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Miriam Grunstein

Juan Francisco Pardini

Andrew B. Derman

Andrew Melsheimer

Schuyler B. Marshall V

*See next page for additional authors*

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## Authors

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# Energy and Natural Resources

Miriam Grunstein, Juan Francisco Pardini, Andrew B. Derman, Andrew Melsheimer, Schuyler B. Marshall V, Maria Cecilia Andrade, Ilan Dunsky, Clarisse Kehler Siebert, Juan Francisco Mackenna and Marcos Ríos*

## I. Recent Developments in Foreign Sovereign Immunity as Applied to U.S. Oil & Gas Companies

Over the past several years, in two related cases, the United States Court of Appeals for the Fifth Circuit issued a series of opinions regarding sovereign immunity under the Foreign Sovereign Immunities Act (FSIA)[1] and Texas garnishment law that will significantly

* Andrew B. Derman, a Partner of Thompson & Knight LLP, Dallas, Tex., and Andrew Melsheimer, an associate at that firm, collaborated on the first section of this article regarding foreign sovereign immunity as applied to U.S. oil and gas companies; this section of the article has been published in whole or in part in The Houston Law Journal, Texas Transnational Law Quarterly, Energy Risk Magazine, AIPN Advisor, The Center for American and International Law, and in the LexisNexis/Matthew Bender bound volume proceedings of the *Institute on Oil and Gas Law*, as well as in its *Oil and Gas Library* CD and in its online *Oil and Gas Library*. Maria Cecilia Andrade of Mattos Muriel Kestener Advogados, São Paulo, Braz., authored the section on developments in Brazil. The section regarding developments in Canada, was prepared by Ilan Dunsky, a partner at Heenan Blaikie LLP, Montreal, Can., and Chairman of the firm's Infrastructure and Public Projects practice group, and Clarisse Kehler Siebert, who will article with that firm. Juan Francisco Mackenna and Marcos Ríos collaborated on the section concerning developments in Chile; they are Partners at Carey y Compañía Limitada in Santiago, Chile. Miriam Grunstein, who authored the section regarding developments in Mexico, is an associate attorney at Thompson & Knight Abogados, Mexico City, Mex. The section concerning developments in Panama was prepared by Juan Francisco Pardini, Pardini & Associates, Panama City, Pan.

1. Sovereign immunity is a doctrine of international law under which domestic courts typically surrender jurisdiction over a foreign state. Congress enacted the FSIA to provide stability and consistency in the application of sovereign immunity by courts against foreign nations. *See* H.R. Rep. No. 94-1487, at 7 (1976) *codified at* 28 U.S.C. §1602 *et seq.* (2006); the FSIA applies the restrictive theory of sovereign immunity—a foreign nation's public acts, but not its private acts, are immune from lawsuits. The FSIA is the exclusive basis under which judgments rendered against foreign states can be executed. A sovereign's property is susceptible to attachment and execution if it is used for a commercial activity in the United States and it satisfies one of seven conditions. *See* 28 U.S.C. §1610. Some examples include the foreign sovereign expressly or implicitly waiving its immunity; the property being used for the commercial activity that gave rise to the claim and; the execution relating to a judgment regarding property taken or exchanged in violation of international law. Additional noncommercial exceptions to immunity include property related to certain prohibited financial transactions and certain actions against vessels of foreign states.

impact how U.S. energy companies do business overseas.[2] These two lawsuits are between the Republic of Congo and its debt collectors, the latter having joined oil and gas companies operating in the global change in order to seize their non-monetary obligations to Congo.

### A. Background

Both cases share a common factual background. CMS Nomeco is the operator of a joint venture and owns 25 percent of an offshore oil concession (the Yombo field) in the Republic of Congo.[3] Affiliates of CMS Nomeco own another 25 percent of the offshore oil concession.[4] The remaining 50 percent of the offshore oil concession is owned by Société Nationale des Pétroles du Congo (SNPC), the Congolese state-owned petroleum company. As participating interest owners in the oilfield, CMS Nomeco and SNPC each receive a share of the oil production. SNPC receives its entitlement share of the production inside Congo.

The concession permits the joint venture to extract oil in exchange for royalties and periodic tax payments to Congo. Under the terms of the concession agreement, Congo can elect to receive either a cash royalty or its share of the production in-kind within Congo. Congo has elected to receive its royalty in-kind. As the operator, CMS Nomeco is legally and contractually required to deliver to Congo and SNPC their royalty oil and entitlement share, respectively. Congo has assigned the right to take (or lift) the royalty oil to SNPC, and SNPC independently markets both Congo's royalty and SNPC's entitlement share of the oil.

In the 1980s, Congo defaulted on loans it made to develop its infrastructure, resulting in several judgments against it. To satisfy the debt and judgments, creditors sought to garnish CMS Nomeco's obligation to deliver to Congo its in-kind royalties and to SNPC its entitlement share of the oil production. CMS Nomeco and Congo maintained that under the FSIA the in-kind royalties, entitlement share, and tax payments are not property subject to garnishment. CMS Nomeco also argued that neither CMS Nomeco nor the property sought by Congo's creditors is located in the United States and, therefore, is not subject to garnishment.

Meanwhile, Congo obtained multiple Congolese court orders that refuse to recognize the U.S. court orders and insist that CMS Nomeco perform its legal and contractual obligations and allow Congo and SNPC to lift their oil. Congo threatened to detain senior-level officers of CMS Nomeco and has used public force to ensure that Congo and the SNPC received their share of the oil production. Against this backdrop, a series of recent opinions by the U.S. Fifth Circuit Court of Appeals have applied the FSIA and Texas law with novel interpretations to resolve the dispute among the Congo, its creditors, and CMS Nomeco.

2. Af-Cap Inc. v. Republic of Congo, 383 F.3d 361, 368-71 (5th Cir. 2004) ("*Af-Cap I*"), *clarified by* Af-Cap, Inc. v. Republic of Congo, 389 F.3d 503 (5th Cir. 2004) ("*Af-Cap II*"); Af-Cap Inc. v. Republic of Congo, 462 F.3d 417, 424-25 (5th Cir. 2006) ("*Af-Cap III*"); and FG Hemisphere Ass'n, LLC v. République du Congo, 455 F.3d 575 (5th Cir. 2006).

3. "CMS Nomeco" refers CMS Nomeco Congo LLC.

4. The Nuevo Congo LLC and Nuevo Congo, Ltd. CMS Nomeco and its affiliates are similarly affected by the litigation. References to CMS Nomeco include its affiliates.

## B. The U.S. Fifth Circuit Decisions

### 1. *Af-Cap Inc. v. Republic of Congo*[5]

#### a. The Meaning of Commercial Activity

The first case involving CMS Nomeco is currently in the U.S. District Court for the Western District of Texas in Austin. For over four years, the lawsuit has passed between the district court and the Fifth Circuit, analyzing whether Congo's royalty and the tax payments were property that can be garnished under Section 1610(a) of the FSIA[6] During this period, the Fifth Circuit has rendered several important opinions regarding the garnishment of royalties and tax obligations owed to foreign nations.

