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Albuquerque Roberto de Chacon

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THE DISAPPROPRIATION OF FOREIGN COMPANIES INVOLVED IN THE EXPLORATION, EXPLOITATION AND COMMERCIALIZATION OF HYDROCARBONS IN BOLIVIA

Roberto Chacon de Albuquerque*

I. INTRODUCTION

On May 1, 2006, Bolivia announced a plan to recover its natural riches through the nationalization of oil and gas. The military enacted this plan by assuming control of fifty-six oil power plants. Oil and gas reservoirs, nonetheless, had already been nationalized a long time ago. According to the Bolivian Constitution, they belonged to the State. The government signed concession contracts with foreign companies for the exploration, exploitation, and commercialization of hydrocarbons. By means of international public biddings, foreign companies were selected to explore oil and gas fields in a contracted area. Concession contracts did not entail the property transfer of oil and gas reservoirs. They always continued to belong to the State.

There has not been, therefore, a nationalization of oil and gas, but a disappropriation of foreign companies that carried out the exploration, exploitation, and commercialization of hydrocarbons based upon contracts that had been signed with the Bolivian State. Bolivia has always remained as the proprietor of oil and gas reservoirs in a direct, inalienable and unrestricted way. One of the key problems in the disappropriation of foreign companies is the legal insecurity that it causes. It may contradict what was agreed on in treaties, as well as what was laid down by highly-regarded decisions of international courts. Disappropriation does not occur solely through the confiscation of assets belonging to com-

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* Lawyer, Doctor in Law from the University of São Paulo, Professor of International Law at the Catholic University of Brasilia
1. "Hydrocarbon" is a term that is usually applied in Bolivia to designate gas and oil. Technically speaking, hydrocarbon is a chemical compound formed by carbon and hydrogen. Natural gas is a gas hydrocarbon, while oil is a liquid hydrocarbon.
2. This article considers the scenario of the government disappropriating facilities belonging to foreign companies involved in the exploration, exploitation and commercialization of hydrocarbons in Bolivia. Disappropriation differs from an expropriation in the strict sense; an expropriation would imply a priori the refusal to pay any compensation to those who might be affected by a measure of such nature.
panies, but also with the adoption of abusive and discriminatory taxes that render the companies’ activities unviable. Even with the goal of the autonomous industrialization of oil and gas, disappropriation affects compensation for the foreign companies involved. Every instance of disappropriation results primarily from a political decision. It requires genuine social support and awareness of its necessities, implications, and repercussions.

Profits from oil and gas exploration may be defined as the difference between the market price, the production costs of transportation, processing and distribution, and the return for the invested capital. When oil and gas prices rise, the position of states with hydrocarbons is strengthened with regard to demanding increased participation in the profits of the exploration of their reservoirs. Joint-venture contracts between foreign companies and the respective State-owned oil and gas company may be revised; new taxes may be adopted; and royalties, the share of the profit that is reserved by the concessionary, may be increased. In extreme cases, the disappropriation of foreign companies that explore hydrocarbons may occur. The situation reverses when oil and gas prices fall. The negotiation power of foreign companies is strengthened because many hydrocarbon-producing countries begin to compete for their investments. Revenue appropriation levels by the State, government take, by means of taxes and royalties are decisive factors in choosing where to invest. Bolivia has followed this dynamic in a consistent way. When oil and gas prices go down, concession contracts are negotiated in a way favorable to foreign companies. As oil and gas prices go up, the State adopts measures that systematically increase revenue appropriation levels.

The oil and gas nationalization announced by Bolivia on May 1, 2006, could have been focused on specific elements that might have legitimized the nationalization both at home and abroad. First, untapped reservoirs could have been recovered under provisions of the contracts with the foreign companies. Second, contracts with foreign companies could have been revised or rescinded if the companies had not carried out their investment engagements. In both cases, however, contractual clauses would not have been implemented by foreign companies.

Bolivia adopted a different strategy. Oil and gas reservoirs, according to the Constitution, already belonged to the State. It was not considered enough to revise or rescind joint venture contracts with foreign compa-

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3. According to article 1.1 of the Hydrocarbons Act 1689, of April 30, 1996, joint-venture contracts, in the context of concession contracts, should be signed for the exploration, exploitation, and commercialization of gas and oil. Ley de Hidrocarburos, Ley N° 1689, 30 de Abril de 1996, Gaceta N° 1933 (Bol.) [hereinafter Hydrocarbons Act 1689].

4. The expression “government take,” in this text, basically means the revenue fraction of the private companies involved in the exploration, exploitation, and commercialization of hydrocarbons that is appropriated by the State through taxes and royalties.
HYDROCARBONS IN BOLIVIA

Yacimientos Petrolíferos Fiscales Bolivianos (YPFB), the Bolivian oil and gas State-owned company, is a de-capitalized company, meaning it is unable to finance its activities and lacks the personnel to guarantee production continuity. The government's goal was to capitalize YPFB so that it would centralize the exploration, exploitation, and commercialization of hydrocarbons. In order to capitalize YPFB, it would be necessary to de-capitalize foreign companies operating in Bolivia, by disappropriating them.

In the previous years, the Bolivian State had already increasingly appropriated revenue earned by foreign companies through their exploration, exploitation, and commercialization of hydrocarbons. The new Hydrocarbons Act 3058, of May 17, 2005, raised the government's share from 18 percent to 50 percent. From May 1, 2006, the government share, at least in the most productive fields, such as those belonging to Petrobras, had risen to 82 percent. In 1996, Petrobras settled in Bolivia under an agreement between Bolivia and Brazil. This agreement allowed the exploration, exploitation, and commercialization of Bolivian natural gas reserves.

The disappropriation of foreign companies has as its goal endowing YPFB with capital that will enable it to continually invest in the exploration, exploitation, and commercialization of hydrocarbons, with or without the participation of foreign companies. If YPFB's capitalization process, based on the de-capitalization of foreign companies, does not succeed, the indicators of oil and gas production in Bolivia will start to fall, damaging the country's economy. The rise in the government's share from 18 percent to 82 percent indicates that the Bolivian State needs to increasingly appropriate higher percentages of revenue, thereby discouraging foreign investment, in order to transfer resources to YPFB with the objective of granting it the means to take absolute control over hydrocarbons. In its long history of oil and gas nationalization, the Bolivian government has swung from one extreme to another like a pendulum.

II. HISTORIC MODELS OF OIL AND GAS NATIONALIZATION

There are basically three extreme models of appropriation of the revenue earned by the exploration, exploitation, and commercialization of hydrocarbons. First, the State monopolizes the activity and thoroughly appropriates the revenue by means of a State-owned company. Second, the State allows private companies to coexist with a State-owned company. The State appropriates part of the revenue of the private compa-

5. YPFB was created on December 21, 1936, during Colonel David Toro's government.
6. Ley Nº 3058, Ley Nº de Hidrocarburos, art. 55.3, de 17 de Mayo 2005, Gaceta Nº 2749 (Bol.) [hereinafter Hydrocarbons Act 3058].
7. Decreto Nacionalización de Hidrocarburos en Bolivia, Decreto Supremo 28701, "Héroes del Chaco," art. 4.1, May 1, 2006 (Bol.) [hereinafter Supreme Decree 28701].
nies through taxes and royalties. Third, the State also appropriates part of the revenue earned through the exploration, exploitation, and commercialization of hydrocarbons through taxes and royalties that are paid by private companies. But the third model differs from the second model because, unlike in the second model, the activity is not shared by a State-owned company and private companies. In the third model, only private companies explore the sector. Saudi Arabia and Iran, for instance, fit in the first model. Bolivia fits into the second model. The United States is an example of the third model, for the United States has never had an oil State-owned company.8

Nationalization may mean reversing property rights to the State's benefit and awarding, as compensation, an indemnity to the disappropriated companies. The State has eminent control over persons situated within the State territory and, indirectly, over their property. By declaring it as "public use," the State may nationalize an activity that was previously owned, controlled, and managed by the private sector. Public authorities traditionally disappropriate private property so as to, for example, build roads, dams, and public buildings. The concept of nationalization nonetheless expanded during the twentieth century, by differentiating itself from disappropriation. Nationalization means disappropriation in order to promote justice and equality, taking into account social and economic considerations, among the various countries in the international community. Eastern Europe's formerly communist countries nationalized nearly their whole industrial and agricultural sector during the period that followed the Second World War. During the labor government from 1945 to 1951, the United Kingdom nationalized a number of sectors, including that of coal mining. In many non-communist countries, it became commonplace to indemnify owners for what the State had disappropriated. In the previously communist countries, where private property of the production means as a principle was not allowed, indemnification was usually not awarded.9

The disappropriation of foreign companies usually occurs in developing countries, where there is strong resentment towards the internationalization of key economic sectors. In 1938, Mexico nationalized its oil sector, which was controlled by American companies. In 1951, Iran disappropriated the Anglo-Iranian Oil Company; and Egypt disappropriated the Suez Canal Company in 1956. In addition, Chile disappropriated the copper mining industry, which was controlled by foreign companies in 1971. Such disappropriations give birth to complex international public

8. Brazil, with Petrobras as a State-owned company, has recently abandoned one model—a model of total monopoly in which Petrobras was an excluding agent—in favor of a model where the coexistence of a State-owned company and private companies in the exploration, exploitation, and commercialization of hydrocarbons is the norm.

