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# NEWS: DUKE ENERGY INTERNATIONAL PERU INVESTMENTS NO. 1 LTD. V. REPUBLIC OF PERU: FOREIGN INVESTORS IN PERU ARE GUARANTEED TAX STABILITY

*By Elizabeth Whitsitt*

In one of two ICSID awards handed down in August involving the US firm Duke Energy, a Tribunal has found the Republic of Peru liable to Duke Energy International Peru Investments No. 1 Ltd. (DEI Bermuda) for damages totaling US$ 18,440,746 plus interest after the SUNAT, Peru's National Tax Administration Superintendency, found DEI Bermuda liable for tax underpayments, interest and penalties equaling some US$ 48.3 million for the years 1996-1999.

### *Tax Assessment had two main components*

The first component was based on SUNAT's view, under its interpretation of the Peruvian Tax Code, that certain corporate transactions resulting in DEI Bermuda's indirect foreign ownership of a Peruvian energy corporation were sham transactions "...concluded solely to take improper advantage of tax benefits under Peru's Merger Revaluation Law (the "Merger Revaluation Assessment")."

The second component of the Tax Assessment was based on SUNAT's opinion that assets belonging to a Peruvian energy corporation indirectly owned by the Claimant were assessed for tax purposes using incorrect depreciation rates (the "Depreciation Assessment").

In its Request for Arbitration, DEI Bermuda made a number of claims against the Respondent as a result of the Tax Assessment. For the Depreciation Assessment, the principal claims at issue were tax stabilization and the doctrine of actos propios (good faith/estoppel). For the Merger Revaluation Assessment, the principal guarantees at issue were tax stabilization, the doctrine of actos propios and the guarantee against discrimination.

> *"This case is notable for the Tribunal's discussion of the scope of tax stabilization guarantees available to foreign investors like the Claimant."*

In finding Peru liable to DEI Bermuda for damages arising out of the Tax Assessment, the Tribunal concluded, by majority, that Peru was not liable for the Depreciation Assessment under any of the theories advanced by Claimant.

With respect to the Merger Revaluation Assessment, however, the Tribunal found Peru liable for breach of the guarantee of tax stabilization under a legal stability agreement entered into between DEI Bermuda and Peru (the "DEI Bermuda LSA"). The Tribunal also considered the Merger Revaluation Assessment to be a violation of Peru's obligation to act in good faith, a guarantee implied in the DEI Bermuda LSA by Peruvian law.

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This case is notable for the Tribunal's discussion of the scope of tax stabilization guarantees available to foreign investors like the Claimant. In particular the Tribunal determined that: (i) laws or regulations that form part of the Peruvian tax regime at the time the LSA is executed will not be amended or modified to the detriment of the investor, (ii) a stable interpretation or application that is in place at the time an LSA is executed will not be changed to the detriment of the investor, and (iii) even in the absence of (a) and (b), stabilized laws will not be interpreted or applied in a patently unreasonable or arbitrary manner. The Tribunal further clarified that tax stabilization does not mean that tax laws must only be interpreted or applied based on the meaning that most favours the foreign investor.

While specific to this particular case, the above clarifications respecting the scope of tax stabilization guarantees for foreign investors in Peru may prove useful to parties involved in other arbitral disputes involving similar claims regarding tax stabilization.

*Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* is available in English from InvestmentClaims, www.investmentlaw.info/

# NEWS: DUKE ENERGY ELECTROQUIL PARTNERS AND ELECTROQUIL SA V ECUADOR: ECUADOR FOUND LIABLE FOR BREACHES OF POWER PURCHASE AGREEMENTS AND INVESTMENT TREATY

*By Damon Vis-Dunbar*

The electricity provider Electroquil SA has been awarded US$ 5,578,566 plus interest stemming from several breaches of power purchase agreements (PPAs) backed by the government of Ecuador. While Ecuador was also found to have breached the Ecuador-US bilateral investment treaty, those violations did not result in additional monetary damages.

The dispute, filed with ICSID in 2004, arises out of agreements between Electroquil, an Ecuadorian company in which the Delaware-based Duke Energy acquired an ownership interest in 1998, and INECEL a state-owned power company.