One issue that the Fifth Circuit has examined is whether a non-monetary obligation can be garnished under the FSIA. Previously, the court held that the appropriate factor to consider is what the non-monetary obligation or royalty is "used for."[7] More recently, the Fifth Circuit concluded that in order to determine whether the royalty is property "used for commercial activity" under the FSIA, a holistic approach should be used, including a review of a foreign nation's past commercial use of the royalty.[8] With respect to Congo's royalties, the court found a commercial activity when Congo previously assigned a portion of the royalty to another judgment creditor in the United States to satisfy a different debt.[9] Although CMS Nomeco argued that the royalty and tax payments were generated from activities in, and delivered and paid in, Congo, the court rejected consideration of how the royalty was generated and instead focused on Congo's past activities to decide that CMS Nomeco's in-kind royalties could be garnished.[10]

#### b. The Location of Intangible Property

A second issue analyzed by the Fifth Circuit in the *Af-Cap* cases has been whether the royalty was property "in the United States" according to Section 1610(a) of the FSIA.[11] The court acknowledged that determining the situs of the obligations was problematic because of their intangible nature.[12] The court compared these obligations to debtor obligations, and despite the fact that all royalty oil was delivered within Congo, found that a "common sense appraisal of the requirements of justice and convenience" required the location of the oil companies (i.e., the United States) to be the situs of the intangible obligations.[13] Because the royalty obligations were used for a commercial activity and

5. *Af-Cap I*, 383 F.3d at 368-71, *clarified by Af-Cap II*, 389 F.3d 503; *Af-Cap III*, 462 F.3d at 424-25.

6. 28 U.S.C. §1610(a) provides, in part,

> The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if . . . .

7. Conn. Bank of Commerce v. Republic of Congo, 309 F.3d 240, 253-54 (5th Cir. 2002).

8. *Af-Cap I*, 383 F.3d at 368-71, *clarified by Af-Cap II*, 389 F.3d 503.

9. *Id.*

10. *Id.*

11. *Id.* at 371-73.

12. *Id.* at 371.

13. *Id.* at 372-73.

were deemed to be in the United States, the Fifth Circuit concluded that Congo's royalty and tax receipts were not immune from garnishment under the FSIA.

c. The Availability of Garnishment under Texas Law

Having concluded that Congo had no defense under the FSIA, the Fifth Circuit next examined whether the prejudgment method employed by Congo's creditors—Texas garnishment law—allows attachment of the royalty oil that CMS Nomeco delivers to the Congo.[14] The Fifth Circuit noted that neither the applicable Texas statute nor case law addressed whether a non-monetary obligation can be subject to garnishment.[15] Because Texas' garnishment statute is to be strictly construed, the court found that CMS Nomeco's royalty and tax obligations could not be garnished under Texas law.[16] Thus, although CMS Nomeco's non-monetary obligations to a foreign sovereign were not protected by the FSIA, the Court held that Texas law prevented their garnishment.[17]

2. *FG Hemisphere Associates, LLC v. The République du Congo*[18]

The second case involving CMS Nomeco was before the U.S. District Court for the Southern District of Texas in Houston. Temporally, this lawsuit arose after the Fifth Circuit determined in *Af-Cap II* that CMS Nomeco's non-monetary obligations were not protected by the FSIA because they were used by Congo for a commercial purpose and were located in the United States. As in *Af-Cap I* and *II*, Congo's creditor sought to garnish the royalties that CMS Nomeco delivers to Congo.[19] In this case, the creditor also sought to garnish SNPC's entitlement share of oil production that it receives as part of its joint venture with CMS Nomeco.

At issue in *FG Hemisphere* was the point in time at which a sovereign's property is subject to attachment under the FSIA.[20] In making its determination, the court adopted a situs snapshot rule: the foreign nation's property must be in the United States at the time a district court applies the exception to immunity under the FSIA, such as the commercial

14. *Af-Cap III*, 462 F.3d at 424-25.

15. *Id.* at 424.

16. *Id.*

17. The Fifth Circuit made two other findings regarding the FSIA. First, the court addressed a turnover order the district court entered against Congo. "In Texas, a court may order a judgment debtor 'to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control.'" *Id.* at 425-26; TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (Vernon 1997). Because this action was against Congo and not against its property, the court looked to section 1605(a) of the FSIA to determine if the district had jurisdiction to make such an order. *Af-Cap III*, 462 F.3d at 426-27. The court found that Congo had not waived jurisdiction, expressly or implicitly, and also that Congo itself did not partake in any commercial activity in the United States. *Id.* Because the district court erroneously found that Congo had waived its immunity, the Fifth Circuit found that the turnover order was improper. *Id.* at 427. In addition, the Fifth Circuit vacated a contempt order the district court entered against Congo when it failed to comply with the court's previous order. The Fifth Circuit noted that the FSIA provides the sole method of enforcing judgments against foreign sovereigns and that monetary sanctions are not provided in the relevant Sections 1610 and 1611 of the FSIA *Id.* at 428-29. The Fifth Circuit therefore found the contempt order was improper against the foreign nation. *Id.*

18. *FG Hemisphere Ass'n*, 455 F.3d at 575.

19. *Id.* at 580-82.

20. *Id.* at 588.

activity exception.[21] Thus, either CMS Nomeco, the in-kind royalty, or SNPC's entitlement had to be located in the United States at the time the court decided whether this property was "used for commercial activity in the United States."[22]

The Fifth Circuit also clarified its previous *Af-Cap* decisions. The court explained that in those decisions it did not analyze whether the garnishees and any intangibles in their possession were in the United States; the garnishees' presence in Texas was undisputed.[23] The court also explained that it never decided the applicable time period during which the obligations must be in the United States for immunity not to apply.[24] Further, the Fifth Circuit explained that in the *Af-Cap* decisions it had only assumed, and never determined, that the royalty obligations to Congo were intangible property.[25] The court acknowledged that it had relied on this assumption to determine that the situs of an intangible obligation is the situs of the garnishee.[26] Thus, having never properly classified the royalty obligations at issue, the court concluded that the Congo's in-kind royalties were in the United States merely because CMS Nomeco was in the United States.[27]

### 3. *Summary of the Fifth Circuit Congo Decisions*

In summary, the Fifth Circuit made several important holdings in *Af-Cap I, II,* and *III,* and *FG Hemisphere.* The Fifth Circuit determined that:

- A totality of the circumstances test, including past use, is applied to determine whether non-monetary obligations to a foreign nation are used for commercial activity in the United States;
- The situs of a garnishee is the situs for determining whether non-monetary obligations owed to a foreign country are property in the United States;
- The situs of the property must be in the United States at the time a district court applies an exception to immunity under the FSIA;
- Texas law on garnishment does not allow attachment of non-monetary obligations.

These holdings change how sovereign immunity is traditionally viewed with respect to U.S. companies' obligations to foreign governments. Indeed, the *Af-Cap* and *FG Hemisphere* opinions will have a significant impact on U.S. companies that operate abroad, particularly oil and gas companies.

## C. Analysis of the Impact of the Congo Cases on U.S. Oil and Gas Companies

CMS Nomeco was not a party to and had no involvement in the underlying loans that led to the lawsuits against Congo. Nevertheless CMS Nomeco, an innocent garnishee, found itself involved in the litigation. Had the Fifth Circuit found that Texas law allows

21. *Id.*
22. *Id.* at 588-90.
23. *Id.* at 586.
24. *Id.*
25. *Id.* Since oil is a tangible commodity, the accuracy of this assumption seems particularly doubtful.
26. *Id.*
27. *Id.*

garnishment of CMS Nomeco's non-monetary obligations, CMS Nomeco would have found itself in an insoluble dilemma. On one hand, a U.S. court had ordered CMS Nomeco to turn over Congo's royalty oil and the SNPC's oil entitlement to Congo's judgment creditors. On the other hand, a Congolese court had found that the U.S. orders were not enforceable in Congo and demanded that CMS Nomeco deliver to Congo its in-kind royalty oil and to SNPC its oil entitlement as mandated by Congolese law and the concession contracts.