9. In a broader sense, "to nationalize" means to convert a foreign property into a national property. Nationalization then gets a social and economic projection that may give it a new meaning. It is the State policy that excludes foreign companies from specific economic sectors.
legal issues. In some cases, the problem is solved by granting indemnification to the disappropriated parties. In other instances, when the remedy of indemnification is not available, there may be a weakening in the international relations between the involved countries. Some developing countries affirm that the concession granted to a foreign company is not an international agreement because it is subject to the conceding State’s national law. Consequently, foreign countries have to face the challenges of disappropriation.

Bolivia has previously twice adopted oil and gas nationalization plans that involved the disappropriation of foreign companies. The first adoption occurred in 1937, under the government of Colonel David Toro. The second occurred in 1969, when the country was ruled by General Alfredo Ovando. The first nationalization had a revanchist motivation. Standard Oil would have acted against Bolivian interests during the Chaco War, in which Bolivia lost a significant part of its territory to Paraguay. Standard Oil would have resisted selling oil to the Bolivian Army, as well as would have been involved in the underground oil export to Argentina and Paraguay. Suspicions like these, and of tax evasion, would have led to its disappropriation on March 13, 1937, followed by the payment of an indemnification. This was the first nationalization suffered by Standard Oil, then the world’s most important oil company. This nationalization caused the international financial market to become unfriendly towards Bolivia. YPFB, the Bolivian hydrocarbons State-owned company, did not have resources to invest in order to increase oil and gas production.

The second disappropriation of foreign companies occurred during the Oil Code of 1956, which intended to create conditions to attract investments. It brought many foreign companies to the country. The most successful was Gulf Oil Company. In 1968, General René Barrientos suspended the Oil Code’s validity. Conditions later emerged for General Alfredo Ovando to disappropriate Gulf Oil Company, once again followed by the payment of an indemnification. Both YPFB and the Bolivian government benefited from this initiative at first. The complete recovery of oil and gas was initially successful because of the increase in the hydrocarbons price. After the disappropriation of October 17, 1969, the financial market once again turned on Bolivia. From 1973 on, with the first oil shock, the price of oil rose, increasing Bolivia’s export revenue source.

There is no consensus on what Bolivia actually achieved economically from the 1937 and 1969 disappropriations. After these events, the development, growth, and expansion of the Bolivian oil industry slowed for decades. Since the beginning of the 1970’s, it was a commonplace view that it would be necessary to industrialize natural gas in Bolivian terri-

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10. The Chaco War is known in Bolivia as the “Oil War”. There were suspicions that in the Chaco, a region that is close to Mato Grosso do Sul, a Brazilian state, and that until then belonged to Bolivia, there would be oil reservoirs, a suspicion that later proved to be unfounded.
tory. But YPFB did not have the means to continue this project. Today, there are no guarantees that YPFB will be able to industrialize natural gas in Bolivia, and a lack of resources is not the only reason. The complete recovery of oil and gas may be a pretext to facilitate an increase in YPFB's bureaucratic structure.

The main entities that supported the last disappropriation of foreign companies, which occurred on May 1, 2006, were the Bolivian Labor Confederation (COB) and the National Heritage Defense Committee (Codepanal). The nationalization model adopted continues to embrace the sharing of the activity of exploration, exploitation, and commercialization of hydrocarbons between a State-owned company and foreign companies as the State appropriates part of the revenue of the latter through taxes and royalties. But the government share, the part of the revenue that is appropriated by the Bolivian State, has grown. The adjustment of the tax and royalties system proposed by COB and Codepanal planned to increase the government share to at least 50 percent.

On May 1, 2006, Bolivia conducted the military occupation of the refineries that were mainly operated by Petrobras, who did not have the opportunity to assimilate the disappropriation decree. First, the fields were occupied manu militare so that in the following 180 days, new contracts would be negotiated with foreign companies. In light of what happened in the past, Bolivia adopted such measures stimulated by the increase in oil and gas prices on the international market. It is in the Andean Region where the consensus concerning the complete recovery of hydrocarbons has been consolidated as a means to increase the State's revenues. Brazil was one of the major investors in the Bolivian energy sector, and its main natural gas buyer. It was the country most seriously hit by the adopted measures. Petrobras was one of the few foreign companies to feel the impact of the Bolivian decision, besides Spain's Repsol and France's Total.

The military occupation of May 1, 2006, of the refineries is not an isolated event in Bolivia's recent history. The water supply system in Bolivia was de-privatized as a consequence of popular uprisings, known collectively as the Water War, which occurred in April 2000 in the city of Cochabamba. Later, in October 2003, Bolivia was once again disrupted by another popular uprising, the Gas War, in which social, political, labor, civic, and neighborhood organizations demanded the complete recovery of hydrocarbons. The mobilization tactics consisted of mass protests,

12. Comité de Defensa del Patrimonio Nacional (Codepanal).
13. As we have already had the opportunity to highlight before, beginning on May 1, 2006, the government take has reached up to 82 percent, well above what had been initially proposed by COB and Codepanal.
14. Supreme Decree 28701, art. 3.1.
15. In Ecuador and Venezuela, measures that increase each State's participation in the profits with oil exports have been recently adopted.
road blockages, and the besiegement of towns and cities. On October 17, 2003, then-president Gonzalo Sánchez de Lozada, who did not support the complete recovery of hydrocarbons, with the massive appropriation of the foreign companies’ revenue, through an increase of taxes and royalties, resigned for the benefit of his vice-president, Carlos Mesa.\(^{16}\)

III. LEGAL MECHANISMS FOR OIL AND GAS NATIONALIZATION

Different legal mechanisms may be used for oil and gas nationalization. Various alternatives were analyzed by the Bolivian government before May 1, 2006. This section discusses the main legal mechanisms that were created to implement the complete recovery of hydrocarbons.

The first alternative that was considered was the disappropriation for public use. Although this has been considered sound from a legal angle, it was not considered convenient from a political viewpoint. Disappropriation for public use mandates the need to indemnify, calculated according to the actual loss and the loss of profits suffered by the disappropriated company. This legal mechanism was determined to be too complex and costly for Bolivia. Thus, a complete-recovery legal mechanism should be considered for hydrocarbons that would imply the least possible amount of indemnification. The path to be followed for the complete recovery of hydrocarbons would then be circumscribed to Bolivian contract law. By transferring to the foreign companies the duty to fulfill the contract clauses, the State’s good faith would not be affected. Bolivia would then not need to indemnify foreign companies, since it would only need to compensate them for investments made in the country after enabling audit.\(^{17}\)

The second alternative that was envisaged by the Bolivian government was the contracts’ rescission or cessation. The first step would be a legal and financial audit to assess the validity and fulfillment of contractual clauses. It would determine the foreseen investment amount in the contractual clauses and the investment amount actually executed by foreign companies for oil and gas exploration, exploitation, and commercialization projects. Most companies would not have executed investments foreseen in the contractual clauses. Foreign companies would then be sued for the contracts’ rescission or cessation.\(^{18}\) Not only were there arguments that the contractually foreseen investment amount had not been

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16. With the “complete recovery” of hydrocarbons, the Bolivian government intended to solve the country’s social and economic problems. The creation of a new model of economic development would only be possible if it integrally met the needs of all Bolivians, which would only be possible if the State retains absolute control of its resources.

17. In order to disappropriate foreign companies, 51 percent of their shares were confiscated, so that the State would be able to participate in the companies’ decisions, businesses, and profits. Supreme Decree 28701, art. 7.2. This alternative was considered to be less drastic that the 100 percent confiscation of their shares, mostly due to the possible impact resulting from the respective indemnification.

18. **CÓDIGO CIVIL** [C.C.], art. 568:
executed, but also that foreign companies manipulated accounting documents, as well as production and commercialization data, thereby defrauding the State. The Supreme Court of Justice itself would be competent to try the lawsuit concerning the contracts' rescission or cessation in the light of what is foreseen in article 775 of the Bolivian Civil Procedure Code and in article 118.1. of the Bolivian Constitution. Contracts for the exploration, exploitation, and commercialization of oil and gas had been signed in the light of Hydrocarbons Act 1689, of April 30, 1996. Its article 30.1 stated that foreign companies should drill an oil well in each plot that was allocated to them. Companies which had around four to six plots later had the duty to drill around four to six wells. Some drilled no more than two wells. If, after five years of the granting of the concession, foreign companies had not built the stipulated amount of wells, the plots would automatically revert to the State.