Electroquil was to receive a guaranteed price for the supply of electricity, and in return it would guarantee delivery of certain amounts of power. Should the company fail to meet these benchmarks, INECEL was permitted to penalize the company. A year into the agreement, INECEL began fining Electroquil; by 2002 these fines amounted to over US$ 8 million.

The fines, which the Claimants argued were improperly levied, formed part of the claim. The Claimants also charged that a payment trust envisioned under the PPAs was not properly established, invoices were often not paid on time, and interest not paid on the late payments.

> *"Although jurisdiction was found to exist only on the basis on the arbitration agreement, the Ecuador-US investment treaty would nonetheless inform the Tribunal's reasoning on the merits of the claim."*

The claim consisted of two other complaints which were not successful: that customs duties were levied on two turbines when they should have been tariff free; and that Ecuador failed to entertain the claimants' suits in local arbitration.

The Claimants invoked an arbitration agreement as the primary basis for the Tribunal's jurisdiction. However, they backed up their claim by also citing the Ecuador-United States bilateral investment agreement, in the event that jurisdiction under the arbitration agreement was declined.

This move could have proved significant, for while the Tribunal asserted jurisdiction over some of the claims—those relating to fines and penalties—it found that the arbitration agreement did not extend to claims related to customs duties.

Jurisdiction under the Treaty was ultimately declined, however, on the grounds that it excluded most claims related to taxation, a category that included the contested customs duties, according to the tribunal. The claim relating to customs duties was therefore dismissed.

### *Ecuador-US investment treaty guides the tribunal as applicable international law*

The Ecuador-US investment treaty would nonetheless inform the Tribunal's reasoning on the merits of the claim. The arbitration agreement stated that both the laws of Ecuador and the relevant principles of international law would apply to settling disputes, and the Claimants argued that the Treaty formed part of the applicable international law.

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## DUKE ENERGY ELECTROQUIL...

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While voicing concern that the Claimants were trying to circumvent domestic law by invoking the Treaty, Ecuador also conceded that the Treaty "helps the parties in defining the precise formulation of the principles of international law that the Tribunal may apply."

The Tribunal concluded that both parties agreed that the principles of Ecuadorian law and international law applied to the claims covered by the arbitration agreement, and, moreover, the applicable international law would include the standards contained in the Treaty. Thus the Tribunal took a two-step approach: first judging the claims in light of the PPAs and Ecuadorian law, and second, determining whether there was a breach of the Treaty.

### *Damages awarded for breach of the power purchase agreement, no additional damages for breach of the Treaty*

The Tribunal concluded that INECEL and Ecuador were in breach of the PPA on several counts, including improperly penalizing Electroquil and failing to abide by the payment schedule stipulated in the PPA. These breaches would amount to monetary damages to Electroquil of just over US$ 5.5 million plus interest.

The tribunal then proceeded to weigh Ecuador's conduct against the Treaty. Here the tribunal found that Ecuador was in breach of the treaty's so-called umbrella clause and the Fair and Equitable Treatment clause.

The umbrella clause stated that "each party shall observe any obligation it may have entered into with regard to investments." While acknowledging that tribunals have taken divergent paths in interpreting such clauses, the Tribunal side-stepped the thornier details of this debate. In this case, the Tribunal concluded that Ecuador clearly had an obligation towards Electroquil's investment. Given this fact, and the broad wording of the umbrella clause, the Tribunal concluded that Ecuador's failure to abide by its commitments under the PPAs meant that it had also failed to live up to the Treaty.

In turning to the Fair and Equitable Treatment clause, the Tribunal yoked the standard to the "investor's justified expectations". The Tribunal determined that Ecuador's failure to guarantee payments under the PPA contravened the Claimants' legitimate expectations, and so therefore also breached of the Fair and Equitable Treatment standard.

Notably, however, neither of these two breaches of the treaty resulted in additional monetary damages. Any damages that resulted from a breach of the umbrella clause were already encompassed in the award granted for the breaches of the arbitration agreement, said the Tribunal. Nor did the Claimants convince the tribunal that the late payments of its invoices—the basis for the breach of the F&E standard—led to any excess damages.