In reality, however, even before the Fifth Circuit's ruling dissolved the garnishment order, CMS Nomeco had no real choice. The oil is produced, stored, and lifted from a storage facility in Congo. The concession (or convention) for the production of the oil is governed by Congolese law. The Congolese government could have used, as it had in the past, public force to ensure that Congo and SNPC received their share of the oil production. Faced with these demands, CMS Nomeco was forced to allow Congo and SNPC to lift their share of the oil production.

Although CMS Nomeco may well escape Congo's creditors in Texas, the outlook is not as clear in the remaining forty-nine states. The Fifth Circuit's conclusion that in-kind royalty obligations can be garnished under the FSIA may create serious problems for oil and gas companies. The rulings suggest that courts will allow garnishment of in-kind royalties if, at the time of application for the garnishment, the oil company and the property are located in the United States and used for a commercial activity in the United States. Unfortunately, the Fifth Circuit declined to decide an issue that would have provided some guidance for future courts: whether CMS Nomeco was in the United States at the time of the creditors' application for garnishment by reason of its mere incorporation in Delaware.[28] The Fifth Circuit left open the possibility for courts outside of Texas to prevent an oil and gas company with U.S. contacts from complying with its legal and contractual obligations abroad.

More importantly, the Fifth Circuit failed to address explicitly cash royalties. While the Fifth Circuit held that Texas law does not allow garnishment of in-kind royalties, the court left the door wide open with regard to garnishment of cash royalties under Texas law. Should non-U.S. cash royalties be subject to garnishment in Texas, the U.S. oil and gas industry is seriously exposed to double liability or losing its concession contracts.

A recent, related decision by the United States Court of Appeals for the Ninth Circuit does not alleviate the threat. In *Af-Cap Inc. v. Chevron Overseas (Congo) Limited*, the Ninth Circuit found that intangible obligations of certain Chevron entities to the Congo were not subject to garnishment.[29] There, Af-Cap sought to garnish Chevron's obligations to the Congo, including bonuses and in-kind royalties. Chevron and the Congo agreed that some of these obligations would offset a prepayment made by Chevron to the Congo under a separate contract.[30] The Ninth Circuit determined that because of the prepay-

28. *See id.* at 590.

29. Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080, 1084 (9th Cir. 2007).

30. Chevron and the Congo entered into an agreement for Chevron to prepay $25 million of bonuses that, according to the Ninth Circuit, Chevron was obligated to pay to the Congo under a participation agreement. *Id.* at 1092-93. The Ninth Circuit found that the value of the cargos lifted by Chevron and any bonuses payable to the Congo were offset against the prepayment amount. *Id.* The obligations Af-Cap sought to garnish included a participation bonus, a signature bonus, an operation bonus, fees and tax obligation to the Congo, a signing bonus, and in-kind royalties. *Id.* at 1085.

ment, the offsetting obligations belonged to Chevron and not to the Congo.[31] Because the obligations were not "used for a commercial activity" in the United States by the Congo, Af-Cap was not able to garnish these offsetting obligations.[32]

In addition, the Ninth Circuit determined that an operator bonus paid by Chevron from its New York bank account to the Congo was not subject to garnishment. The Ninth Circuit reasoned that the mere relation of the operator bonus to commercial activity in the U.S. was not enough.[33] Had the Congo used the operator bonus to repay a debt in the United States, however, like the Congo had done with CMS Nomeco's intangible obligations, the Ninth Circuit may have been willing to allow Af-Cap to seize Chevron's obligations.

Oil and gas companies that operate abroad, like CMS Nomeco, could find themselves caught between a rock and a hard place. A U.S. court ordered CMS Nomeco not to deliver oil as required by law and its contract in Congo, and Congo ordered CMS Nomeco to comply with the law and its contract and to deliver such oil. If CMS Nomeco had not delivered the royalty oil and the entitlement oil, Congo could have terminated CMS Nomeco's concession. Similarly situated oil and gas companies will face the same dilemma with two untenable options: risk being held in contempt of court or paying twice. Moreover, if the company pays twice, it will be left trying to recoup the double payment from a foreign nation that has already shown an unwillingness to repay its debts.

Our research concluded that over seventy countries have defaulted on sovereign debt during the past decade, many of which are rich in natural resources. Doing business with those countries has just become riskier and more expensive. The mere possibility that a U.S. court might issue an order preventing U.S. companies from complying with their legal and contractual obligations abroad may cause many governments, especially those with sovereign debt issues, to think twice before doing business with a U.S. company.

As a result of the Fifth Circuit's decisions, U.S. companies doing business in foreign debtor nations can expect to be embroiled in convoluted litigation as creditors seek to make U.S. companies the guarantors of defaulted sovereign debt with no viable means of recoupment.

## II. Brazil

In Brazil, 2006 was an election year, which meant that no significant foreign investment was made in the energy field. This sector was, however, deeply discussed because of the problems faced by the national oil company, Petrobras, with the Bolivian government and the Brazilian government's focus on the search for alternative solutions to its energy crisis, particularly programs supporting biofuel.

31. *Id.* at 1093.

32. *Id.*

33. *Id.* at 1094. The court reached a similar conclusion regarding a payment made in exchange for shares in a commercial joint venture and payments made for social programs within the Congo. *Id.* at 1094-95.

### A. Brazil/Bolivian Gas Supply Crisis

On May 1, 2006, Evo Morales, president of Bolivia, announced a presidential decree nationalizing the oil and gas industry in that country.[34] Brazil is the largest purchaser of oil and gas from Bolivia, consuming almost half its annual output.[35] Petrobras, the nationally affiliated oil company of Brazil, has invested millions of dollars building refineries and pipelines in Bolivia to get the oil and gas from Bolivia to Brazil.[36] Sudden nationalization caused an uproar within Brazil,[37] which meant that Brazil's president Lula was under tremendous pressure not to accede to Bolivia's demands, at least until after the election in October 2006. Sure enough, President Lula was reelected in October, and on February 14, 2007, Brazil and Bolivia announced that a deal had been reached whereby it is expected that Brazil will pay at least US$100 million more each year for its gas.[38]

### B. Development of Brazilian Energy Sector

Since 2005, the private and public sectors have realized the need to restore the level of private investment in Brazil. Concern has also risen, particularly in light of the crisis with Bolivia, that there may be an energy shortage in the next two or three years, similar to what occurred in 2001. Discussions regarding a potential electricity supply crisis remain as well, especially because the regulatory framework for a new electrical supply system does not exist. The authorities have not yet decided on the model to adopt, trying to balance ensuring a secure supply of electricity with promoting new investments in the country.

Regulatory and tax risks remain in Brazil as barriers to new projects in the generation of energy. The attractiveness of new investments will depend on changes in the regulatory framework. Brazilian tax legislation in this sector depends on public policy, which can be changed at any moment. Potential investors continue to face difficulties in obtaining environmental licenses.