As a third alternative, the nullification of the contracts was considered. Its goal would be to invalidate the contracts signed with foreign companies for the exploration, exploitation, and commercialization of hydrocarbons, as well as its legal effects. The respective lawsuit would be tried when contractual clauses go against constitutional tenets. Contracts

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1. En los contratos con prestaciones recíprocas cuando una de las partes incumple por su voluntad la obligación, la parte que ha cumplido puede pedir judicialmente el cumplimiento o la resolución del contrato, más el resarcimiento del daño; o también puede pedir sólo el cumplimiento dentro de un plazo razonable que fijará el juez, y no haciéndose efectiva la prestación dentro de ese plazo quedará resuelto el contrato, sin perjuicio, en todo caso, de resarcir el daño. (Arts. 344, 520, 596 del Código Civil).

2. Si se hubiera demandado solamente la resolución, no podrá ya pedirse el cumplimiento del contrato; y el demandado, a su vez, ya no podrá cumplir su obligación desde el día de su notificación con la demanda.

19. The Supreme Court of Justice is the paramount organ of the Bolivian Judiciary Power.

20. "En todos los casos en que existiere contención emergente de los contratos, negociaciones o concesiones del Poder Ejecutivo, conforme a las previsiones pertinentes de la Constitución Política del Estado, se presentará la demanda ante la Corte Suprema de Justicia con los requisitos señalados en el artículo 327." Código de Procedimiento Civil [Civil Procedure Code] art. 775(Bol.).


22. Hydrocarbons Act 1689, art. 30.1:

El área de explotación seleccionada dentro del área del contrato por cada descubrimiento comercial, tendrá una superficie máxima de diez parcelas. En cualquier caso, si en el plazo de cinco años desde la notificación a YPFB y a la Secretaría Nacional de Energía con la declaratoria de un descubrimiento comercial, el interesado no hubiese efectuado la perforación de al menos un pozo productor o de inyección en cada una de las parcelas seleccionadas, éstas serán obligatoriamente devueltas.

23. Código Civil art. 549 (Bol.):

El contrato será nulo: 1) Por faltar en el contrato, el objeto o la forma prevista por la ley como requisito de validez. 2) Por faltar en el objeto del contrato los requisitos señalados por la ley. 3) Por ilicitud de la causa y por ilicitud del motivo que impulsó a las partes a celebrar el contrato. 4) Por error esencial sobre la naturaleza o sobre el objeto del contrato. 5) En los demás casos determinados por la ley.
would *de facto* transfer oil and gas ownership to foreign companies, contrary to the provisions in article 139 of the Bolivian Constitution. Another example of contradiction between contractual clauses and constitutional tenets is that the contracts contemplated controversy resolution by foreign courts, thereby disregarding article 135 of the Bolivian Constitution: “All companies that were established to explore, take benefit or make business in the country shall be considered nationals and be submitted to the sovereignty, to the laws and authorities of the Republic.” Lack of formal requirements would also motivate the contracts’ nullification. Contracts signed with foreign companies for the exploration, exploitation, and commercialization of hydrocarbons would not have been submitted to the legislative power’s approval, violating article 59.5 of the Bolivian Constitution. The lawsuit for contract nullification does not expire.

IV. BOLIVIAN CONSTITUTION

For a long time, the Bolivian Constitution has assured that the State is the owner of its oil and gas reservoirs in a “direct, inalienable, and unprescriptive” way. Oil and natural gas were not nationalized on May 1, 2006; on this date, there was only the disappropriation of foreign companies involved in the exploration, exploitation, and commercialization of oil and gas.

The third part of the Bolivian Constitution is called “Special Regimes.” Its first title refers to the “Economic and Financial Regime.” The first title is divided into two chapters: the first, “General Dispositions,” and the second, “National Goods.”

Article 133 of the Bolivian Constitution determines the country’s economic purpose: “The economic regime shall favor the strengthening of the national independence and the country’s development through the defense and the use of natural and human resources in the protection of the State’s security and in the search of the Bolivian people’s well-be-

24. *Constitución Política* art. 139:

Los yacimientos de hidrocarburos, cualquiera que sea el estado en que se encuentren o la forma en que se presenten, son del dominio directo, inalienable e imprescriptible del Estado. Ninguna concesión o contrato podrá conferir la propiedad de los yacimientos de hidrocarburos. La exploración, explotación, comercialización y transporte de los hidrocarburos y sus derivados, corresponden al Estado. Este derecho lo ejercerá mediante entidades autárquicas o a través de concesiones y contratos por tiempo limitado, a sociedades mixtas de operación conjunta o a personas privadas, conforme a ley.

25. *Id.* art. 135.

26. *Id.* art. 59: “Son atribuciones del Poder Legislativo . . . 5: Autorizar y aprobar la contratación de empréstitos que comprometan las rentas generales del Estado, así como los contratos relativos a la explotación de las riquezas nacionales.”

27. *Código Civil* art. 552: “La acción de nulidad es imprescriptible.”


29. *Id.*, Third Part, First Title, Regímen Económico y Financiero.

30. *Id.*, Third Part, First Title, Chapter I, Disposiciones Generales.

31. *Id.*, Third Part, First Title, Chapter II, Bienes Nacionales.
ing.” Article 134 forbids the private accumulation of economic power and monopoly:

It shall not be allowed the private accumulation of economic power in such a degree that the State’s economic independence be put in danger. No kind of private monopoly is recognized. Public services concessions, when they are exceptionally made, shall not be awarded for a period longer than forty years.

Article 136 notes that national goods belong to the State’s proprietary domain:

1. Besides the goods to which the law confers this quality, the ground and the underground with all its natural riches, the lake, river and medicinal waters, as well as the elements and physical forces suitable for use belong to the State’s proprietary domain. 2. The law shall set up the conditions of this domain, as well as of its concession and adjudication to private parties.

National goods, under article 137, constitute public property: “The Nation’s heritage goods constitute public property, inviolable, having every national territory’s inhabitant the duty to respect and protect it.” Article 139 states that the Bolivian State is the owner of its oil and gas reservoirs, in a direct, inalienable and unprescriptable way:

Hydrocarbons reservoirs, no matter the state in which they are or the form in which they are presented, belong to the direct, inalienable and unprescriptable State’s domain. No concession or contract shall confer the ownership over hydrocarbons reservoirs. Exploration, exploitation, commercialization and transportation of hydrocarbons and its by-products belong to the State. This right shall be exerted by means of autarchic entities or through concessions and contracts for a limited period, to mixed societies of joint operation or to private parties, according to the law.

By increasing the government share through the adjustment of the tax and royalties system, Bolivia, from May 1, 2006 onwards, disappropriated the revenue earned by foreign companies through their exploration, exploitation, and commercialization of oil and gas, in what can be considered an indication that they, just like the mining groups, may in the future have their assets completely transferred to the government. The Bolivian Constitution, article 138, indicates that the nationalized mining sector belongs to the nation’s patrimony:

The nationalized mining groups belong to the Nation’s patrimony as one of the bases for the development and diversification of the country’s economy, and they cannot be transferred or adjudicated in property to private companies with any purpose. The upper direction

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32. Id. art. 133 (translated by author).
33. Id. art. 134 (translated by author).
34. Id. art. 136 (translated by author).
35. Id. art. 137 (translated by author).
36. Id. art. 139 (translated by author).
and management of the state mining industry shall be in charge of an autarchic entity with the attributions determined by the law.37

V. REFERENDUM ON HYDROCARBONS

In October 2003, Bolivia experienced a serious political crisis, the so-called “Gas War.” Social protests paralyzed the country, causing dozens of deaths and injuries. Peasant and labor organizations built a front against former President Gonzalo Sánchez de Lozada, asking for his resignation. They demanded the convocation of a constituent assembly, the holding of a referendum on the “complete recovery” of hydrocarbons and the non-export of natural gas to Chile.38 On October 17, 2003, former President Gonzalo Sánchez de Lozada resigned. Vice-President Carlos Mesa took over the presidency after the Bolivian Congress accepted him as the constitutional successor.

President Mesa shortly thereafter announced a referendum that since the beginning was paradoxically considered as having an antidemocratic nature by peasant and labor organizations. Its purpose would not be to pay attention to the demands of large sectors of the Bolivian population, but rather to legitimize the approval of a new Hydrocarbons Act39 that would not be different at all from the Hydrocarbons Act already in force.40 The referendum’s result would be indifferent. It would end up legitimizing Gonzalo Sánchez de Lozada’s previous policy on hydrocarbons, which was favorable to foreign companies. Popular demands from the October 2003 uprising basically comprised the following: the “complete recovery” of hydrocarbons; the strengthening of YPFB as a State-owned company that should participate in the exploration, exploitation, and commercialization process of hydrocarbons; and the increase in the government share to at least 50 percent.41 President Mesa was accused of using the referendum to legitimize the foreign companies that had signed contracts with the Bolivian government for the buying and selling of oil and gas.42