*Duke Energy Electroquil Partners and Electroquil SA v Ecuador* is available in English and Spanish from the ICSID website, www.icsid.worldbank.org

# NEWS: TRANS-GLOBAL PETROLEUM INC. V. HASHEMITE KINGDOM OF JORDAN: FIRST APPLICATION OF ICSID ARBITRATION RULE 41(5)

*By Elizabeth Whitsitt*

An ICSID tribunal has ruled on whether to uphold objections filed by the Hashemite Kingdom of Jordan pursuant to Rule 41(5) of the ICSID Arbitration Rules in response to claims made by Trans-Global Petroleum Inc., a U.S. corporation based in Texas The Tribunal's decision, handed down on 12 May 2008, marks the first time that Rule 41(5) has been considered since its introduction into the ICSID Arbitration Rules in April 2006.

Similar to domestic rules of civil procedure that allow a party to request summary dismissal of frivolous claims prior to trial, Rule 41(5) permits a party to an arbitral proceeding to object (no later than 30 days after the constitution of an arbitral tribunal) to any claim made by an opposing party on the basis that the claim is "manifestly without legal merit."

In this case, the dispute arises out of the TGPI's investment of US $29 million in a ten-year petroleum exploration venture in Jordan's national territory that confirmed the existence of oil deposits in the Dead Sea and Wadi Araba basin. According to TGPI, Jordan commenced a systematic campaign to destroy TGPI's investment by preventing Trans-Global Petroleum Jordan, Ltd. (TGPJ), a subsidiary of TGPI, from pursuing any further role in the development of those oil deposits.

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Specifically, TGPI alleges that after confirming the existence of oil deposits, the Jordanian government removed TGPJ as project operator and "forced" the company to assign 80% of its interest in the project to Porosity Limited, a company that was "accepted and liked" by the Jordanian National Resource Authority. In addition, TGPI asserts that Jordan revoked TGPJ's contractual customs exemptions, ordered its workers out of Jordan and refused to communicate with TGPJ regarding its remaining investment in the development of the newly-found oil deposits.

In determining whether to uphold the Respondent's objections under Rule 41(5), the tribunal examined the meaning of the terms "manifestly" and "without legal merit" and found that Rule 41(5) will only apply to a "clear" and "obvious" case in which the claims made are "patently unmeritorious." Moreover, the tribunal held that while a tribunal should not weigh the credibility of a disputed factual allegation when considering the legal merits of a party's claim, a tribunal "need not accept at face value any factual allegation which may be regarded as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; nor need a tribunal accept a legal submission dressed up as a factual allegation."

Applying the above principles, the Tribunal went on to reject all but one of Jordan's objections to TGPI's claims, a result which may signal the difficulty of avoiding arbitration of claims by objecting under Rule 41(5).

## COMMENTARY: A CASE FOR AN INTERNATIONAL INVESTMENT COURT

*By Gus Van Harten*
*Assistant Professor, Osgoode Hall Law School, York University*

I shall lay out an argument for an international investment court, not because I wish to associate myself with grandiose schemes for international reform, but because I see it as the most pragmatic and appropriate way to fix serious problems in the existing system of investment treaty arbitration.

Investment treaty arbitration differs from other forms of international arbitration

There are two initial points to keep in mind. The first is that investment treaty arbitration is unlike other forms of international adjudication in that it is a public law system. This is not to say that investment treaty arbitration is precisely the same as domestic public law. But it does differ from other forms of adjudication that are reciprocal (i.e., in which either of the disputing parties can bring a claim against the other) such as conventional international adjudication between states and international commercial arbitration between private parties.

Investment treaty arbitration is different in that only one class of parties, the investor, brings the claims and only one class of parties, the state (acting as sovereign), is punished for breach of treaty. Moreover, the disputes in question arise from the regulatory relationship between individual investors and the state. The system reviews and disciplines legislators, judges, and other public officials in order to protect business. It does not regulate business in order to protect the public. It is in this sense more akin to domestic systems of constitutional or administrative law than to international adjudication as normally understood.