In the hydrocarbons sector, no significant changes took place in 2006. In September 2005, Petrobras announced an investment plan to be implemented through 2011 in the amount of US$52.4 billion (an average of US$17.4 billion per year), which includes investments in oil, petrochemicals, energy, biofuels, and renewable energy.[39] Finally, in 2006 negotiations for the construction of a new refinery between Petrobras and PDVSA, the Venezuelan oil company, were concluded.[40] This refinery will be built in Pernam-

34. *See* Carin Zissis, Bolivia's Nationalization of Oil and Gas, Backgrounder, Council on Foreign Relations (May 12, 2006), *available at* http://www.cfr.org/publication/10682/.

35. *Crisis Talks on Bolivia Gas Move*, BBC News, May 3, 2006, *available at* http://news.bbc.co.uk/1/hi/world/americas/4964300.stm.

36. *Id.*

37. *Press Abuzz over Bolivia Gas Move*, BBC News, May 3, 2006, *available at* http://news.bbc.co.uk/1/hi/world/americas/4969006.stm.

38. *Bolivia and Brazil Agree Gas Deal*, BBC News, Feb. 15, 2007, *available at* http://news.bbc.co.uk/1/hi/business/6363715.stm.

39. Alexander Campbell, *Petrobras' and PdVSA's Investment Plans*, 10 Alexander's Gas & Oil Connection 18 (2005), *available at* http://www.gasandoil.com/goc/company/cnl53996.htm.

40. *See Petrobras-Pdvsa Refinery up USD 2.8 Billion*, Venezuelan Newsletter (Embassy of the Bolivian Republic of Venez/El Universal, U.K.), Nov. 13, 2006, *available at* http://www.venezlon.co.uk/newsletter/new_newsletter/nov06/ene13.htm.

buco. Early production is expected to begin in late of 2008, while full production will kick in 2011.

## III. Canada

### A. Canada's Energy Mix

Globally, Canada ranks sixth in use of primary energy.[41] This high consumption reflects a vast geography, cold climate, an energy-intensive industrial base, a high standard of living, and results from relatively low energy prices.[42] The energy sector is therefore significant, representing nearly 6 percent of the GDP[43] and a net export value of Cdn.$54 billion in 2005.[44]

Canada's sources of energy are equally vast, with more than 75 percent of production coming from fossil fuels—natural gas, oil, and coal—and the remainder from hydro, nuclear, and liquefied natural gas.[45] Renewable energy is growing rapidly as a source of energy, though currently renewables occupy a small part of the market. Canada is the eighth largest producer of oil, third largest producer of natural gas,[46] and competes with China for largest producer of hydro-electric power worldwide.[47] An increase in production from the Canadian oil sands is of anticipated global significance in the coming decades. It is against this backdrop that the major developments in the Canadian energy field for 2006 are highlighted.

### B. Developments in Energy Production

#### 1. *The Alberta Oil Sands*

The bitumen resources of the province of Alberta's oil sands are second only to those of Saudi Arabia.[48] In 2006 CIBC World Markets predicted that by the end of 2010, the Alberta oil sands will be the largest contributor to new global supplies of oil. It is esti-

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41. *See Energy Consumption*, Environment Canada, Apr. 11, 2004, *available at* http://www.ec.gc.ca/soer-ree/English/Indicator_series/new_issues.cfm?tech_id=45&issue_id=11.

42. *Id.*

43. Statistics Canada, *Table 4: Gross Domestic Product at Basic Prices, by Industry (Chained 1997 Dollars)*, Canadian Economic Observer, April 13, 2006, at 9, *available at* http://www.statcan.ca/english/freepub/11-010-XIB/00406/tables_html/tab_04_en.htm.

44. Samad Udin, *The Impact of Higher Commodity Prices on Canada's Trade Balance* 3 (Report for the Office of the Chief Economist, Foreign Affairs and International Trade, June 2006), *available at* http://www.international.gc.ca/eet/pdf/Analytical-Report-Commodity-en.pdf).

45. Organisation for Economic Co-operation and Development (OECD), *OECD in Figures 2005—Energy Production*, Nov. 17, 2005, *available at* http://ocde.p4.siteinternet.com/publications/doifiles/012005061T019.xls.

46. Canadian Association of Petroleum Producers, *Canada's Oil and Natural Gas Industry: Contributing to a Strong National Economy*, February 2006, *available at* http://www.capp.ca/raw.asp?x=1&dt=NTV&e=PDF&dn=107232.

47. International Energy Agency (IEA), Key World Energy Statistics 19 (2006), *available at* http://www.iea.org/textbase/nppdf/free/2006/key2006.pdf.

48. *Oil Sands*, Government of Alberta: Energy, Dec. 2005, *available at* http://www.energy.gov.ab.ca/89.asp.

mated that production from Canadian oil sands will triple to 3mb/d by 2015, and perhaps reach 5mb/d by 2030.[49]

Expansion of the oil fields progressed steadily in 2006. Global interest has been evidenced by, among other examples, continued interest by Chinese energy firms seeking to acquire a foothold as a reliable source of petroleum supply.[50] In early November, Shell Canada Ltd. approved a Cdn.$12.8 billion expansion of its Athabasca Oil Sands Project, projecting an increase in output of 100,000 barrels a day to reach 255,000 barrels per day by 2010.[51] Shell Canada holds a 60 percent stake in the project; Chevron Corp. and Western Oil Sands Inc. each hold 20 percent.[52] In October, Shell Canada was subject to a Cdn.$7.7 billion bid by parent company Royal Dutch Shell for the 22 percent of Shell Canada it does not already own.[53]

2. *Pipeline Expansion*

Both domestic distribution and export of Canadian oil and gas are dependent on pipelines. There are at present three major gas-transporting pipelines, and three crude-oil transporting pipelines, in Canada, the capacity of which will soon be insufficient to meet transport demands. Of the many proposals for pipeline expansion, two long-term projects witnessed particular developments this year.

a. Mackenzie Gas Pipeline

In early 2006, the National Energy Board began hearings on the Mackenzie Gas Pipeline Project, renewing an effort first initiated in the 1970s to transport gas from the Canadian north to southern markets through 1400 km of pipes.[54] Supporters of the Mackenzie Valley Pipeline project include Imperial Oil, ConocoPhilips, ExxonMobil, and Shell Canada, as well as the Aboriginal Pipeline Group which coordinates three of the four aboriginal groups settled along the proposed pipeline route.[55] Contingent on the outcome of consultations and regulatory approval, final decisions are not likely before the end of 2007. Construction would begin in 2009, and start-up in 2011. A November 2006 ruling by the Federal Court that the government failed to properly consult an affected Aboriginal group leaves the future of the hearings in question.[56]

49. OECD/IEA, WORLD ENERGY OUTLOOK 2006 341(2006).

50. David Winning, *China Energy Watch: Allure of Oil Sands Hard to Resist*, RIGZONE NEWS.COM, Nov. 15, 2006, http://www.rigzone.com/news/article.asp?a_id=38206.

51. *See* Albian Sands, Athabasca Oil Sands Project, http://www.albiansands.com/main-aosp.htm.

52. *Id.*

53. Heather Timmons & Ian Austen, *Shell Canada Gets Bid from Parent*, INT'L HERALD TRIB., Oct. 23, 2006, *available at* http://www.iht.com/articles/2006/10/23/business/shell.php.