37. Id. art. 138 (translated by author).
38. In the Pacific War, which occurred between 1879 and 1883, Chile defeated the alliance formed by Bolivia and Peru. Bolivians lost their access to the sea. This provoked a strong popular resentment against Chile in Bolivia up to the present time, leading its population to systematically reject, for instance, the natural gas export to that country.
39. The new Hydrocarbons Act was approved on May 17, 2005, at the very end of Carlos Mesa’s government. See Hydrocarbons Act 3058.
40. The Hydrocarbons Act then in force against which the Bolivian population had massively protested against was the Hydrocarbons Act 1689, of April 30, 1996. It had been approved during Gonzalo Sánchez de Lozada’s government, and was considered favorable towards the interests of foreign companies.
41. It was also intended to forbid gas exports to Chile and to industrialize hydrocarbons within the Bolivian territory.
42. If majority voted “yes” on the referendum, the people would legitimize the new Hydrocarbons Act proposed by Carlos Mesa, which would leave entrenched the policy of the former Hydrocarbons Act. This new Act did not contemplate the “complete recovery” of gas and oil. If the “no” votes prevailed, the former Hydrocarbons Act would be legitimized. The referendum’s questions would circum-
President Mesa went forward, meeting the demands of peasant and labor organizations by promising: 1) to establish a constituent assembly; 2) to hold a binding referendum on natural gas; and 3) to reformulate the Hydrocarbons Act 1689, of April 30, 1996, then in force. The Bolivian Constitution, article 4.1, states: "The people deliberate and govern by means of its representatives and through the citizen's legislative initiative and the constitutional referendum, established by this Constitution and normalized by law." Gonzalo Sánchez de Lozada had intended to hold a referendum in order to decide the hydrocarbons' fate. President Mesa, on the contrary, had promised to hold a binding referendum. The referendum's results would determine his policies regarding oil and gas. President Mesa scheduled the binding referendum for July 18, 2004, but did not submit the Hydrocarbons Bill of Law that had been presented to the National Congress for popular approval. The COB protested against the referendum, since its proposals did not contemplate the "complete recovery" of hydrocarbons. Mesa did not favor the disappropriation of foreign companies.

The five questions of the July 18, 2004 referendum were as follows:

1. Do you agree that the Hydrocarbons Act 1689, enacted by Gonzalo Sánchez de Lozada, should be repealed? Yes or No.
2. Do you agree that the Bolivian State should recover ownership over all hydrocarbons at the wellhead?\(^{50}\)

3. Do you agree that [YPFB] should be re-established, reclaiming State ownership of the Bolivian people’s stakes in the capitalized oil companies, so that it can take part in all stages of the hydrocarbon production chain?\(^{51}\)

4. Do you agree with President Carlos Mesa’s policy of using gas as a strategic recourse to achieve a sovereign and viable route of access to the Pacific Ocean?\(^{52}\)

5. Do you agree that Bolivia should export gas as part of a national policy framework that ensures the gas needs of Bolivians; encourages the industrialization of gas in the nation’s territory; levies taxes and/or royalties of up to 50 percent of the production value of oil and gas on oil companies, for the nation’s benefit; and earmarks revenues from the export and industrialization of gas mainly for education, health, roads, and jobs?\(^{53}\)

We are now going to analyze the scope of each question.

A. Question 1. “Do you agree that the Hydrocarbons Act 1689, enacted by Gonzalo Sánchez de Lozada, should be repealed? Yes or No.”

One of the October 2003 protests’ demands was that the Hydrocarbons Act 1689, of April 30, 1996, be repealed. Its repeal would entail the nullification of the contracts that had been signed within its framework. Former President Mesa had declared that the repeal of the Hydrocarbons Act 1689 would not imply the nullification of shared-risk contracts\(^{54}\) with oil companies, signed under the protection of this Act. The Act would be repealed, but the contracts would remain in force until their expiration date.

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50. “¿Está usted de acuerdo con la recuperación de la propiedad de todos los hidrocarburos en boca de pozo para el Estado boliviano?” Id., question 2. “Boca de Pozo: Es el punto de salida de la corriente total de fluidos que produce un pozo (Petróleo, Gas Natural, Agua de Formación y Sedimentos), antes de ser conducidos a un Sistema de Adecuación.” Hydrocarbons Act 3058, art. 138.

51. “¿Está usted de acuerdo con refundar Yacimientos Petrolíferos Fiscales Bolivianos, recuperando la propiedad estatal de las acciones de las bolivianas y los bolivianos en las empresas petroleras capitalizadas, de manera que pueda participar en toda la cadena productiva de los hidrocarburos?” Referéndum 2004, question 3, supra note 49.

52. “¿Está usted de acuerdo con la política del presidente Carlos Mesa de utilizar el gas como recurso estratégico para el logro de una salida útil y soberana al Océano Pacifico?” Id., question 4.

53. Id., question 5 (translated by author). “¿Está usted de acuerdo con que Bolivia exporte gas en el marco de una política nacional que cubra el consumo de gas de las bolivianas y los bolivianos, fomente la industrialización del gas en territorio nacional, cobre impuestos y/o regalías a las empresas petroleras llegando al 50 por ciento del valor de la producción del gas y el petróleo en favor del país; destine los recursos de la exportación e industrialización del gas, principalmente para educación, salud, caminos y empleos?” Id.

54. The original Spanish expression used in Bolivian law is “contratos de riesgo compartido.”
This question has a mostly generalist approach. It would convey the impression that the repeal of the Hydrocarbons Act 1689, of April 30, 1996, would allow for the “complete recovery” of hydrocarbons, with the nullification of the respective contracts. The “yes” answer to the repeal of the Hydrocarbons Act 1689 would give a carte blanche for Mesa’s government to adopt a new hydrocarbons act without the need of public approval. The new Hydrocarbons Act 3058, of May 17, 2005, as a matter of fact was not submitted to public approval. With the favorable response to the July 18, 2004, Referendum, Mesa obtained a tacit approval to his own bill. The new Hydrocarbons Act was seen as too moderate by segments of the Bolivian population. Public mobilizations returned, and President Mesa’s government ended up being overthrown in the same way as Gonzalo Sánchez de Lozada’s had been.

B. QUESTION 2. “DO YOU AGREE THAT THE BOLIVIAN STATE SHOULD RECOVER OWNERSHIP OVER ALL HYDROCARBONS AT THE WELLHEAD?”

There were three articles in the Hydrocarbons Act 1689, of April 30, 1996, that transferred the hydrocarbons’ ownership that had already been extracted to foreign companies. Under article 1.1, the exploitation of hydrocarbons was made by means of shared-risk contracts that were signed between the State and private companies. Article 5 indicated that “the import, export, and commercialization” of these hydrocarbons was free. According to article 24, the production obtained by the companies could be freely disposed. According to Mesa, contracts signed under Hydrocarbons Act 1689 would remain in force despite its repeal.

The second question did not explain why contracts signed with the Bolivian government would not be nullified. The new Hydrocarbons Act 3058, of May 17, 2005, would maintain the same contracts regime. This question was interpreted by sectors of the Bolivian population as having the intent to grant legal security to foreign companies. It would not in any way harm their interests and would definitely eliminate the shadow of their disappropriation. The Bolivian Constitution, article 139, clarifies that the State is the owner of its oil and gas reservoirs in a “direct, inalienable and unprescriptable” way. But without the funding to bring natural gas to surface and to commercialize it, worthless gas reservoirs would be nationalized.

55. Hydrocarbons Act 3058, art. 5.

This question was considered fundamental by peasant and labor organizations, since the State can exert full property rights over hydrocarbons only through a State-owned company such as YPFB. To Mesa’s government, the question was not about re-establishing YPFB with the characteristics that it had before its capitalization, i.e., as a State-owned company that would control hydrocarbons throughout its productive chain. The government would intend to re-establish YPFB so that it could operate only through foreign companies, indirectly exerting property rights over hydrocarbons by means of shared-risk contracts. YPFB would not even be included in the transportation and refining process. It would not be about re-establishing an YPFB that would control hydrocarbons, taking part in its production and commercialization, but about restoring an YPFB that would be in charge of signing contracts for the exploration, exploitation, and commercialization of hydrocarbons with foreign companies. The goal would be to create an YPFB SAM (Mixed-Economy Public Company) as a shareholder company able to finance, but that would not take part in the production process.

D. QUESTION 4. "DO YOU AGREE WITH PRESIDENT CARLOS MESA’S POLICY OF USING GAS AS A STRATEGIC RECOURSE TO ACHIEVE A SOVEREIGN AND Viable ROUTE OF ACCESS TO THE PACIFIC OCEAN?"

This question could have a double meaning. There would be a vital need for Bolivia “to achieve a sovereign and viable route of access to the Pacific Ocean,” but how would Bolivia achieve it? The so-called policy of Carlos Mesa’s government “gas for sea” would thereby be clearly defined. The objective would be to obtain a sea strip in the north of Chile, close to Peru’s border, where a Bolivian harbor would be built. In exchange, foreign companies would have the right to export Bolivian gas to the Chilean market under unfavorable conditions for Bolivia.

The loss of access to the Pacific Ocean is a source of lasting national trauma in Bolivia, but the issue of access to the Pacific Ocean would also be used to ensure the gas export to Chile. To former president Carlos Mesa, Chile could not have access to Bolivia’s natural gas before solving the problem of the access to the Pacific Ocean. Gas export, as long as this problem had not been solved, would be directed towards other countries. Natural gas would then be used as a strategic resource by the Bolivian foreign policy. This question evoked patriotic feelings in the Bolivian people by making them think of the “sovereign and viable route of access.

