

LATIN AMERICA INVESTMENT & ARBITRATION LAW

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INTERNATIONAL INVESTMENT AGREEMENTS IN THE AMERICAS. THREE AND PROBABLY MORE SUPRISES.

This month's issue of Latin America Investment & Arbitration Law Bi-Monthly takes a look at the role that International Investment Agreements (IIAs) play in the investment world, particularly in the Americas; as well as a bird's eye view of Bolivia.

The IIAs is basically used by the UNCTAD, a branch of the United Nations that among its other functions, provides statistical information and studies on foreign direct investment (FDI). IIAs are international instruments, generally treaties, whose purpose has been the protection and promotion of FDI. Lately, UNCTAD has decided to classify treaties for the avoidance of double taxation as IIAs as well.¹

Protection and promotion of FDI has been included both in free trade agreements and bilateral investment treaties, the later identified under various names, such as Acuerdos de Promoción y Protección Recíproca de Inversiones (APPRI), Tratados de Promoción y Protección de Inversiones (TIPPs), Bilateral Investment Treaties (BITs) and Tratados Bilaterales de Inversión (TIBs).

The fact that foreign investors have the protection of an IIA and therefore access to international investor v. State arbitration, which is not granted to domestic investors against their own country, should not come as a surprise. This feature was anticipated by the IIAs drafters and thus has long been known by the international community.

On the other hand, while the execution of IIAs had the original focus of protecting first world entrepreneurs investing in emerging countries, a few years after NAFTA came into effect (1994), the **first surprise** arose in 1998: investors from a first world country filed a claim against the government of another first world country.

The case was brought before ICSID by Canadian investors against the US Government (The Loewen Group, Inc. and Raymond L. Loewen v. USA).

The **second surprise** arose when an emerging market country (Argentina), was sued for amounts far in excess of those anticipated when the IIAs were drafted. Claims against Argentina now exceed 35 billions US and continue to grow. The still unresolved question is whether the Argentine economic crisis (in 2001), could be considered a case of *necessity to safeguard an essential interest*, i.e. a circumstance precluding wrongfulness.

Governments thereafter have been concerned about having agreed to protect FDI by means of executing IIAs. Argentine has been pointed out as an excess for having executed 51 TPPI's. Brazil, a knowledgeable country in the field of international matters, has not executed a single IIA. In the last years it has seen its neighbor suffering the many claims brought against it by "protected" FDI. Such events emphasized its position of avoiding IIAs protection of FDI.

We are now in the presence of the **third surprise**. President Evo Morales has nationalized Petrobras (Brazilian oil and gas company) investment in Bolivia, i.e. the investment of an emerging market country investor in an emerging market country. However, the Brazilian investor is not protected under an IIA.

¹ The number of IIAs increased from 2,392 to more than 5,200. Systemic Issues in International Investment Agreements, Monitor No.1 (2006), p.1, at UNCTAD/WEB/TTE/IIA/2006/2.

Bolivia's nationalization of its gas industry has mainly affected (i) Petrobras and (ii) Repsol-YPF, a Spanish/Argentine investor protected under a BIT between Bolivia and Spain (in force since 2002) and a BIT between Bolivia and Argentina (in force since 1995). While the Spanish and Argentine investors have the possibility of filing a claim against the government of Bolivia, seeking a solution from an international panel of arbitrators, Petrobras can only use Bolivian judicial courts. This may prove a relevant difference not only in the end result but at the negotiation table.²

While this report has been prepared, the dynamics of IIAs revealed a **new surprise**: Mexico and Colombia are considering suing Venezuela, because of its express desire to terminate its participation in the free trade agreement signed by the three countries, in force as of June 1994.

Bolivia: Due to Bolivia's relevant expropriation, it seems appropriate to mention two recent cases:

1. Aguas del Tunari, S.A. (ICSID Case No. ARB/02/3). Plaintiff's main stockholders: Bechtel Enterprises Holding Inc. (USA company) y ABENGOA S.A. (Spanish company), Andrés Petricevich y Samuel Doria Medina (Bolivian nationals). The claim for 25 million US was based on the cancellation of a concession to provide drinking water in the city of Cochabamba. The dispute was recently settled. The parties reached a stock selling price and an agreement whereby the company's stock will be wholly owned and controlled by Bolivia's Government.

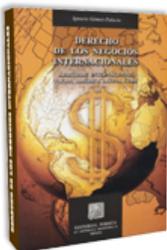
2. Aguas del Illimani, S.A. In 1997, the Bolivian Government executed with Aguas del Illimani, S.A., (a Bolivian company majority owned by Lyonnaise des Eaux –French investor currently named Ondeo-, and minority participation of the International Finance Corporation and the Bolivian Investment Corporation), a concession to provide drinking water and drainage service to the cities of La Paz-El Alto. Beginning in 2004, the company was subjected to public pressure to stop rate increases and expand service. While negotiations between the parties to mutually terminate the concession have taken place, the French investor has been considering starting international arbitration against Bolivia under the APPRI agreed upon between Bolivia and France, in force as of 1989.

This article is provided as a service to clients and friends of Ignacio Gomez-Palacio. It is not intended as legal advice on any matter.

² Maybe a fourth surprise could be mentioned in the conduct of Brazil's President Luis Inacio Lula da Silva. He has distanced himself, stating that the investments of Petrobras (the Brazilian government owns 32.2% of its stock and 55.7% of its voting power), are decided by Petrobras, "a company having autonomy to invest." Periódico Reforma, 5. May. 2006, Internacional, p.1. Brazil's Minister of Economy, on the other hand, is complaining of actions by Venezuela's President Hugo Chavez against Latin America's market integration.

NEWS

Last month my book on International Investment Law was published in Mexico City in the Spanish language, by Editorial Porrúa, S.A.



Contents: Actors in the international investment field. Interpretation of international law. State responsibility. International standards of treatment of foreign investors. Investor v. State arbitration and ICSID. Rules for Entry and Admission. Index, Table of Cases, Table of Treaties, Preface by Jose Luis Siqueiros and Bernardo Cremades. Available for delivery all over the world at: www.porrúa.com

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