54. *See* Mackenzie Gas Project, Home Page, Mackenzie Gas Pipeline, http://www.mackenziegasproject.com/.

55. *Id.*

56. Dene Tha' First Nation v. Canada (Minister of Environment), [2006] F.C. 1354, *available at* http://www.canlii.org/ca/cas/fct/2006/2006fc1354.html.

b. Alaska Gas Pipeline

A second pipeline proposal would run from northern Alaska through three Canadian provinces (British Columbia, Alberta, and Saskatchewan) back into the United States.[57] The 2800 km proposal would make the pipeline the largest in the world. In 2006, the government of Alaska presented a Canada Plan to increase the efficiency of the existing pipeline grid and to enhance cooperation between all stakeholders for the new pipeline, including United States and Canadian officials, industry, and affected communities.[58] Alaska's newly elected governor made negotiating a deal on the $20 billion project a trademark of her campaign. Unlike earlier negotiations which involved primarily foreign companies, TransCanada Pipelines is now among the pipeline operators expected to present a proposal.[59]

3. *Liquefied Natural Gas*

North American gas markets have been challenged to keep up with demand increases in recent years. Canada's response has been eight liquefied natural gas (LNG) import terminal proposals.[60] In 2006, two proposed terminals in Quebec entered the final regulatory review process.[61]

a. Gros Cacouna Island

Initiated in 2004 by TransCanada Pipelines and Petro-Canada, this LNG import facility venture[62] on Gros Cacouna Island,[63] northeast of Rivière-du-Loup, Québec, moved closer to final approval as the Canadian Environmental Assessment Agency and Quebec's provincial Bureau d'audiences publiques sur l'environnement submitted their assessment report to the federal and provincial governments in November 2006.[64] Preliminary

57. *See* State of Alaska, Home Page, Alaska Gas Pipeline, http://www.gov.state.ak.us/gasline/.

58. *Alaska Natural Gas Pipeline: Canada Plan*, presented by Dept. of Natural Resources Comm'r Michael L. Menge to the Twenty-Fourth Alaska State Legislature (May 16, 2006), *available at* http://www.gov.state.ak.us/gasline/pdf/Canada%20Plan%20FINAL%2005162006-4-2.pdf.

59. *See* Yukon Government, *Introduction: Alaska Highway Pipeline Project*, Feb. 2007, http://www.emr.gov.yk.ca/pipeline/ahpp.html.

60. *See generally* Natural Resources Canada, Natural Gas Division, Petroleum Resources Branch, Energy Policy Sector, *Liquefied Natural Gas: A Primer* (Apr. 2005), *available at* http://www2.nrcan.gc.ca/es/erb/CMFiles/LNG_Web_A_Primer206NCG-04042005-706.pdf.

61. Centre for Energy, *What New LNG Projects Have Been Proposed?*, Feb. 27, 2007, *available at* http://www.centreforenergy.com/silos/ong/LNG/LNGOverview07.asp.

62. *See generally*, Cacouna Energy, Home Page, www.cacounaenergy.ca.

63. *See generally*, Natural Resources Canada, Natural Gas Division, Petroleum Resources Branch, Energy Policy Sector, *Canadian LNG Import Projects: April 2006 Update* (Apr. 2006), at 7-8, *available at* http://www2.nrcan.gc.ca/es/erb/CMFiles/LNG_Update_April_2006209OFE-27042006-9532.pdf. *See also*, Natural Resources Canada, Natural Gas Division, Petroleum Resources Branch, Energy Policy Sector, *Canadian LNG Import Projects: September 2006 Update* (Apr. 2006), at 9, *available at* http://www2.nrcan.gc.ca/es/erb/CMFiles/LNG_Web_September_2006209LQB-01092006-7930.pdf.

64. BUREAU D'AUDIENCES PUBLIQUES SUR L'ENVIRONNEMENT, CACOUNA ENERGY LNG TERMINAL PROJECT: INQUIRY AND PUBLIC HEARING REPORT (Canadian Environmental Assessment Agency & Bureau, Report 230, Nov. 2006), *available at* http://www.ceaa-acee.gc.ca/050/documents/18338/18338E.pdf.

engineering contracts have been granted,[65] and it is anticipated that construction, to take place 2007-2009, will have the facility operational as early as 2009.

b. Beaumont

The Rabaska LNG[66] project near Beaumont is being developed by Gaz Métropolitain, Enbridge, and Gaz de France.[67] In September 2006, the Rabaska project received environmental impact approval from the provincial government and entered into community consultations.[68] Construction is planned to begin in 2007, and commercial start-up in 2010.

4. *Wind*

In 2006, Canada's wind energy capacity reached 1341 megawatts (mw), a doubling from 2005.[69] While this represents only a negligible fraction of the country's total energy requirements, proposals for wind expansion are under consideration in most provinces and territories.

As the most ambitious wind project of 2006, Hydro-Québec announced a 2006-2012 Cdn.$348.3 million investment for the integration of wind power, following its 2005 call for proposals for 2000mw of wind power over a five-year period.[70] This followed a 2004 award for an initial 990mw of wind energy.[71] The first wind facilities under the 2004 tender are scheduled to be completed in December, 2006,[72] with total planned capacity intended to reach 3,500mw by 2013.[73]

Other provinces also announced wind power developments in 2006. In British Columbia, BC Hydro issued contracts to three wind power projects totaling 325.2mw.[74] Manitoba Hydro has announced it will seek proposals for 900mw of wind energy over the next

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65. Press Release, Sofregaz News, LNG Receiving Terminal at Cacouna (June 1, 2006), *available at* http://www.sofregaz.fr/titrearticle.php.

66. *See* Rabaska, Home Page, www.rabaska.net.

67. *Canadian LNG Import Projects: April 2006 Update*, *supra* note 63, at 6-7. *See also*, *Canadian LNG Import Projects: September 2006 Update*, *supra* note 62, at 7.

68. Rabaska, *Bulletin d'information électronique*, October 2006, *available at* http://www.rabaska.net/docs/Bulletin-Rabaska_Volume1_numero4.pdf.

69. Press Release, Canadian Wind Energy Ass'n, Canada's Installed Wind Energy Capacity Doubles in 2006 (Nov. 22, 2006), *available at* http://www.canwea.ca/images/uploads/File/November_22_-_Press_release.pdf.

70. HYDRO-QUÉBEC, STRATEGIC PLAN 2006-2010, ADJUSTED VERSION 5 (2006), *available at* http://www.hydroquebec.com/publications/en/strategic_plan/2006-2010/pdf/complete.pdf.

71. *Id.* at 5.

72. *Id.*

73. HYDRO QUÉBEC, FINANCIAL PROFILE 2005-2006 13 (2006), *available at* http://www.hydroquebec.com/publications/en/financial_profile/2005_2006/pdf/profile_2005-2006.pdf.

74. Press Release, BC Hydro, BC Hydro Awards Energy Contracts (July 27, 2006), *available at* http://www.bchydro.com/news/2006/jul/release47609.html.

twelve years, bringing provincial capacity up to 1000mw.[75] Ontario awarded 955mw of power purchase agreements to wind energy developers in 2005.[76]

### 5. *Hydro Power*

No significant developments occurred in the hydro power sector in 2006, although in November the Quebec Minister of Sustainable Development issued a certificate of authorization to Hydro-Québec for construction of the Eastmain 1 powerhouse and diverting of the Rupert River.[77] This is the largest major project under that province's impressive hydroelectric network in a decade.