Moreover, investment treaty arbitration goes beyond other forms of international adjudication that resemble domestic public law – especially in the human rights field – because investment treaties remove the duty of investors to use domestic remedies before bringing a claim, and because they allow for damages to be awarded in favour of investors that are enforceable by domestic courts around the world, while barring the courts from reviewing any legal errors made by the arbitrators.

Investment treaty arbitration lacks basic requirements of openness and independence

This leads to the second item to keep in mind. In establishing such an exceptionally powerful system of regulatory adjudication, investment treaties should have been written to ensure a very high level of openness and independence in the adjudicative process. For whatever reason, they were not so written. Instead, the treaties import the model of private arbitration into the public sphere, creating numerous problems of which two are especially serious.

The first is that in many instances the arbitrations can be kept secret at the option of the disputing parties. This may be appropriate in private law or even in inter-state arbitration. But it simply does not square with principles of democratic accountability in public law adjudication, where fundamental choices are made about the lawfulness of sovereign decisions and the allocation of public funds.

Linked to this is the issue of independence. One does not have a properly independent judicial body where the adjudicative process is closed to public scrutiny. Secrecy is therefore the first nail in the coffin of judicial independence under the

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## A CASE FOR AN INTERNATIONAL INVESTMENT COURT...

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current system. Another nail, less widely recognized, relates to security of tenure.

In public law, judges are appointed for a set term – typically for life or until a set retirement age – so as to insulate them from inappropriate influences that may be brought to bear by powerful forces in government or the private sector. Security of tenure does not guarantee judicial independence, but it is long recognized as a vital prerequisite.

Arbitrators do not have tenure, nor are they subject to other objective guarantees of judicial independence (such as prohibitions on outside remunerative activity). Instead, arbitrators are appointed on a case-by-case basis. Again, this may not pose any problem in private law or in inter-state adjudication. But in public law, where only one class of parties brings the claims, a system of case-by-case appointment creates an unfortunate perception that arbitrators may decide cases and interpret the law in ways that favour investors, so as to encourage claims. As an informed observer can readily see, more claims means more business for the arbitration industry. For the outsider, it is troubling to see how, in numerous cases, the arbitrators have interpreted the treaties creatively in favour of investors and to the detriment of the regulatory position of states.

Investment treaty arbitration is thus a unique form of international adjudication that protects a small class of persons, mainly large firms, and that is structurally slanted in favour of those persons. By design, then, the system disadvantages those who stand to benefit from business regulation that is foreclosed by arbitration awards, or from other public initiatives that are made too costly or fiscally uncertain by the threat of investor claims.

I doubt that this type of system would ever fly in a domestic context as a means to resolve regulatory disputes between business and the state. It would be outlandish for a claim of 'unfair regulation' brought by a company against a government to be decided by an ad hoc tribunal, the president of which was appointed by the national chamber of commerce. But this is the effective state of affairs under the many investment treaties that assign appointing authority to the International Chamber of Commerce, for example.

An international investment court is the best solution.

What can be done? The best option, without falling back on domestic courts and abandoning the use of international adjudication to protect investors, is an international investment court. This need not be a grandiose thing and it need not depend on agreement by all. Rather, groups of like-minded states might agree to establish an international judicial body to replace the role of private arbitrators in the existing system by providing for claims under the states' existing treaties to be channeled through the new entity. They could then appoint an appropriate roster of judges to the court for a set term and direct the judges to develop rules for the court according to well-known principles of judicial decision-making.

Such a court would enable greater fairness and accountability in this tremendously powerful arm of the international legal system. It is thus desirable for reasons of public interest. But investors would also benefit in an important way. Most investors will never bring a claim under an investment treaty. Claims are costly and best regarded as a last resort. As such, the system's main benefit for investors is the deterrence of regulatory abuse by states. An international court, properly established, would deliver this benefit on a much more credible and lasting basis than the current system.

## NEWS: ECUADOR THREATENS CANCELLATION OF OIL CONTRACTS UNLESS ICSID NIXED AS ARBITRATION FORUM

*By Fernando Cabrera Diaz*

The Ecuadorian government will consider contracts with oil companies terminated unless they remove the International Centre for Settlement of Investment Dispute (ICSID) as the venue of arbitration. The threat comes as the Andean nation considers domestic legal reforms which would make it unconstitutional for the country to be involved in arbitrations in venues outside of Latin America.