56. SAM, in Spanish, stands for “Sociedad Anónima de Economía Mixta.”
to the Pacific Ocean.”

E. QUESTION 5: “DO YOU AGREE THAT BOLIVIA SHOULD EXPORT GAS AS PART OF A NATIONAL POLICY FRAMEWORK THAT ENSURES THE GAS NEEDS OF BOLIVIANS; ENCOURAGES THE INDUSTRIALIZATION OF GAS IN THE NATION’S TERRITORY; LEVIES TAXES AND/OR ROYALTIES OF UP TO 50 PERCENT OF THE PRODUCTION VALUE OF OIL AND GAS ON OIL COMPANIES, FOR THE NATION’S BENEFIT; AND EARMARKS REVENUES FROM THE EXPORT AND INDUSTRIALIZATION OF GAS MAINLY FOR EDUCATION, HEALTH, ROADS, AND JOBS?”

The underlying question was: “Who actually are the entities that should export gas?” If contracts with foreign companies were not nullified, only these would export and industrialize Bolivian gas. For foreign companies, it would be more convenient to export than to industrialize natural gas. But even if some companies did industrialize gas, its commercialization would be free, and its production would more probably be directed towards the foreign market. The whole process would benefit only the foreign companies. The voter’s response to the first part of the question would confirm his or her response to the previous question, i.e., it ultimately asks the voter if gas is a raw material.

It would still be impossible, for the peasant and labor organizations, to levy taxes and/or royalties of up to 50 percent of the production value of oil and gas. The strategy of Mesa’s government to reach this goal would be simple. Royalties of 18 percent should not increase, while the direct tax on hydrocarbons (DTH) would slowly rise year by year until it reaches 32 percent. This tax rise would be sheer speculation. It had once been a government-promise, but it had not been fulfilled. The second part of the question, after ensuring that the gas would meet national demands, would aim the favorable vote of those who would support its industrialization in Bolivia.

F. EXAMINATION OF THE REFERENDUM’S RESULTS

The referendum’s result was clear. On July 18, 2004, 60.06 percent of the Bolivian voters took part in the referendum. Although voting was compulsory, the turnout was the lowest since the transition towards democracy. If the referendum’s result had been “no,” former President Carlos Mesa would be obliged to thoroughly change the orientation of its policy or would be obliged to hold new anticipated elections. The five questions did receive the necessary votes in order to be considered ap-

57. The issue of Bolivia’s geographical seclusion, mediterraneity, is a constant theme in the Bolivian-Chilean relations, and has been dealt with in international fora such as the Organization of American States (OAS) and the United Nations (UN).
58. In Spanish, IDH stands for “impuesto directo a los hidrocarburos.”
proved. Questions 1, 2, and 3 received more than 85 percent of favorable votes. Question 2 received the highest percentage of popular support, followed by Question 3. Question 1, which had been formulated to control the referendum’s results and to assure its support, reached the third place in the popular preference. Questions 4 and 5 received the lowest support levels, but they were not turned down. The “complete recovery” of hydrocarbons would empower Bolivia with the resources to invest in education, health, roads, and jobs; this would give means to modernize the Bolivian State, in all its sectors. The standard of living would rise, and taxes would go down. Bolivia would be able to grant better living conditions to its inhabitants. There was a redeeming and messianic quality to the referendum’s popularity.

Former president Carlos Mesa then felt authorized to adopt a new hydrocarbons act, the Hydrocarbons Act 3058. He interpreted the result as a demonstration of support for his presidency and his policies. His goal was to begin by exporting gas to Mexico and the United States through and with the collaboration of Peru. But what Mesa could not stand against was the National Congress’ resistance to the presidential initiatives. Each party had its own interpretation of “complete recovery.” Former President Mesa and the Bolivian National Congress confronted for approval of the executive branch’s Hydrocarbons Bill of Law. The conflict was mostly circumscribed to tax modifications and/or tax types that should be adopted to increase the government’s share. After various months of analysis and debate, the Bolivian National Congress approved Hydrocarbons Act 3058. The law established that a royalty of 18 percent and a tax of 32 percent was to be collected from foreign companies.

Former president Carlos Mesa, despite the approval of Hydrocarbons Act 3058, did not manage to achieve a consensus on the Bolivian State’s policy as regards oil and gas in relation to the disappropriation of foreign companies. Segments of the Bolivian society continued to demand an oil royalty of 50 percent. The interpretation of the results of the referendum’s five questions was the most significant factor for the increasing stress in the relations between Mesa and the National Congress. As a culminating point in this increasingly frustrating process, Mesa, beset by an uprising similar to that previously faced by former president Gonzalo Sánchez de Lozada, resigned on June 7, 2005, from the presidency of the Republic.

VI. HYDROCARBONS ACT

Bolivia has already had several hydrocarbons acts throughout its history. Their content has varied, depending upon political contingencies.

60. “La sumatoria de los ingresos establecidos del 18% por Regalías y del 32% del Impuesto Directo a los Hidrocarburos (IDH), no será en ningún caso menor al cincuenta por ciento (50%) del valor de la producción de los hidrocarburos en favor del Estado Boliviano, en concordancia con el Artículo 8° de la presente ley.” Hydrocarbons Act 3058, art. 55.3.
Some have reinforced YPFB's role, the Bolivian oil and gas State-owned company; others have restricted its mission, foreseeing that, for instance, it should not industrialize natural gas. YPFB's key function has been operating reservoirs. Oil and gas exploration, exploitation, and commercialization have traditionally been in charge of foreign companies. The popular uprisings that led former presidents Gonzalo Sánchez de Lozada and Carlos Mesa to resign have aimed to change this situation. The uprisings demanded the nullification of the contracts that had been signed with foreign companies, and contracts that involved the reservoirs of hydrocarbons; the uprisings also demanded the strengthening of the YPFB so that it could competently engage in oil and gas exploration, exploitation, and commercialization.

Nonetheless, the first article of Hydrocarbons Act 1689, of April 30, 1996, noted, in accordance with the established in the Bolivian Constitution, article 139, that the State already was the owner of oil and gas reservoirs: "Under the Constitution, all hydrocarbons reservoirs, in whatever condition or form they are found, fall under the "direct, inalienable, and unrestricted domain" of the State. No concession or contract shall confer ownership of the hydrocarbons reservoirs." YPFB signed concession contracts with foreign companies for the exploration, exploitation, and commercialization of hydrocarbons:

The right to explore and exploit hydrocarbon fields and commercialize the products thereof is exercised by the State through YPFB. This State-owned company shall necessarily sign joint venture contracts of limited duration with individual or legal entities, whether Bolivian or foreign nationals, for the exploration, exploitation, and commercialization of hydrocarbons in adherence to the provisions of this law.

The primordial goal of Hydrocarbons Act 3058, article 2, was "the execution and enforcement of the July 18th 2004 Referendum's results, which expresses the Bolivian people's decision." The enforcement of this goal implied the repeal of Hydrocarbons Act 1689. The strategic character of natural gas for the Bolivian foreign policy was immediately set forth:

It is recognized the value of natural gas and the rest of hydrocarbons as a strategic resource, which collaborates with the objectives of social and economic development for the country and with the Bolivian State's foreign policy, including the achievement of a sovereign and viable route of access to the Pacific Ocean.

61. General Hugo Banzer Suárez's government, in the beginning of the 1970's, considerably reduced YPFB's field of action, having then also been accused of having privatized it.
62. CONSTITUCIÓN POLÍTICA art. 139.
63. Hydrocarbons Act 1689, art. 1.1.
64. Hydrocarbons Act 3058, art. 2.
65. "Se abroga la Ley de Hidrocarburos N° 1689, de 30 de abril de 1996." Id. art. 3
66. Id. art. 4.
The "complete recovery" of hydrocarbons was foreseen by Hydrocarbons Act 3058, article 5 heading:

Following the Bolivian people's sovereign command, expressed in the answer to question number two of the July 18th 2004 Binding Referendum, and in application of article 139 of the State's Political Constitution, the ownership over all hydrocarbons at the wellhead is recovered for the Bolivian State. The State shall exercise, through [YPFB], its ownership right over the totality of hydrocarbons.67

It has been set up the renegotiation of contracts signed with foreign companies:

The parties that have signed joint venture contracts to execute the activities of exploration, exploitation and commercialization, and have obtained licenses and concessions under the protection of Hydrocarbons Act 1689, of April 30, 1996, shall compulsorily convert themselves to the contract categories set up in the present Act and adapt themselves to its provisions within the deadline of one hundred and eighty (180) calendar days calculated from its coming into force.68

The executive branch has been confirmed as responsible for the policy of natural gas export and industrialization:

The executive branch, under the economic regime set up in the State's Political Constitution, shall be responsible for: a) establishing the policy for the development and opening of markets for gas export; b) promoting the massive consumption of gas throughout the national territory in order to improve the Bolivians' life quality, dynamizing the productive basis, and rising the national economy's competitiveness; c) developing the policy and the incentives for gas industrialization in the national territory; d) fomenting the private sector's participation in gas export and its industrialization.69