## C. Policy Developments Affecting Energy

Canadian jurisdiction over energy policy and regulation is divided between the federal government, and the provinces and territories. A change in federal government in early 2006 saw a number of domestic policy decisions affecting Canadian energy developments; two will be highlighted.

### 1. *Change in the Taxation of Income Trusts*

In late October, the federal government announced that corporate income tax will be applied to income trusts.[78] The income trust structure, which permitted companies to avoid corporate income tax and maximize distributions to unit-holders, was widely used in the energy sector. Changes in the Income Tax Act are intended to curb the conversion of some of Canada's largest non-energy corporations into trusts and have been met with opposition from the Canadian energy sector.[79] The Coalition of Canadian Energy Trusts, with members having existed as trusts for many years, believes that energy trusts should be exempted from the application of corporate income tax, arguing that the new tax will have distressing impacts on the Canadian energy sector.[80] The long-term impact of this recent

75. Press Release, Manitoba Hydro, St. Leon Celebrates 99-Megawatt Harvest with 63 Turbines Constructed: Chomiak Announces Results of Next Steps In Developing 1,000 More Megawatts of Wind (March 10, 2006), *available at* http://www.gov.mb.ca/chc/press/top/2006/03/2006-03-10-02.html.

76. IEA, IEA Implementing Agreement for Co-operation in the Research, Development, and Deployment of Wind Energy Systems: Annual Report 2005 99, *available at* http://www.ieawind.org/AnnualReports_PDF/2005/05%20Canada.indd.pdf.

77. Press Release, Hydro Quebec, Eastmain-1-A and Rupert Diversion Hydropower Project: Québec Issues Certificate of Authorization (Nov. 24, 2006), *available at* http://www.mddep.gouv.qc.ca/communiques_en/c20061124-eastmain.htm.

78. Press Release, Department of Finance Canada, Communiqué 2006-061, Canada's New Government Announces Tax Fairness Plan (Oct. 31 2006), *available at* http://www.fin.gc.ca/news06/06-061e.html.

79. This has already happened in other sectors. On October 11, 2006, BCE, Inc., the holding company of Bell Canada, announced it would convert to an income trust. *See Bell Canada to Convert to Income Trust*, CBC News, Oct. 11, 2006, *available at* http://www.cbc.ca/money/story/2006/10/11/bceincometrust.html. On December 12, 2006, however, following the announcement by the Department of Finance, BCE reversed its decision. *See BCE Drops Plan for Income Trust Conversion*, CBC News, Dec. 12, 2006, *available at* http://www.cbc.ca/money/story/2006/12/12/bcetrustconvert.html.

80. *See* Letter from Gordon J. Kerr, Co-Chair, Coalition of Canadian Energy Trusts to The Honorable James Flaherty, Minister of Finance (Nov. 10, 2006), *available at* http://www.canadianenergytrusts.ca/pdfs/LettertoMinisterFlaherty.pdf.

policy change remains unclear but will undoubtedly be significant for the Canadian energy sector.

2. *Energy Futures Report*

Throughout 2006, the National Energy Board conducted cross-country consultations with stakeholders—industry, government, nongovernmental organizations, and academia—on the future of the national energy supply, and its economic and environmental implications. To be released in October 2007, the Report will be both a comprehensive energy supply and demand outlook for the years 2005 to 2030, and an important tool for shaping future policy-making in Canada.

## IV. Chile

### A. Power Sector

Over one and a half years after the enactment of important changes to the Electricity General Electrical Services Law (Electricity Law),[81] opinions differ as to whether such changes have helped to promote new investments in the power generation industry.[82] The amendments to the Electricity Law were brought about by the so-called Short Law II, Law 20,018, enacted in May 2005.[83] Under this law, power distribution companies must secure their electric power needs for the next three years through competitive, open and transparent bidding processes resulting in long-term supply contracts, for a maximum duration of fifteen years.[84] These contracts must include indexation formulas that take into account the cost of fuel and other supplies required for power generation.[85] These changes are aimed at making investment in power generation more appealing by introducing the possibility of entering into longer-term contracts with more stable prices.

While these rules have in fact created incentives for the entry of new investors into the Chilean power generation sector (such as pension funds, mutual funds, and other investors seeking predictable long-term cash flows), thus trying to curb the traditional concentration in this market, the results of the first bidding process were not overly auspicious. In fact, only the traditional generation market players participated in such bidding process, and new investors were notably absent.[86] There seems to be a consensus, however, that

81. The current regulatory framework applicable to the power sector in Chile was created by the 1982 Electricity Law and its 1998 Regulations. The Electricity Law was enacted by virtue of Decree Law No.1, published in the Official Gazette on September 13, 1982, as last amended by means of Law 20,018, published in the Official Gazette on May 19, 2005, which also contains the Electricity Law's revised version. The Regulations of the Electricity Law were enacted by Decree No. 327 issued by the Ministry of Mining and published in the Official Gazette on September 10, 1998, as amended by Decree No. 158 issued by the Undersecretary of Economy and published in the Official Gazette on October 9, 2003.

82. For a recent review of changes in Chile's energy sector, *see*, M. Soledad Arellano, *The Old and New Reform of Chile's Power Working Industry*, (Ctr. of Applied Econ., Dep't of Indus. Eng'g, Universidad de Chile, Working Paper No. 226), *available at* http://www.dii.uchile.cl/cea/msarellano/SerieEconomia/126_SA.pdf.

83. Law 20,018, Official Gazette (May 19, 2005), *available at* http://www.bcn.cl/leyes/pdf/original/238139.pdf.

84. Article 79 § 1 of Law No. 20,018.

85. *Id.*

86. Raúl O'Ryan & Jacques Clerc, La Segunda (Chile), Oct. 19, 2006.

this lack of new participants was caused by the excessively short deadlines provided in the bidding rules for commencement of supply to the distribution companies. In spite of these problems, the National Energy Commission (NEC) and the distribution companies have expressed their satisfaction with the bidding process, which included the award of 92 percent of the total 12,000 gigawatts/hour tendered, at competitive prices below the maximum price set by the NEC when preparing the relevant bidding rules.[87] The next bidding process, however, scheduled for July of 2007, is expected to attract a larger number of long-term investors by providing a more extended time period to assess and develop the relevant generation projects.

On the other hand, the 2005 amendment to the Chilean Water Code[88] has created substantial activity in water rights transactions, by providing a new annual license payable for unused water rights, and thus promoting the sale (or effective use) of such rights.[89] As a consequence, water rights owners have been drawn to sell their unused water rights to avoid paying the annual license, while new investors, tempted by the attractive prices of the Chilean power market and by recent legal developments promoting generation and Non-Conventional Resource (Renewable) Energy (NCRE), have moved to acquire water rights.[90] This trend has contributed to the development of new large hydro-generation projects, by both traditional and new market participants.

While no further material amendments to the Electricity Law are expected in the short term, the government has stressed its intention to create further incentives for investment and development of NCREs, including wind, mini-hydro, biomass, geothermal, and solar power generation projects.[91] The government's Energy Program has set a goal of producing, in 2010, 15 percent of Chile's power based on NCRE (approximately 360 to 420mw), from only 2.4 percent (170mw biomass, 112mw mini-hydro, and 2mw wind) currently.[92] Environmental considerations, as well as increasing the diversification, autonomy, and reliability of Chile's power supply, are at the core of this governmental goal.