Ecuador's Oil and Mining Minister, Galo Chiriboga, said Ecuador has doubts about the impartiality of ICSID arbitration, and offered Chile's Centre for Arbitration and Mediation (Centro de Arbitrajes y Mediación de Santiago) as an alternative venue.

A proposed draft constitution, which will be put to a public referendum on 28 September, would make it illegal under Ecuadorian law for the country to enter into international treaties that could lead to investor-state arbitration unless disputes are settled in Latin American forums.

However, it is unclear how the draft constitution would affect the rights of foreign investors to use the ICSID

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## ECUADOR THREATENS CANCELLATION OF OIL...

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facility under Ecuador's bilateral investment treaties (BITs) that refer to the Centre as an option for arbitrating disputes.

Hernán Pérez Loose of the Quito-based law firm Coronel & Pérez Abogados said that the constitutional changes would probably have little impact on the foreign investors currently in the country. Mr. Pérez Loose points out that under international law countries cannot use national legislation, such as their constitutions, to escape commitments they have made under international law, like treaty arbitration clauses, he explained.

Ecuador would therefore have to either modify its BITs or convince potential claimants to keep arbitrations in Latin America. Altering BITs would require the consent of the co-signing country; a time consuming process at best. Moreover, convincing claimants to consent to a regional arbitration venue over ICSID is unlikely, concluded Mr. Pérez Loose, adding that the lack of experience and jurisprudence in the region would make investors wary of regional arbitration.

Ecuador is currently defending itself in nine arbitrations at ICSID, from claims totaling over US$ 10 billion. Most of the claims relate to the 2006 "Ley 42", which levied a 50% tax on oil company windfall profits.

Foreign oil companies operating in Ecuador, including Repsol, Murphy, Burlington, City Oriente and Parenco, have responded by initiating arbitration proceedings through ICSID.

Ecuador is also seeking a larger share of oil profits by modifying contracts with foreign oil companies by converting them to service contracts under which Ecuador holds ownership of the operations.

Minister Galo Chiriboga is currently negotiating with the oil companies, looking to both re-structure contracts and end arbitrations over the windfall tax. Ecuador recently settled with City Oriente, agreeing to pay the company US$ 70 million. In return, the company agreed to exit the country and withdraw its US$ 400 million claim at ICSID.

# NEWS: TRIBUNAL DECLINES JURISDICTION IN AFRICAN HOLDING COMPANY OF AMERICA, INC ET SOCIÉTÉ AFRICAINE DE CONSTRUCTION AU CONGO SARL (S. AFRICA) V. RÉPUBLIQUE DÉMOCRATIQUE DU CONGO

*By Suzy H. Nikièma*

An ICSID tribunal has declined jurisdiction in a dispute over a failed construction contract between the Democratic Republic of Congo (DRC) and two U.S. investors. Two members of the three-person tribunal held that the dispute began when the investment was under the control of a Belgium company, therefore disqualifying the claimants from seeking protection under the US-DRC bilateral investment treaty.

The claim arose out of the alleged non-payment of invoices under a construction contract between the DRC and SAFRICA, a Belgium company at the time that the contract was concluded in the early 1990s. (The exact date of the contract is unknown, as the contract was lost at some point in the 1990s during the civil strife that gripped the country. But the tribunal concluded that a contract existed on the basis of "indirect proofs" and the conduct of the parties).

In 2000 SAFRICA was sold to a company constituted under the laws of the Cayman Islands, but controlled by an American investor, the Blattner family. In 2004, the debt was transferred an American company, African Holding.

The two claimants, SAFRICA and African Holding, alleged that the DRC breached its obligations under the US-DRC BIT when it announced in 2005 that it would not pay the full amount of debt claimed by the investors.

In declining jurisdiction, the majority of tribunal determined that "the events giving place to the dispute" – i.e., the non-payment of invoices - stretched back to the early 1990s, when the company was under Belgium control. As such, the co-arbitrators ruled that the claim was outside their jurisdiction for reasons of ratione temporis (temporal jurisdiction).

