National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective

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In various countries, national legislative enactments provide for guarantee of contractual stability between the host State and the foreign investor.¹ Recent years have witnessed quite a number of countries, such as Timor-Leste, Papua New Guinea, Peru, Panama, Ivory Coast, Bolivia, Venezuela, Colombia and Kazakhstan² to legislate specific stability laws or to make provision for stability in general hydrocarbon laws or specific Codes in order to attract foreign investment.

Fiscal/Tax Stability

The guarantees in a variety of national laws very often include fiscal stability more prominently as it is the rock bottom of such contractual relationship as far as the foreign investor is concerned. Thus, Article 2 of the Timor Sea Petroleum Development (Tax Stability) Act, 2003 provides that:

"1. In the case of any long term project (being a project of more than fifteen (15) years' expected duration and production from which commences after entry into force of the Timor Sea Treaty) relating to the contract of petroleum activities in the Joint Petroleum Development Area, the Government may enter into an agreement with a Contractor which guarantees the tax stability of the project by reference to the laws of the Republic in force on the effective date of the agreement in respect thereof:

a) Taxes applicable to or related to the petroleum activities in the Joint Petroleum Development Area in accordance with Article 5(b) of the Timor Sea Treaty; and

b) The rates at which such Taxes are charged, and the manner in which liability in respect thereof is calculated and payments and refunds are made.

¹ For example, see Columbian Judicial Stability Law (July 8, 2005, Law 963, passed through decree 2950 of August 29, 2005).
² The stabilization provisions in Kazakhstan could be found in various laws such as “Law on Investments” (adopted on January 8, 2003); “Law on Subsoil and Subsoil Usage” (adopted in January of 1996), Article 71; “Law on Petroleum” (adopted in June of 1995), Article 57; Code of the Republic of Kazakhstan “On Taxes and Other Obligatory Payments to the Budget” (adopted in June 2001), Article 283.1 & 283.2.
2. A Tax Stability Agreement may be made by the Prime Minister of the Republic or the Designated Minister and may provide for disputes thereunder to be settled in any manner (including by international arbitration) and for that purpose, the laws of such place as shall be agreed by the parties thereto shall apply.”

A similar fiscal stability guarantee provision can also be found in the Resource Contracts Fiscal Stabilization Act (2000) of Papua New Guinea. Article 2 of the Act provides as follows:

“The State may, in the case of a long term resource-based project (i.e. mining projects, petroleum projects, gas projects), enter into an agreement with a developer which –

(a) guarantees the fiscal stability of the project by reference to the law in force at the respective date of the agreement in respect of –

(i) applicable taxes, duties, fees and other fiscal imposts; and

(ii) the rates at which such taxes, duties, fees and other fiscal imposts will be charged and the manner in which liability in respect thereof will be calculated; and

(b) for the purpose of Paragraph (a), but not otherwise, contains special provisions relating to the payment of applicable taxes, duties, fees or other fiscal imposts to take effect to secure fiscal stability in the event of a change in the applicable law after the effective date of the agreement.”

The Peruvian Organic Law for Hydrocarbons provides tax and exchange guarantees as follows:

Article 63: TAX AND EXCHANGE GUARANTEE

“The State guarantees the Contractors that the tax and exchange systems in force at the time the Contract is entered into, shall remain unchanged during the life thereof. On behalf of the State, the Central Reserve Bank will participate in the Contracts referred to in the above paragraph, so as to guarantee the availability of foreign exchange as detailed in Article 66. It is the function of the Minister of Economy and Finances to enforce the guarantee of the tax system stability in this article.”

Article 66: GUARANTEES FOR THE FREE USE AND AVAILABILITY OF FOREIGN EXCHANGE

“The Central Reserve Bank of Peru, on behalf of the Government, is obliged to guarantee companies, local and foreign, which make up the Contractor, the availability of foreign exchange accruing to them in keeping with this Law and what is established in the Contracts, including also the following:

a) The free availability of 100% (one hundred percent) of the foreign exchange generated by their Hydrocarbon export, which they may freely dispose of in their local or foreign bank;

[Emphasis added], Article 2.

[Emphasis added], Article 1.


Law No. 26221. By way of a Supreme Decree No. 32-95-EF, dated February 27, 1995, the President of the Republic of Peru issued Regulations for the Tax Stability Guarantee and Tax Standards of Law No.26221, Organic Hydrocarbon Law (on the author’s file).

Emphasis added.

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