87. Press Release, Nat'l Energy Comm'n (Comisión Nacional de Energía), Great Satisfaction on Results of the Electricity Supply Bids' Process (Nov. 10, 2006), *available at* http://www.cne.cl.

88. Enacted by virtue of Decree with Force of Law No. 1,122, issued by the Ministry of Justice and published in the Official Gazette on Oct. 10, 1981, as last amended by Law No. 20,017, published in the Official Gazette on June 16, 2005.

89. Title XI of the Chilean Water Code.

90. *See, e.g.*, Press Release, Pacific Hydro, Financial Close of US$270 Million La Higuera Hydro Project (Nov. 2, 2005), *available at* http://www.pacifichydro.com.au/docs/La_Higuera_financial_close_021105.pdf.

91. For an overview of the Chilean Government's work in this area, *see* CHILEAN ECONOMIC DEVELOPMENT AGENCY (CORPORACIÓN DE FOMENTO DE LA PRODUCCIÓN), RENEWABLES IN CHILE INVESTMENT OPPORTUNITIES AND PROJECT FINANCING: PROJECT'S DIRECTORY (2006), *available at* http://www.todochile.cl/todochile/incjs/download.asp?glb_cod_nodo=20040318151250&hdd_nom_archivo=renovables%20en%20Chile%20(English).pdf.

92. Government of Chile, presentation at the Chilean Companies' Rational Administration Institute—ICARE (*Instituto Chileno de Administración Racional de Empresas, Icare*), The Government's Energy Security Program (May 2006).

### B. Oil & Gas

In 2005, Chile paid a total US$5.6 billion for fossil fuels—a US$2.9 billion increase from 2003 mainly due to an 85 percent increase in fuel prices.[93] These increased costs were compounded by a high increase in domestic energy demand and an intensified shortage of Argentine natural gas supply. This scenario resulted in an urgent need of new energy sources.

Under the Chilean Constitution, while exploration and exploitation of fossil fuels is reserved to the government and to government-owned companies, the government may grant administrative concessions and award special operation contracts to private companies.[94] These operation contracts include certain investment incentives, such as tax stabilization clauses and freedom to export.

In this context, *Empresa Nacional del Petróleo* (ENAP)—the government-owned company controlling the fossil fuel monopoly in Chile—is developing, together with Endesa (the largest power generator in Chile) and Metrogas (the largest natural gas distributor in Chile), the first LNG project in the country.[95] This project is being sponsored and built by British Gas.[96] In addition, ENAP is currently preparing the bidding rules to develop joint oil and gas exploration programs in certain prospective areas, and major multinational companies, such as Petrobras, British Gas, Chevron, Marathon, and Apache, have shown interest in participating in these programs.[97]

While no material constitutional or legal amendments are expected in the near future in connection with the oil and gas sector, some political and industry expert opinions are emerging regarding the need to improve private industry's market accessibility to help meet the increasing energy demands of a growing Chilean economy.

## V. Mexico

### A. Legislative Blackout in the Mexican Federal Congress

Energy may be Mexico's most politically sensitive sector. In the past, therefore, legislative activity concerning the sector has taken place in times of political and social calm. This has not been the scenario in Mexico during the past few years, and even less so during 2006, a year of marked political and social uncertainty and unrest as a result of the presidential elections that took place on July 2, 2006.[98] As a consequence, there has been

93. Statistics published by the National Energy Commission (Comisión Nacional de Energía) at its website, http://www.cne.cl.

94. Const. Chile art. 19, no. 24.

95. Press Release, ENAP, ENAP, Endesa and Metrogas Ratify LNG Project (March 31, 2006), *available at* http://www.enap.cl/ingles/opensite_det_20060403090618.asp.

96. *See BG Group Chosen to Supply LNG, Build Regasification Terminal*, Rigzone News, Feb. 16, 2006, *available at* http://www.rigzone.com/news/article.asp?a_id=29526.

97. *See, e.g., Enap, Repsol YPF, Enarsa Sign Offshore E&P Contract*, Rigzone News, Feb. 9, 2006, *available at* http://www.rigzone.com/news/article.asp?a_id=29303; *Enap, PDVSA Discuss Joint Oil Projects*, Rigzone News, Dec. 16, 2005, *available at* http://www.rigzone.com/news/article.asp?a_id=27862; *Enarsa, Sipetrol, YPF Ratify February Offshore E&P Accord*, Rigzone News, Sept. 28, 2006, *available at* http://www.rigzone.com/news/article.asp?a_id=36613.

98. On September 5, 2006, the Tribunal Federal Electoral declared Felipe Calderon Hinojosa the President-elect of Mexico. *See Dictamen Relativo al Cómputo Final de la Elección de Presidente de los Estados Unidos*

very limited legislative activity in energy matters within the Mexican Federal Congress during 2006.

Only one package of amendments[99] to the *Ley Minera* (Mining Act) and to the *Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo* (the Oil Act) was approved by the Mexican Congress in 2006. The amendments concern the use and consumption of hydrocarbon gases derived from carbon mining activities. Under the amendments, for the first time in Mexico, private parties are permitted either to extract and deliver coal-bed hydrocarbon gases derived from coal mines to Petróleos Mexicanos (PEMEX),[100] for a fee, or consume the gases for their own use.

The background to these unprecedented amendments is interesting and tragic. Prior to June 28, 2006 (the effective date of the amendments), due to an explicit Constitutional prohibition,[101] only PEMEX could acquire by-products (such as hydrocarbon gases) from the exploration and production of hydrocarbons in Mexico. Mining companies in Mexico, in compliance with the Constitution and the law, were required to vent the gases released during mineral extraction to prevent explosions, but were not permitted to collect such gases. Indeed, for many years prior to these amendments, mining companies had fruitlessly requested the Department of Energy to issue permits to collect the carbon gas and the methane into a pipeline system that would transmit the gases to PEMEX, in exchange for a service fee. The Department of Energy, with Constitution in hand, firmly and repeatedly denied mining companies such collection and transmission permits.

While complaints from mining entrepreneurs failed to shake the legal conscience of the Mexican authorities, an explosion that took the lives of sixty-five miners in the Pasta de Conchos coal mine on February 19, 2006, did.[102] According to press reports, the deaths of these miners was caused by the combination of a lethal concentration of methane plus deficient evacuation and rescue procedures implemented by Grupo Mexico, the concession holder of the Pasta de Conchos mine.[103] A political scandal followed this tragedy,

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*Mexicanos, Declaración de Validez de la Elección y de Presidente Electo*, Judgment Committee: Alfonsina Berta Navarro Hidalgo and Mauro Miguel Reyes Zapata, Sept. 5, 2006, *available at* http://www.trife.org.mx/acuerdo/dicatamen.pdf. Calderon Hinojosa, a member of the ruling *Partido Acción Nacional* (PAN), received just 233,831 more votes than the nominee of the *Coalición por el Bien de Todos*, a left-wing alliance of political parties formed to promote Andres Manuel Lopez Obrador's candidacy. The election had been challenged by the coalition.

