industrialisation of hydrocarbons (Art.5) without (at this stage at least) nationalising these facilities; and (5) expropriating contractual rights in reducing investors' returns to 18 per cent in Art.4.I, and in requiring the renegotiation of existing contracts (Art.3).

The expropriation of existing rights affected by the Nationalisation Decree does not affect hydrocarbons deposits as these already belonged to the state (by virtue of Art.139 of the Political Constitution of the Republic of Bolivia all hydrocarbon deposits are "directly, inalienably and imprescriptively" owned by the state). In addition, and as discussed below, the Hydrocarbons Law No.3058 of May 17, 2005 the Bolivian state had already moved to recover ownership and control of its hydrocarbons sector, increased its returns at the expense of investors, and required the renegotiation of existing contracts.

The companies affected by these measures are conceded the following privileges by the Nationalisation Decree: (1) to continue operating in the country while their existing contracts are renegotiated during a period of no more the six months; (2) in the larger fields, to recover 18 per cent of the value of their production during this transition period (Art.4.I); this 18 per cent is down from 50 per cent under Art.8 of Hydrocarbons Law No.3058

¹¹ The Bono de Solidaridad ("BONOSOL") entitles some 300,000 Bolivians over 65 years of age to a once-a-year payment.

¹² It is difficult to separate the new elements of Arts 1 and 2 of the Nationalisation Decree from the confirmation of controversial elements of Hydrocarbons Law No.3058 of May 17, 2005 still subject to negotiation between foreign investors and the Bolivian state.

of May 17, 2005 and from the 82 per cent granted under the previous Hydrocarbons Law No.1689 of April 30, 1996; (3) to receive compensation for or continuing participation in their contracts (Art.4.III).

The nationalisation of a controlling percentage of shares in Art.7 affects five Bolivian companies. These companies are presently controlled by foreign investors and, in three cases, include substantial shareholdings by pension funds on behalf of the beneficiaries of the Bolivian Fondo de Capitalización Colectiva. It is understood that the investors and their shareholdings in these companies at the time of the Nationalisation Decree were as follows:

¹³ The shares in these pension funds were the subject of a further Supreme Decree No.28711 of May 15, 2006, specifically intended to give effect to the Nationalisation Decree. Article 3 of this Supreme Decree No.28711 states that property in the shares in Andina SA, Transredes SA and Chaco SA is recovered, and therefore BBVA Previsión AFP SA and Futuro Bolivia SA AFP are required to transfer the title to these shares to YPFB. BBVA Previsión AFP SA initially sought an indemnity from Bolivia before surrendering the shares, and it was reported on May 19, 2006 in the Spanish newspaper *El País* that BBVA Previsión AFP had decided to challenge Supreme Decree No.28701 before the Constitutional Court of Bolivia on the grounds that it violated the legislation that entrusted it with the management of the Fondo de Capitalización Colectiva in order to secure payment of the BONOSOL.

¹⁴ Supreme Decree No.24806 of August 4, 1997, which approved the model hydrocarbons exploration and development contract was challenged in the Bolivian Constitutional Court on two grounds. First, that the model contract had the effect of transferring property in Bolivia's hydrocarbons deposits to the oil companies, violating Art.139 of the Bolivian Constitution. Secondly, that the model contract had been approved by Decree and executed without being approved by the Legislature as required by cl.5 of Art.59 of the Constitution. The Bolivian Constitutional Court ruled that Supreme Decree No.24806 did not violate Art.139 of the Bolivian Constitution, as the model contract did not transfer the property of the deposits of oil and gas but of the oil and gas production at the wellhead. However, it also stated that the contracts had to be approved by the Legislature (*Sentencia Constitucional del Tribunal Constitucional de Bolivia 00114/2003* of December 5, 2003; and *Sentencia Constitucional del Tribunal Constitucional de Bolivia 0019/2005* of March 7, 2005).

¹⁵ For a full analysis of the results of the referendum see the website of the Corte Nacional Electoral of Bolivia, and, especially Luis Tapia Mealla, "Por el Si por el No. Análisis de Resultados del Referendum 2004", available at www.cne.org.bo.

- (1) *Chaco SA*: Chaco SA was 50 per cent owned by Pan American Energy (in turn 60 per cent owned by BP (UK) and 40 per cent owned by Bidas Corp registered in the British Virgin Islands). The pension funds BBVA Previsión AFP SA and Futuro Bolivia SA AFP owned 24.5 per cent each, while the remaining 1 per cent was owned by individual shareholders.
- (2) *Andina SA*: Repsol YPF (Spain) owned 50 per cent of the capital. The pension funds BBVA Previsión AFP SA and Futuro Bolivia SA AFP owned 24.46 per cent each. The remaining 1.08 per cent was owned by individual shareholders.
- (3) *Transredes SA*: Royal Dutch Shell (Dutch) and Prisma Energy (United States) each owned 25 per cent of the share capital. BBVA Previsión AFP SA and Futuro Bolivia SA AFP together owned 34 per cent of the share capital. 16 per cent was owned by other shareholders.
- (4) *Petrobras Bolivia Refinación SA*: 70 per cent of the share capital was owned by Petrobras (Brazil) and 30 per cent by Pecom (Argentina).
- (5) *Compañía Logística de Hidrocarburos de Bolivia SA*: GMP SA (Perú) and Oiltanking GmbH (Germany) each owned 50 per cent of the share capital.