Meeting the demands of the popular uprising that led Gonzalo Sánchez de Lozada to resign, it has been recognized that the revenues from the export and industrialization of gas should be earmarked for fighting poverty: "The executive branch shall earmark national revenues from the export and industrialization of gas mainly in attention for education, health, roads, and jobs."70 In order to reach this goal, the foreign companies' revenue appropriation levels by the Bolivian State actually needed to increase: "It is stipulated that the State shall retain fifty per cent (50%) of

67. Id. art. 5.

68. Hydrocarbons Act 3058, art. 5.1 (translated by author).

69. Id. art. 7, heading (translated by author).

70. Id. art. 7, sole paragraph (translated by author).
the production value of oil and gas, in accordance with the decision contained in the answer to question number 5 of the July 18th 2004 National Referendum Act."\(^{71}\) "The sum of the foreseen revenues of 18% for royalties and of 32% of the Direct Tax on Hydrocarbons (DTH) shall be in no case lower than fifty per cent (50%) of the production value of hydrocarbons in favor of the Bolivian State, in accordance with article 8 of the present Act."\(^{72}\)

The objectives of the hydrocarbons national policy were oriented by an eminently state-like and sovereign-oriented logic:

The general objectives of the hydrocarbons national policy are as follows: . . . b) to exert control and the effective management, by the State, of the hydrocarbon activity in protection of its economic and political sovereignty; . . . e) to strengthen, technically and economically, [YPFB] as the State-owned company in charge of executing the National Hydrocarbons Policy in order to assure the sovereign use of the hydrocarbon industry.\(^{73}\)

In the same way as Hydrocarbons Act 1689, of April 30, 1996, the Hydrocarbons Act 3058, of May 17, 2005, once again in accordance with what is foreseen in the Bolivian Constitution, has recognized that oil and gas reservoirs belong to the State:

Hydrocarbons reservoirs, whatever the state in which they are found or the form in which they are presented, belong to the direct, inalienable and unrestricted State's domain. 1. No contract can confer the ownership over hydrocarbons reservoirs or over hydrocarbons at the wellhead or up to the fiscalization point. 2. The party to a joint venture, operation or association contract is obliged to deliver to the State the totality of the hydrocarbons produced in the contractual terms that are set up by this.\(^{74}\)

Concession contracts have been used as the legal instrument allowing foreign companies to assume the exploration, exploitation, and commercialization of hydrocarbons: "The exploration, exploitation, commercialization, transportation, storage, refining and industrialization of hydrocarbons and its derivatives correspond to the State, a right that shall be exerted by it through autarchic entities or through concessions and contracts for a limited period by mixed societies or private persons, in accordance with the law."\(^{75}\) The Hydrocarbons Ministry is in charge of defining the prices policy: "The Hydrocarbons Ministry, as regards hydrocarbons, has the following attributions: . . . d) to determine the prices of hydrocarbons at the fiscalization point for the payment of royalties, retributions and participations, in accordance with the rules set up in the present Act."\(^{76}\)

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71. *Id.* art. 8 (translated by author).
72. *Id.* art. 55.3 (translated by author).
73. *Id.* art. 11 (translated by author).
74. *Id.* art. 16 (translated by author).
75. *Id.* art. 17.1 (translated by author).
76. *Id.* art. 21 (translated by author).
Hydrocarbons Act 3058, article 65, has established that the maximum duration of contracts signed with foreign companies is “forty (40) years.” The production, once again in accordance with Hydrocarbons Act 3058, article 66, must be handed over to YPFB, in exchange for the retribution that is foreseen in the contract. Contracts, always in the light of Hydrocarbons Act 3058, article 68, must “be authorized and approved, in accordance with what is set up in article 59.5 of the State’s Political Constitution.”

VII. CONTRACT BETWEEN PETROBRAS AND YPFB

The contract of buying and selling of natural gas between Petrobras and YPFB was signed on August 16, 1996. It contains a take or pay clause, determining that Petrobras shall need to pay for the negotiated natural gas, even if it was not consumed. The contract sets up the selling volume, the volume measurement system, how the prices shall be adjusted and to whom the gas shall be delivered. Subclause 20.1 of the contract provides for a duration of twenty years, counted “from the supply beginning, pending on the Parties’ agreement to be extended.” The Consideranda in the contract refers to the instrument signed by Brazil and Bolivia that gave occasion to the contract’s signing:

On November 26, 1991, in the city of La Paz, a Letter of Intentions on the Energetic Integration Process between Bolivia and Brazil, by Petrobras, YPFB and the Ministry of Energy and Hydrocarbon of the Republic of Bolivia was signed. . . . YPFB on its turn decided to reach an agreement with Petrobras in order to supply with natural gas the Brazilian market and to adopt the necessary measures to assure the availability of the previously cited volumes.

The buying and selling of gas was considered a fundamental factor in the integration between Bolivia and Brazil:

That the Ministry of Mining and Energy of the Federative Republic of Brazil and the Ministry of Energy and Hydrocarbons of the Republic of Bolivia, gathered from May 25 to May 26, 1992, in the city of Brasilia, declared that the buying-selling of Natural Gas is a pivotal political decision to the integration process between Brazil and Bolivia and for the economic growth of both countries.

According to subclause 2.1, the contract’s objective was the purchase of natural gas by Petrobras from YPFB for “a duration of twenty years calculated from the Supply Beginning, what can be extended by the parties’ agreement” One of the goals of constructing the gas pipeline, under subclause 3.6, was to supply Brazil’s South and Southeast Region, mostly the State of São Paulo. The contract provided for a meticulous price adjust-

77. Id. art. 65 (translated by author).
78. Id. art. 68 (translated by author).
ment system. Subclause 11.1 states: “The price of Gas, in US$/MMBtu, in Rio Grande, Bolivia, for each Year, in the gas pipeline’s entrance point, is what is included in the following chart, price that henceforth will be called P(i), being (i) the contractual year of reference.” Also, subclause 15.1 allows parties to review contractual clauses by requesting for review:

Without interrupting nor suspending the deadlines fixed for the fulfillment of the Party’s obligations, it is reserved the Parties’ right to mutually request meetings, which shall not be refused to discuss any Clause of commercialization, economic and technical nature, in case of occurrence of subsequent changes, including those motivated by the evolution of the international energy market prices, that may affect the basis on which such Clauses have been agreed and that harm any of the Parties.

Subclauses 17.1 and 17.2 indicate that the dispute solution process includes the recourse to arbitration:

Subclause 17.1: Any dispute, controversy or complaint that is elicited by or in relation to the Contract between the Parties shall be solved initially by discussion, consultation and negotiation between the Parties.

Subclause 17.2: All disputes, controversies and complaints that could be elicited from the interpretation or fulfillment of any of the Contract’s Clauses and that have not been solved by the Parties in accordance with what is set up in Subclause 17.1 of the present Clause, within a deadline of sixty (60) days, shall be exclusively submitted to the American Arbitration Association of New York, being applied its Regulation on International Arbitration.

Furthermore, subclause 17.5 makes the result of arbitration binding: “The arbitrators’ majority decision shall be presented in writing and shall be binding and unappealable.”

VIII. SUPREME DECREE

On May 1, 2006, President Evo Morales, after 100 days in government, enacted the Supreme Decree 28701, announcing the “complete recovery” of oil and gas.\(^{80}\) The decree contains, right in its beginning, an evocation to the “heroes of Chaco.”\(^{81}\) In the Chaco War, fought from 1932 to 1935, Bolivia, as we have already highlighted before, lost to Paraguay a vast territory where supposedly there was oil.

The Consideranda explicitly connect the “complete recovery” of oil and gas to the popular uprisings that led former presidents Gonzalo Sánchez de Lozada and Carlos Mesa to resign: “In historic struggles, the people have paid with their blood for the right to have our hydrocarbon riches returned to the hands of the Nation.”\(^{82}\) Supreme Decree 28701

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80. In Bolivian law, a supreme decree is a law approved by the President of the Republic based on his regulatory and administrative competence.
81. Supreme Decree 28701, “Héroes del Chaco.”
82. Id., Consideranda.
was adopted as an answer to the July 18, 2004 Referendum, when the electorate would have decided in favor of the “complete recovery” of hydrocarbons. The referendum did not contemplate, nonetheless, any question regarding the disappropriation of foreign companies. There was a question on the ownership of hydrocarbons at the wellhead. In the referendum, the electorate did not vote either for the ownership, possession, and absolute and total control over these resources. In the light of the Bolivian Constitution, articles 136, 137, and 139, oil and gas belong to the State in a “direct, inalienable, and unrestricted” way. They constitute an inviolable public property. The “complete recovery” of oil and gas would then need to entail the disappropriation of foreign companies, based on the ground that the contracts that had been signed with them could be nullified for lack of form requirements. They would not have been authorized and approved by the legislative branch, a requirement that is stipulated by the Bolivian Constitution, article 59.5. The language adopted by the Supreme Decree 28701 is categorical: “The so-called process of capitalization and privatization of YPFB has not only caused grave economic harm to the State, but is also an act of treason against the country for placing the control and management of a strategic sector in foreign hands, violating national sovereignty and dignity.”