In a dissenting opinion, Otto de Witt Wijnen disagreed on the grounds that the events that occurred before 2000 were not "litigious in nature." According to Mr. Wijnen, the non-fulfilment of a contract does not in itself constitute a dispute.

Source: decision on jurisdiction in African Holding Company of America, INC et Société Africaine de construction au Congo SARL (SAFRICA) v. République Démocratique du Congo

# NEWS: SOUTH AMERICAN ALTERNATIVE TO ICSID IN THE WORKS AS GOVERNMENTS CREATE AN ENERGY TREATY

*By Fernando Cabrera Diaz*

A July 16-17 meeting of the Bolivarian Alternative for the Americas (comprised of Bolivia, Cuba, Dominica, Nicaragua, and Venezuela)* ended without public mention of the International Centre for Settlement of Investment Disputes (ICSID), the World Bank agency that administers investor-state arbitrations. Nonetheless, the bloc's push for a regional alternative to the Centre initiated at last year's forum is gaining some momentum.

The Energy Council for South America — represented by energy ministers from all 11 South American sovereign nations — met for the first time in May to discuss a regional Energy Security Treaty. At the conclusion of that meeting, the Venezuelan energy minister, Rafael Ramírez, announced that the Council had approved working groups whose task is to design a legal mechanism to settle investor-state disputes related to the energy sector.

These rules would eventually replace those of ICSID as the preferred means to settle disputes between foreign energy companies and governments of Latin America, said Mr. Ramírez. The Energy Council has given itself six months to finalize the Energy Security Treaty.

During last year's 5th annual ALBA Congress, President Evo Morales famously announced that ALBA members had agreed as a group to withdraw from the ICSID Convention.

While Bolivia followed through on its promise, informing ICSID of its withdrawal from the Convention by letter dated May 1, 2007, other ALBA members have not followed suit. Nicaragua and Venezuela remain ICSID members, while Cuba and Dominica were never signatories to the Treaty.

Nicaragua, which has only faced one case at ICSID, has given mixed signals as to whether it intends to withdraw from the Centre. On April 14, the Managua-based newspaper La Prensa reported Attorney General Hernán Estrada as saying that Nicaragua was looking closely at Bolivia's experience, before determining its next step.

Nicaragua has for a year now stopped referring to ICSID in its investment treaties, opting instead for the Paris-based International Court of Arbitration, added Mr. Estrada.

However, in a rare move, Nicaragua lodged an ICSID case in June against the Spanish hotel group Barceló. Nicaragua is seeking US$ 30 million, which it claims to be owed from a disputed 1993 resort property sale to Barceló. Only two other cases have been registered by a government against a foreign investor at ICSID, according to ICSID records: a 1975 dispute over the construction of a maternity ward filed by Gabon against Société Serete S.A., and a pending dispute over a coal mining contract between the Government of the Indonesian Province of East Kalimantan and PT Kaltim Prima Coal.

Venezuela is also sending mixed signals. On February 13, the country's National Assembly passed a resolution approving Venezuela's withdrawal from ICSID, but the very next week Venezuela asked ExxonMobil to drop judicial proceedings at London and Paris arbitration courts, and instead return to ICSID to resolve their ongoing dispute over the nationalization of oil fields in the Orinoco.

*Honduras president Manuel Zelaya announced on July 30 that his country will shortly be joining ALBA.

# INTERVIEW: ALEJANDRO FAYA-RODRIGUEZ SENIOR LEGAL ADVISOR MEXICAN MINISTRY OF ECONOMY

Alejandro Faya-Rodriguez was the Deputy Director-General for International Affairs of the Directorate-General of Foreign Investment at the Mexican Ministry of Economy until last March, where, he negotiated ten bilateral investment treaties and one investment chapter within a free trade agreement.He also led the analysis for Mexico´s accession to the MIGA Convention, represented Mexico in various international fora and gave advice on domestic policy on foreign investment. He recently moved to a new post as a senior legal advisor to the Ministry of Economy, at the "Proceso MARCO", a project aimed at crafting proposals that foster competition or improve the regulation in key sectors. He still regularly advises the Ministry on matters of foreign investment.ITN reached Mr. Faya-Rodriguez by phone at his office in Mexico City.