The Nationalisation Decree addresses in Art.6 the future of the Pension Scheme (*Fondo de Capitalización Colectiva*) that depends for income on the returns from shares in Chaco SA, Andina SA and Transredes SA. The shares in these companies were held in pension funds administered by BBVA Previsión AFP SA (owned by Spain's Banco Bilbao Vizcaya Argentaria ("BBVA")) and by Futuro de Bolivia SA AFP (owned by the Swiss Zurich Financial Services Group).¹³

After the transfer of the shares held by the pension funds to YPFB, this state company will hold between 34 and 49 per cent of the shares in Chaco SA, Transredes SA and Andina SA which will reduce the number of shares that need to be nationalised from other investors in these companies to give YPFB the controlling interest required by Art.7. However, it remains uncertain whether the remaining shares will be nationalised on a pro rata basis or some mechanism of selection or discrimination between investors will be applied for the purposes of nationalisation.

Background to the nationalisation, and initial reactions

This Nationalisation Decree is a culmination of a lengthy period of political and legal uncertainty in respect to Bolivia's oil and gas sector. Until 2005 the legal framework of Bolivia's hydrocarbons sector was defined by the Hydrocarbons Law No.1689 of April 30, 1996. This Law was politically controversial, and the contracts entered into with investors had been challenged in the Bolivian courts as unconstitutional.¹⁴ Hydrocarbons Law No.1689 of April 30, 1996 and Bolivian energy policy was the subject of a national referendum on July 18, 2004. The five questions (to be answered "yes" or "no") and results of this referendum were as follows¹⁵:

- (1) Do you agree with the repeal of Hydrocarbons Law No.1689 promulgated by Gonzalo Sanchez de Lozada? [86.6 per cent voted "yes" and 13.4 per cent voted "no"];
- (2) Do you agree with the recovery of the property of all hydrocarbons at the wellhead by the Bolivian state? [92.2 per cent voted "yes" and 7.8 per cent voted "no"];
- (3) Do you agree with the re-establishment of Yacimientos Petrolíferos Fiscales Bolivianos ("YPFB"), recovering state ownership of the shares of Bolivians in the "capitalised" oil companies, in such way as it is able to participate in the entire productive chain of hydrocarbons? [87.3 per cent voted "yes" and 12.7 per cent voted "no"];
- (4) Do you agree with President Carlos Mesa's policy of using gas as a strategic resource in order to achieve a useful and sovereign access to the Pacific Ocean? [54.8 per cent voted "yes" and 45.2 per cent voted "no"];
- (5) Do you agree that Bolivian exports its gas in the context of a national policy that: guarantees the Bolivian gas consumption; develops the industrialisation of gas within national territory; includes taxes and/or royalties on oil companies up to 50 per cent of the value of oil and gas production for the benefit of the country; and applies the benefits of gas exportation and industrialisation primarily to education, health, roads and employment? [61.7 per cent voted "yes" and 38.3 per cent voted "no"].

As a result of this Referendum Hydrocarbons Law No.1689 of April 30, 1996 was repealed and replaced by Hydrocarbons Law No.3058 by the President of the National Congress, Hormando Vaca Diez, on May 17, 2005. Hydrocarbons Law No.3058 inter alia recovered ownership of all hydrocarbons at wellhead (*boca de pozo*), i.e. at the point of leaving the ground before being separated for refining or transport (Art.5); refounded the state entity YPFB to represent the state in the hydrocarbons sector (Art.6); required all hydrocarbons production to be delivered to YPFB in return for a contractual payment of participation (Art.66); imposed the new IBH tax of 32 per cent on all hydrocarbons production (Arts 53–57); and required parties to contracts executed pursuant to the previous Hydrocarbons Law No.1689 to convert their contracts so as to comply with the new Law within 180 days (subsequently extended until June 2006).

¹⁶ Art.22 of the Political Constitution of the Republic of Bolivia reads:

"Article 22.- Guarantee of Private Property

I. Private property is guaranteed, provided that the use made of it is not prejudicial to the collective interest.

II. Expropriation may take place for reasons of public utility or when the property does not perform any social function, in accordance with law and subject to adequate compensation." There is a limited and antiquated form of Calvo Clause (dating from 1967) in Art.24 of the Bolivian Constitution providing that foreign companies and individuals are subject to Bolivian law, and cannot in any circumstances invoke special treatment nor appeal to diplomatic protection. Article 67 of the Hydrocarbons Law No.3058 also requires a clause waiving the right to diplomatic protection in contracts with YPFB.

¹⁷ *The Economist*, May 20–26, 2006, p.58.