The complete recovery of oil and gas is announced as the primordial objective to be reached: “The State reclaims total and absolute ownership, possession and control of these resources.” Beginning May 1, 2006, the oil companies currently carrying out gas and petroleum production activities in the national territory are required to deliver ownership of all hydrocarbons production to YPFB. “YPFB, in the name and representation of the State, in full exercise of its ownership over all hydrocarbons produced in the country, will take over their commercialization, defining the conditions, volumes and prices for export and industrialization as well as for the domestic market.” Hydrocarbons Act 3058, of May 17, 2005, then in force, did not allow the State to unilaterally fix export prices for natural gas. The Act was therefore modified by means of a decree, which is unconstitutional:

Only the companies which immediately abide by the provisions of the present Supreme Decree will be able to continue operating in the country until, in a period of not greater than 180 days from its enactment, their activity is regularized through contracts which comply with legal and constitutional terms and requirements. At the end of this period, companies which have not signed contracts will not be able to continue operating in the country.

Further ahead, the decree states:

83. Id.
84. Id. art. 1.1.
85. Id. art. 2.1.
86. Id. art. 2.2.
87. Id. art. 3.1.
During the transition period, for those fields whose average certified production of natural gas for the year 2005 was higher than 100 million cubic feet daily, the value of the production will be distributed in the following manner: 82% for the State (18% in royalties and participation, 32% in Direct Tax on Hydrocarbons - DTH, and 32% through an additional participation for YPFB), and 18% for the companies (which covers operational expenses, amortization of investments and profits). 88

Only the fields of San Alberto and San Antonio, then operated by Petrobras, fell within the daily production average, “higher than 100 million cubic feet daily.” 89 These fields were responsible for around half of the gas volume imported by Brazil. Article 4.1 was written having Petrobras as its goal. The 82 percent was meant to be applied only during the transition period of 180 days. This increase in the government take reduced the profitability of Petrobras, which became negative. This provision contradicts what had been approved in the Referendum and what was mandated by the Hydrocarbons Act 3058, of May 17, 2005. The Referendum and the Hydrocarbons Act 3058 reduced the government take to no more than 50 percent. Once again, a decree revokes what is mandated by an act.

Foreign companies became sheer production operators and would receive 18 percent from YPFB as remuneration. The “complete recovery” of oil and gas should happen in the framework of audits that would define the government take, the appropriation by the State of part of the revenue that is earned by foreign companies with the exploration, exploitation, and commercialization of hydrocarbons, but not the indemnification due in case of disappopriation:

The Ministry of Hydrocarbons and Energy will use audits to determine, case by case, the investments made by the companies as well as their amortizations, operational expenses and profitability obtained in each field. The results of the audits will serve as benchmarks for YPFB to determine the final payments or participation due to the companies on the contracts to be signed according to Article 3 of the present Supreme Decree. 90

Foreign companies would be able to continue operating in Bolivia, as long as they adjust themselves to the new government take levels, to be defined by means of audit reports.

The Bolivian State then began to lead with exclusivity the exploration, exploitation and commercialization of hydrocarbons: “The State will take control of the management of production, transportation, refining, storage, distribution, commercialization and industrialization of the country’s

88. Id. art. 4.1.
90. Id. art. 4.3.
hydrocarbons.”

“The State recovers its full participation in the entire chain of production of the hydrocarbon sector.” In order to ensure the means for the State to accomplish this mission, the nationalization of foreign companies was announced without indemnification, what can be considered as a kind of expropriation: “The necessary stocks are nationalized so that YPFB controls at a minimum 50% plus one in the companies Chaco S.A., Andina S.A., Transredes S.A., Petrobras Bolivia Refinación S.A. and Compañía Logística de Hidrocarburos de Bolivia S.A.” Petrobras Bolivia Refinación S.A. operated two refineries in Bolivia, one in Santa Cruz de la Sierra and another in Cochabamba. They were the country’s most important refineries and were handed over to the control of the local State-owned company: “YPFB will immediately appoint its representatives and trustees to the respective boards of directors and will sign new partnership and management contracts in which the State’s control and governance of hydrocarbon activities in the country are guaranteed.” The “complete recovery” of oil and gas did not comprise the nationalization of oil and gas reservoirs, which had not been denationalized. Foreign companies had obtained in international public biddings concessions that allowed them to be involved in the exploration, exploitation and commercialization of hydrocarbons, but none of them had the ownership over oil and gas reservoirs.

IX. AGREEMENT ON ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS

Petrobras Bolivia, signatory to the contract with YPFB, is controlled by a Petrobras subsidiary whose headquarters are located in the Netherlands. It was not Petrobras/Brazil, but instead Petrobras/Netherlands that made the investments in Bolivia. The Netherlands signed a bilateral investments treaty with Bolivia, the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia. Bilateral investments treaties have as goal the protection of foreign investments. They not only contain rules that protect the invested assets, but they also foresee mechanisms to solve disputes between a country member and investors of another country member. The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the

91. Id. art. 5.1.
92. Id. art. 7.1.
93. Chaco S.A. is controlled by British Petroleum.
94. Andina S.A. is a subsidiary of the Spanish Repsol.
95. Transredes S.A. is connected to the Anglo-Dutch Shell and to the American Enron.
96. Compañía Logística de Hidrocarburos de Bolivia S.A. is controlled by the German Oiltanking GmbH; Decreto Supremo, art. 7.2.
97. Decreto Supremo, art. 7.3.
Republic of Bolivia could have been used to defend the interests of Petrobras in case of disappropriation.

Under the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia, the protection of foreign investments helps "to strengthen the traditional ties of friendship" and "to extend and intensify the economic relations" between the Netherlands and Bolivia.98 Both the Netherlands and Bolivia have recognized that the "agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable."99

In the light of the Agreement, article 1, the broadest possible interpretation should be given to "investments":

For the purposes of the present Agreement: (a) the term 'investments' shall comprise every kind of asset and more particularly, though not exclusively: i. movable and immovable property as well as any other rights in rem in respect of every kind of asset; ii. rights derived from shares, bonds and other kinds of interests in companies and joint ventures; iii. title to money, goodwill and other assets and to any performance having an economic value; iv. rights in the field of intellectual property, technical processes and know-how; v. rights granted under public law, including rights to prospect, explore, extract and exploit natural resources.100

Article 1 also defines the parameters according to which a company may be considered a national to one of the contracting parties:

For the purposes of the present Agreement: . . . (b) the term 'nationals' shall comprise with regard to either Contracting Party: i. natural persons having the nationality of that Contracting Party in accordance with its law; ii. without prejudice to the provisions of (iii) hereafter, legal persons constituted in accordance with the law of that Contracting Party; iii. legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party.101

The "fair and equitable treatment" and the "full security and protection" of foreign investments are the key guidelines of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia:

1) Each Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and

99. Id.
100. Id. art. 1.a.
101. Id. art. 1.b.
shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. 2) More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favorable to the investor.\textsuperscript{102}

Disappropriation entails the payment of an indemnification:

Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given; (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.\textsuperscript{103}

If disputes arise, the contracting parties should primarily have recourse to consultation:

1) For the purpose of resolving disputes that may arise from investments between one Contracting Party and a national of the other Party to the present Agreement, consultation will be held with a view to settling, amicably the conflict between the parties to the dispute.

2) If a dispute cannot be settled within a period of six months from the date on which the interested national shall have formally notified it, the dispute shall, at the request of the interested national, be submitted to an arbitral tribunal.

3) The arbitral tribunal shall be constituted ad hoc, in such a way that each party shall nominate an arbitrator, and the arbitrators shall agree on the choice of a national of a third State as chairman of the tribunal. The arbitrators shall be nominated within a period of two months, and the chairman within a period of three months, from the time the interested national shall have communicated his wish to submit the dispute to an arbitral tribunal.

4) If the time limits provided for in paragraph three are not observed, either of the parties to the dispute shall, if no other provisions apply between the parties to the dispute, be empowered to request the President of the Court of Arbitration of the Paris International Chamber of Commerce to proceed to make the necessary appointments.

\textsuperscript{102} Id. art. 3.