*As a negotiator of investment treaties, how would you describe your fundamental responsibility?*

The task is to deliver a good legal instrument. It's a major responsibility, and one that not all negotiators handle well. Many negotiators try and finish negotiations too quickly in order to please a boss or leader. No matter how understandable this might be, it

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is highly irresponsible. The duty of a negotiator lays in capturing a proper balance by establishing enough legal protection to investments, in order to fulfill the treaty´s objective, and, at the same time, provide well-defined rules and standards, of both substance and procedure, which give legal certainty and prevent, to a reasonable extent, frivolous claims and awkward interpretations. This is not always easy and it may take some time.

*That tendency to rush an agreement, I imagine can come from political pressures. How can negotiators work to shield themselves from the pressure to make concessions, or rush the process, which may result in a treaty that is detrimental to the interests of the country?*

It's important to understand that negotiators are technicians, not politicians. The negotiator needs to clearly articulate his opinion, put it in writing and circulate it. If he disagrees with something, he has to have the ability to communicate his concerns and put them at the discretion of the higher ranks. A negotiator fulfills his role as long he gives his opinion, and is not afraid of doing so, even it that implies delaying a negotiation. Of course, this requires an ability to distinguish critical issues and priorities.

*What are some of the most difficult investment treaties negotiations that you have been a part of?*

There are a couple negotiations that stand out. One was our most recently concluded negotiation for a BIT with China, which may be signed shortly. That negotiation took more than three years and involved six negotiating rounds, as well as many more conference calls and other exchanges. There was a big gap in terms of culture and legal perspective. For China, it was the first major departure from their BIT model, which is far more basic and general. For instance, it was hard and it took intensive persuasive work to convince China of the need to include certain content in the procedural section. Our model contains provisions that relate to the scope and legal standing for the submission of claims, the establishment of an arbitral tribunal, applicable law, consolidation, characteristics of the awards and enforcement conditions, among other things. Our model is also explicitly clear that it only covers disputes that arise from alleged breaches of the treaty, and not for breaches of domestic law or investment agreements. Fortunately, we faced very good negotiators on the other side of the table, and, in the end, we were both convinced on the quality of the final text.

> *"It is better to not have a treaty then to have a bad treaty."*

Even more time-intensive was our BIT negotiations with the UK. That BIT, which has been in force since last July 2007, took 10 years to conclude. From the very beginning, the UK was asking for formulas that were not acceptable to Mexico. For the UK, also, this BIT marked a departure of their traditional model.. Bear in mind that the Mexican model follows the NAFTA approach, and is far more elaborate. It was not easy, for example, to convince the UK on the importance of tying the fair and equitable treatment standard expressly to the customary international law.

These two negotiations are very good examples of the fact that patience and hard work, at the end, render a good outcome. In both cases,the atmosphere between the negotiators was very positive and constructive, which also helps matters. Negotiators should try to encourage these conditions as much as possible.

*What lessons have you learned from your treaty negotiations that you would pass on to other negotiators?*

I would recommend patience, and learning how to say 'no' sometimes. It is better to not have a treaty then to have a bad treaty. Rushing should not be an option. The other advice is to learn and study as much as possible. Negotiators need to have solid technical expertise if they are going to have a strong negotiating position. I have encountered poorly prepared negotiators, and they are not in a position to struggle back against demands which may not be in their best interest, or to, discuss specific wordings or approaches. In other cases, they are insecure and not ready to move forward in a constructive manner. Two poorly prepared negotiators make the worst agreements of all. One good negotiator and one bad negotiator results often results in a deadlock. By contrast, two good negotiators tend to produce the best agreements.