99. In force since June 26, 2006, the package of amendments consists of: (a) the addition of a second paragraph to Article 30, Section II, of the Oil Act; (b) the amendment of the Mining Act Article 3, Sections I and II; Article 4, Section VIII; Article 5, Section I; Article 19, Sections XI and XII; and Article 55, Sections VII, VIII, IX, and X; and (c) the addition to the Mining Act of Sections XIII, XIV, and XV of Article 7; Section XIII of Article 19; Sections XI, XII, XIII, and XIV of Article 27; and Sections IX, X, XI and XII of Article 55. All of these amendments were published in the *Diario Oficial de la Federación* (The Federal Official Gazette), April 20, 2006.

100. The Mexican national oil company.

101. The third paragraph of Article 27 of the Mexican Constitution provides that "[t]he Nation has direct ownership of all natural resources of the continental shelf and underwater zones around islands, of minerals or substances that are in veins, layers, or masses," and the fifth paragraph of that article states that "[t]he ownership of the Nation is inalienable and [imprescriptable]." Constitución Politíca de los Estados Unidos Mexicanos [Const.], *as amended*, art. 27, ¶¶ 3, 5, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

102. El Universal, *Todos están muertos*, Feb. 26, 2006, http://www.eluniversal.com.mx/primera/26312.html.

103. Ioan Grillo, *Search for Mexican Miners Suspended*, EL DIARIO, Feb. 25, 2006, *available at* http://www.diario.com.mx/nota.asp?notaid=D7302741db3c0026fb47cac0e6109ea3.

nearly resulting in the resignation of the Secretary of Labor and the removal of the leader of the Mining Workers Union.[104] It also brought about the only legislative changes in Mexico's energy laws for 2006.

It is worth noting that, while the amendments are in force today, the administrative regulation, which allows the amendments to be put into practice, has not yet been issued by the Federal Executive. The key unresolved issues of the regulation are the following:[105]

- As hydrocarbons gases are national assets, the price that the permit holders will have to pay the Federal Government for their own use is still to be determined.
- The transmission and extraction fees that PEMEX will pay the permit holders is yet undetermined.

The competitiveness of the price of the gas and of the fees payable by PEMEX may be the crux of these amendments. If the price for the gas extracted from the mines is uncompetitive, and so are the fees payable by PEMEX, mining companies will have no incentive to implement this new scheme.

## VI. Panama Moves Forward in 2006

Panama has caught the eye of local as well as foreign business, which are attracted by its geographic location, its flexible company law system, merchant marine fleet and the Canal (its economic mainstay). On October 22, 2006, Panamanians overwhelmingly endorsed a plan to modernize the Canal, convinced by the Government's arguments that the $5.25 billion project would generate jobs and keep the Canal relevant for future generations.[106] The energy field has benefited from forward-looking atmosphere and the following developments were brought forward in 2006.

### A. Hydrocarbons

There have been no major changes to Panamanian law on hydrocarbons since the enactment of the National Hydrocarbon Policy by Cabinet Decree No. 36, dated September 17, 2003.[107] Recently, however, the Panamanian authorities have set forth an action plan for invigorating the hydrocarbons sector, based on:

- Diversification of the Energy Balance (through the introduction of liquefied petroleum gas (LPG) for automobiles and the import of natural gas);

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104. Press Release, Federal Labor Ministry, Recommendation 26/2006, National Human Rights Commission, (July 18, 2006); *see generally*, Int'l Metalworkers' Fed'n, Report of IMF Fact Finding Mission to Mexico, (2006), *available at* http://www.imfmetal.org/main/files/06100216213279/Bericht_IMB_Delegation03_eng.pdf.

105. I thank Efrain Tellez, adjunct director of energy policy at the Comisión Reguladora de Energia (Mexican Federal Energy Regulatory Commission) for this valuable information.

106. Marc Lacey, *Panamanians Vote Overwhelmingly to Expand Canal*, N.Y. Times, Oct. 23, 2006, at A3, *available at* http://www.nytimes.com/2006/10/23/world/americas/23panama.html?ex=1319256000&en=adc3962ee89fb55c&ei=5088&partner=rssnyt&emc=rss. Additional information about the expansion is available on the website of the Panama Canal, http://www.pancanal.com/eng/plan/.

107. Official Gazette No. 24,892, issued on Sept. 22, 2003.

- Energy Sustainability and Independence (through the use of ethanol, support for the Kyoto Clean Development Mechanism Protocol,[108] the promotion of oil exploration and the encouragement of the use of alternative energies);
- Promotion of a Competitive Environment (through Decree No. 36, publication of a suggested fuel retail price, equalization of the prices between cities, and reformulation of the parity price);
- Preservation of the Environment (by changing the requirements and classifications of environmental impact studies, a project for improved kitchen equipment, and a change in fuel specifications);
- Introduction and Encouragement of New Technologies (through the promotion of hybrid vehicles and a national energy savings plan); and
- A Plan for taking Advantage of the Potential Created by the Geographical Position as an Energy Center (by developing a regional refinery, an up-grader, and a plant for recycling lubricants).[109]

### 1. *Electricity*

Modified in February 2006,[110] the newly named National Authority for Public Utilities issued Resolution JD-3460, dated August 19, 2006, establishing a procedure for granting electric and geo-thermal electric power generating concessions.[111] Among the main changes is the requirement that persons intending to generate hydro-electric or geo-thermal electric power post a guarantee bond calculated at US$100 for each megawatt or fraction thereof they intend to generate.[112] In addition, under the Resolution it will now be necessary for the National Environment Authority to require an Environmental Impact Study in addition to the concession to be used by the project.[113]

## B. Environment

As indicated, the National Environment Authority is the Panamanian authority that, both for hydrocarbons as well as for electricity, is charged with requiring Environmental Impact Studies of persons engaged in exploration and exploitation of oil as well as the generation of hydro-electric or geo-thermal electric power. Decree 209, dated September 6, 2006, has modified the entire process related to the approval of Environmental Impact Studies.[114] Under the new system, such studies are now classified in Categories I, II, and III, with the last applying to exploration and exploitation of hydrocarbons as well as to the generation of electric power. A Category III Environmental Impact Study should contain

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108. *See The Mechanisms Under the Kyoto Protocol: The Clean Development Mechanism, Joint Implementation and Emissions Trading*, United Nations Framework Convention on Climate Change, 2006, *available at* http://unfccc.int/kyoto_protocol/mechanisms/items/1673.php.

109. *See* Ministerio de Comercio e Industrias, Acerca de la Direccíon de Hidrocarburos y Energías Alternativas, http://www.mici.gob.pa/hidrocar.php.

110. Decree No. 10 of Feb. 22, 2006. Published in Official Gazette No. 25,493 issued on Feb. 24, 2006.

111. Official Gazette No. 25,610, issued on Aug. 16, 2006.

112. *Id.* at art. 1, § 1.

113. *Id.* at arts. 2, 3(1).

114. *Id.* at art. 24. Published in Official Gazette No. 25,625 issued on Sept. 6, 2006.

at least the following:[115] index; executive summary; introduction; general information; a general description of the project; a description of the physical environment; a description of the biological environment; a description of the social-economic environment; an identification of specific environmental impacts; an environmental management plan; economic adjustments due to the outside influence of social and environmental factors and a final cost-benefit analysis; a list of the professionals that took part in the preparation of the Environmental Impact Study; conclusions and recommendations; bibliography; and exhibits.

115. *Id.* at arts. 27, 30.