\textsuperscript{103} Id. art. 6.
5) Paragraphs 4 to 7 of Section 13 of the present Agreement shall apply mutatis mutandis.\textsuperscript{104}

The Agreement also explicitly sets forth the recourse to the International Center for the Settlement of Investment Disputes (ICSID), which is an autonomous international organization created by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which came into force on October 14, 1966:

If both Contracting Parties have acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965, any disputes that may arise from investment between one of the Contracting Parties and a national of the other Contracting Party shall, in accordance with the provisions of that Convention, be submitted for conciliation or arbitration to the international Centre for Settlement of Investment Disputes.\textsuperscript{105}

ICSID aims at facilitating the solution of disputes involving governments and foreign investors through conciliation and arbitration. By the time of the so-called "nationalization process", Bolivia and the Netherlands were members to the ICSID.\textsuperscript{106} "The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments, which have been made before that date."\textsuperscript{107}

The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia, article 13.1, also sets up procedures for arbitration:

Any dispute between the Contracting Parties concerning the interpretation or application of the present Agreement which cannot be settled, within a reasonable lapse of time, by means of diplomatic negotiations, shall, unless the Parties have otherwise agreed, be submitted, at the request of either Party, to an arbitral tribunal, composed of three members. Each Party shall appoint one arbitrator and the two arbitrators thus appointed shall together appoint a third arbitrator as their chairman who is not a national of either Party.\textsuperscript{108}

"If one of the Parties fails to appoint its arbitrator and has not proceeded to do so within two months after an invitation from the other Party to make such appointment, the latter Party may invite the President of the International Court of Justice to make the necessary appointment."\textsuperscript{109}

"If the two arbitrators are unable to reach agreement, in the two months following their appointment, on the choice of the third arbitrator, either Party may invite the President of the International Court of Justice, to

\textsuperscript{104} Id. art. 9.
\textsuperscript{105} Id. art. 9.6.
\textsuperscript{107} Agreement, art. 10.
\textsuperscript{108} Id. art. 13.1.
\textsuperscript{109} Id. art. 13.2.
make the necessary appointment.\textsuperscript{110}

If, in the cases provided for in the second and third paragraph of this Section, the President of the International Court of Justice is prevented from discharging the said function or is a national of either Contracting Party, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is prevented from discharging the said function or is a national of either Party the most senior member of the Court available who is not a national of either Party shall be invited to make the necessary appointments.\textsuperscript{111}

The tribunal shall decide on the basis of respect for the law, including in particular the present Agreement and any other relevant agreement between the Contracting Parties as well as the generally recognized rules and principles of International Law. Before the tribunal decides, it may at any stage of the proceedings propose to the Parties that the dispute be settled amicably. The foregoing provisions shall not prejudice the power of the tribunal to decide the dispute \textit{ex aequo et bono} if the Parties so agree.\textsuperscript{112}

The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia, article 13.6, also states: "Unless the Parties decide otherwise, the tribunal shall determine its own procedure,"\textsuperscript{113} "The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the Parties."\textsuperscript{114}

\textbf{X. INTERNATIONAL RESPONSIBILITY}

The international responsibility of the State has immediate and direct consequences to the companies that are established abroad. It is not necessarily connected to the breach of international treaties. In the \textit{Mavrommatis Palestine Concessions} case, the Permanent Court of International Justice said:

It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights - its rights to ensure, in the person of

\begin{itemize}
\item \textsuperscript{110} \textit{Id.} art. 13.3.
\item \textsuperscript{111} \textit{Id.} art. 13.4.
\item \textsuperscript{112} \textit{Id.} art. 13.5.
\item \textsuperscript{113} \textit{Id.} art. 13.6.
\item \textsuperscript{114} During the so-called "nationalization process," Bolivia withdrew from ICSID and announced its intention to revise its bilateral investment treaties. Bilaterals.org, Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions, http://www.bilaterals.org/article.php3?id_article=8221 (last visited Sept. 27, 2007); Agreement, art. 13.7.
\end{itemize}
its subjects, respect for the rules of international law.\footnote{115}{The Mavrommatis Palestine Concessions Case (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3, at 12 (Aug. 30).}

Several diplomatic disputes regarding companies that operate abroad have already arisen based on many grounds. If a company is hit abroad in a way that there is a violation to international law, it must contact the respective Department of Foreign Affairs. Whether or not the government of its country of origin will defend this company, it will depend upon this country’s interests and political conveniences. Under the standpoint of international law, the company that regards itself as having been hit has no right to compel the government of its country of origin to file an international claim on its behalf. The filing of an international claim may be a motivation for the involved States to reach an agreement through diplomatic negotiation. The state that hits the company that operates abroad may admit responsibility and pay indemnification.

The company must certify its nationality as national to the claiming state and exhaust the local remedies available in the state that shall be held accountable for the internationally illegal conduct. The company’s nationality usually depends upon its corporate headquarters and what is foreseen by the legal system of the state where it is organized. The local remedies of the responding state must be actually available; they must be feasible. It is not necessary to exhaust these local remedies if they are not feasible, nor if it is not relevant to have access to them: “There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief; nor is it necessary again to resort to those courts if the result must be a repetition of a decision already given.”\footnote{116}{The Panevezys-Saldutiskis Railway Case (Est. v. Lith.), 1939 P.C.I.J. (Ser. A/B) No. 76, at 18 (Feb. 28).} Bolivian courts would unlikely contradict what is set forth in the Supreme Decree 28701, of May 1, 2006. If Brazil had intended to file an international claim on the behalf of Petrobras requiring indemnification for its disappropriation, the State should not have demanded that Petrobras had exhausted Bolivia’s local remedies.

For a state to be held responsible for the payment of an indemnification, its international responsibility must have been acknowledged in a concrete case. Rules of international law, and not of national law, must have been broken. There must be an illegal conduct under an international standpoint. When a contract between a foreign company and a state is nullified or violated, would it be possible to acknowledge the international responsibility of the latter? If this contract’s framework was the national law, would there be a violation to the international law rules? The answer to these questions is in the affirmative. If the contract is arbitrarily nullified or violated, if the assets of the foreign company were confiscated, the responsibility of the state may be acknowledged based on the violation of international law rules.
HYDROCARBONS IN BOLIVIA

If a foreign company suffers disappropriation, its facilities must be subject to indemnification. For instance, the *Selwyn* case, from the Arbitral Tribunal, describes the following:

The act of the Government may have proceeded from the highest reasons of public policy and with the largest regard for the state and its interests; but when from the necessity or policy of the Government it appropriates or destroys the property or property rights of an alien it is held to make full and adequate compensation therefore.\(^\text{117}\)

The same point of view was adopted by the Mixed Arbitral Tribunal in the *Goldenberg* case: "If international law authorizes a State for motives of public utility, to derogate from the principle of respect for the private property of aliens, it is on the condition *sine qua non* that the expropriated or requisitioned property will be paid for fairly as quickly as possible."\(^\text{118}\) The disappropriation of a foreign company is legal if a "full and adequate" indemnification is paid.

Resolution 1803 (XVII) of the United Nations General Assembly, of December 14, 1962, called "Permanent Sovereignty over Natural Resources" recognizes the right of every State to dispose of its natural resources according to its interests with the goal of strengthening its economic independence. It is possible to authorize, to limit or to forbid the activities of foreign companies interested in the exploitation of such resources.\(^\text{119}\) In case of nationalization or disappropriation of a foreign company, even if it is based on public utility, the State must anyway pay an indemnification:

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.\(^\text{120}\)


\(^{118}\) *Id.* at 405-06 (discussing the *Goldenberg* Case of 1928 from the Mixed Arbitral Tribunal).

\(^{119}\) G.A. Res. 1803 (XVII), Annex, § 2, U.N. Doc. A/Res/1803 (XVII)/Annex (Dec. 14, 1962). "The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities." *Id.*

\(^{120}\) *Id.* § 4.
XI. CONCLUSION

As we discussed in this article, Bolivia was the first South American country to nationalize its hydrocarbon resources, in 1937, a measure that was adopted again in 1969. Now, we would be facing the third and definitive nationalization of oil and gas. There is not, nonetheless, a new nationalization, in the strict sense, but, as we have the opportunity to demonstrate, a disappropriation of foreign companies. For a long time, the Bolivian Constitution has made sure that oil and gas reservoirs belong to the State.

The disappropriation of foreign companies in Bolivia has violated contracts signed in the light of the Bolivian law then in force. The State took over the shares control of Petrobras Bolivia Refinación S.A. YPFB, representing the Bolivian State, took over the commercialization of hydrocarbons, defining the conditions, volumes and prices of their industrialization and export. The rise in the government take from 50 percent to 82 percent rendered unviable Petrobras operations in Bolivia. This increase would be temporary, but 50 percent would already be a confiscation. Companies that did not agree with the "complete recovery" of oil and gas had only 180 days to revise the contracts from the enacting of Supreme Decree 28701, of May 1, 2006. Petrobras was the most hit foreign company, since it had the broadest presence in Bolivia. The "complete recovery" of oil and gas was announced by the president Evo Morales in the field of San Alberto, the most important in Bolivia, then operated by Petrobras.

In the dispute involving the disappropriation of Petrobras facilities in Bolivia, the best choice was a friendly solution between the parties. The recourse to the Bolivian judicial branch was thought about. The Bolivian judicial branch, notwithstanding, would have trouble in contradicting the guidelines set up by the executive branch of that country. The recourse to arbitration, according to the procedures and rules of the American Arbitration Association (AAA), in order to fix the controversies around the price of gas, was also cogitated. If no agreement had been reached in the framework of the original contract, the right to recover Petrobras investments through the application of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia could have been a choice. This agreement sets forth the possibility of recourse to the International Center for the Settlement of Investment Disputes (ICSID). The best possible choice to this conflict was precisely, nonetheless, to avoid, by means of diplomatic and political negotiations, a scenario that would justify the search for an unfriendly solution.