*Few would dispute the fact that FDI is an important element in a country's overall economic development. Yet there is no conclusive evidence that bilateral investment treaties actually lead to an increase in FDI. In your opinion, what are the best arguments in favour of a country entering into BITs?*

I don't think that the evidence can even be called inconclusive. It is clear that BITs alone will not attract FDI. No matter how many BITs a country has, if it doesn't have a good business environment, it will not attract FDI. Far more important are features like macroeconomic conditions, the domestic regulatory framework, sound public institutions, and good infrastructure and education. This is not to say BIT´s do not have a function. I devoted four years of my life negotiating them and I believe they are quite positive. BITs play a

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supplementary role within an overall package that is conducive to attracting FDI. When I had to explain to our senators why they should ratify an investment treaty, I never said that it would attract investment per se; instead, I explained that BITs send a positive signal to investors and complement other policies.

However, not all countries should negotiate BITs. For instance, those whose policy objectives are in contradiction with the BIT itself, or some very small countries without a strong domestic institutional infrastructure, or countries that could not afford the cost of an eventual award. BITs are like credit cards; they are positive as long as they are in the correct hands. They may trigger liabilities, and there is nothing wrong with that, as that is part of the concept, so long as these liabilities are under control and can be administered properly.

*You commented recently on the functioning of the Most Favoured Nation (MFN) provision in an article in the Journal of International Arbitration. What's your take on how the MFN provision should be interpreted in BITs?*

Essentially, I argue that the MFN clause, as a matter of principle, should not be used as a tool for treaty shopping. This goes for most MFN clauses, which are worded in very general terms. That is not the original intention of the clause, and in my experience as a negotiator, that is certainly not the intended effect. Its function is to eliminate distortions in terms of competitive conditions, such as preventing differentiated treatment among two foreign investors with respect to matters like taxation, real estate, and commercial regulation, to name a few. Apart from a few exceptions, such as pre-establishment rights and transfers, investment treaties are not concerned with competitive conditions,, but rather establish legal standards of protection. Competitive conditions are established at the domestic level.. Therefore, unless clear working indicates otherwise – something I have not seen -the MFN provision should not be read as applying to clauses of third treaties.

*Where do you see the legal regime governing international investment headed in the next decade? Do you expect a renewed effort to form a multilateral agreement on investment, either through the WTO or some other institution?*

I don't see a multilateral approach any time soon. There are still some countries that are not sure about the benefits of FDI, and even among those countries that are, they are not sure about the proper legal regime that should govern FDI internationally. I don't think we are in a better scenario than when the MAI was frustrated in the late 1990's, and we may even be in a worse scenario. The so-called "spaghetti bowl" is inevitable. In other words, we will continue to see BITs signed at the bilateral level, although at a slower pace, given the fact that so many BITs have already been concluded. I think in the future we will also see the number of arbitrations that arise out of BITs decrease.

*Why do you forecast fewer investment arbitrations?*

We've been witnessing a bubble with respect to investment treaty-based arbitrations. For a long time, no one paid much attention to these treaties. It was only after the first cases arose in ..., especially those of NAFTA, ththat lawyers and investors realized that these were legal instruments that could be operated and which could lead to pecuniary awards. But there has been an overreaction, in my opinion. Over time I think this overreaction will correct itself for a number of reasons. First, as patterns of interpretation emerge the limits to both the State and investors are becoming clearer. It's now quite hard, for example, to prove an indirect expropriation case .Under the NAFTA, the same goes for the fair and equitable treatment standard. Second, there are consequences for submitting a frivolous claim. It is costly, and it may grow more expensive, as some losing investors have been condemned to pay the totality or majority of the legal fees of the arbitral proceedings. Finally, transparency would do much for the legitimacy of the system and the quality of decisions. Arbitrators must know their awards will be assessed by a circle that is growing.

> *"No matter how many BITs a country has, if it doesn't have a good business environment, it will not attract FDI."*

Of course there are currently discussions and debate on issues such as the umbrella clause, MFN, and fair and equitable treatment and full protection and security outside the NAFTA. There have been, in my opinion, some quite expansive interpretations of these provisions. Personally I do not favor interpretations that impose unreasonable obligations upon States or deviate from well-recognized concepts of international law, or pro-State views that do not condemn arbitrary acts against investors. At the end, the best scenario is a balance, and if the system ever deviates to far in either direction, it may well break down. This is not in the interest of many countries which are both exporters and receivers of investments.