Foreign investors in the energy sector therefore were well prepared for change. There had been reports that certain foreign investors were considering investment arbitration claims after the enactment of Hydrocarbons Law No.3058 of May 17, 2005. Bolivia has signed Bilateral Investment Treaties with various states whose nationals are affected by Hydrocarbons Law No.3058 and the Nationalisation Decree, notably Spain, United Kingdom, United States of America, Germany, France and Argentina, so investment arbitration claims are certainly a possibility. A legal challenge to the Nationalisation Decree before the Bolivian Constitutional Court is another strategy that has been mooted in press reports, and (as noted above) BBVA Previsión AFP SA has already announced a legal challenge to the supplemental Decree relating to the shares held by pension funds. Investors also have a right to compensation for expropriation pursuant to Art.22 of the Bolivian Constitution,¹⁶ although comments by President Evo Morales attacking Bolivian judges as "representing the colonial state" do not encourage confidence in the effectiveness of domestic remedies.¹⁷ There is no Bilateral Investment Treaty between Brazil and Bolivia, but Brazil's state-owned Petrobras reacted to the Nationalisation Decree by immediately threatening arbitration in New York, presumably on a contractual basis. This was subsequently contradicted by the Brazilian President, Mr Lula da Silva, who indicated negotiations would take place on a state-to-state basis. As the largest customer of Bolivian natural gas, Petrobras has negotiating strength notwithstanding its lack of any BIT protection.

Bolivia needs foreign investment to exploit its hydrocarbon resources, and its Government has indicated it wishes foreign investors to remain. President

¹⁸ The Preamble states that “the people have conquered at the cost of their own blood, the right to their hydrocarbon riches”. It describes the existing contracts as violating the Constitution “in delivering the property of our hydrocarbons riches into foreign hands” which is an “act of treachery to the country” and refers to previous “heroic” nationalisations of hydrocarbons in Bolivia in 1937 and 1969.

¹⁹ *The Economist*, fn.13 above, at p.11.

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Evo Morales has told the European Parliament that the Nationalisation Decree “did not expel or expropriate anyone, and that any investor in the country had the right to recover its investment” but added that the foreign investors would be “partners, not owners” in Bolivian natural resources. The foreign investors in the energy sector do not seem to be hurrying to abandon the country, ceasing negotiations or relying on possible legal remedies. The negotiations are complicated by some inflammatory rhetoric by members of the Bolivian Government (which extends to the preamble of the Nationalisation Decree itself¹⁸). The timing of the Nationalisation Decree associated it first with Hugo Chavez—who has also increased taxes and the state shareholdings in Venezuela’s oil companies—and his anti-capitalist rhetoric, and secondly with the state takeover of the interests of Occidental Petroleum in Ecuador on May 15, 2006, and more generally with the spectre of “anti-American leftist nationalism” across Latin America.¹⁹ However, it is dangerous to generalise across Latin America, and the roots of the Nationalisation Decree are in domestic Bolivian politics. The challenge for the foreign investors over the coming months is to negotiate a legally secure and economically viable long-term commitment to the Bolivian energy sector in an unhelpful environment of short-term gesture politics.

EUROPE

England & Wales

AMIR WEISSFISCH V (1) ANTHONY JULIUS (2) RAMI WEISSFISCH (3) PHILIP DAVIS

Challenging the jurisdiction of an arbitrator

 *keywords to follow*

The Court of Appeal stated that that it would only be under exceptional circumstances that a party wishing to restrain an arbitrator under an agreement providing for arbitration with its seat in a foreign jurisdiction would be justified.

[Case Reference?]

Facts

The principal protagonists in these proceedings are two wealthy brothers, the claimant (“Amir”) and the second defendant (“Rami”). The first defendant, Mr Julius, is a solicitor of the Supreme Court. The third defendant Mr Davis, is a lawyer practising in the Bahamas, who is the trustee of a discretionary trust entitled the APW trust. The beneficiaries of the said trust were Amir and his children, or such others as might be appointed by the nominated protectors under the terms of the trust. Rami was a nominated protector. The said trust owned some companies within the MRC group of companies. Mr Julius acted for (1) the MRC group; (2) on occasion personally for Rami; (3) on occasion personally for Amir. Disputes arose between the brothers which could not be resolved by mediation conducted by Mr Julius.

Mr Davis, on Amir’s instructions, transferred certain assets from the APW trust to other trusts which were controlled by Amir. Mr Davis subsequently made a criminal complaint in the Bahamas against Amir, alleging that he falsely stated that the transfer of assets had had the approval of Rami as protector. Rami was anxious that the assets should be returned to the APW trust. Amir was anxious that the criminal inquiry should be discontinued.

An agreement was entered into by Amir, Rami, Mr Julius and Mr Davis (“the Agreement”). The Agreement among other things appointed Mr Julius as arbitrator.

The Agreement contained the following relevant clauses:

“A. Arbitration

- 1.1 The parties agree to and hereby appoint Anthony Julius, who accepts such appointment, to act as arbitrator (“the Arbitrator”), with the broadest possible powers to make final and binding determinations or awards on all issues and disputes between the parties in full and final settlement of them.
- 1.2 These issues and disputes, which in substantial part were the subject of the Arbitrator’s extensive efforts over a period of several months to help the relevant parties settle matters amicably (and through which he was able to understand the intention of the parties with regard to this arbitration and its scope), are as follows: