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Energy Deals  
Nuances of International Contracts  
Julio Arboleda  
Borden Ladner Gervais LLP



# Introduction

**In this presentation we will touch on some relevant and timely considerations**

**Legal Disclaimer: You should consider retaining legal counsel experienced in the international matter you are considering, and usually, the earlier the better. This presentation is not legal advice**

# International Contracts

- **Nuances matter**
- **Nuances will vary depending on region**
- **Parties from different places may come from different legal traditions (e.g. Anglo Saxon Common law v.s. Civil law or other)**
- **Agreement may merely formalise the napkin/back of the envelope, or may be something more (e.g. a state grant of a concession)**



# Nuanced Issues

## ■ Structuring

- Business reasons for structure?
- Home country reasons for structure?
- Host country reasons?
- Repatriation of funds?
- Taxation
  - ◆ home and host country issues
  - ◆ taxation treaty?
  - ◆ tax treatment of capital flows?
  - ◆ Get tax advice!

## ■ Timing

- Time to set up desired corporate entities
- Time to ensure appropriate Powers (of attorney or otherwise) are granted
- Time to negotiate
- Language and translation issues
- Time to have documents legalized



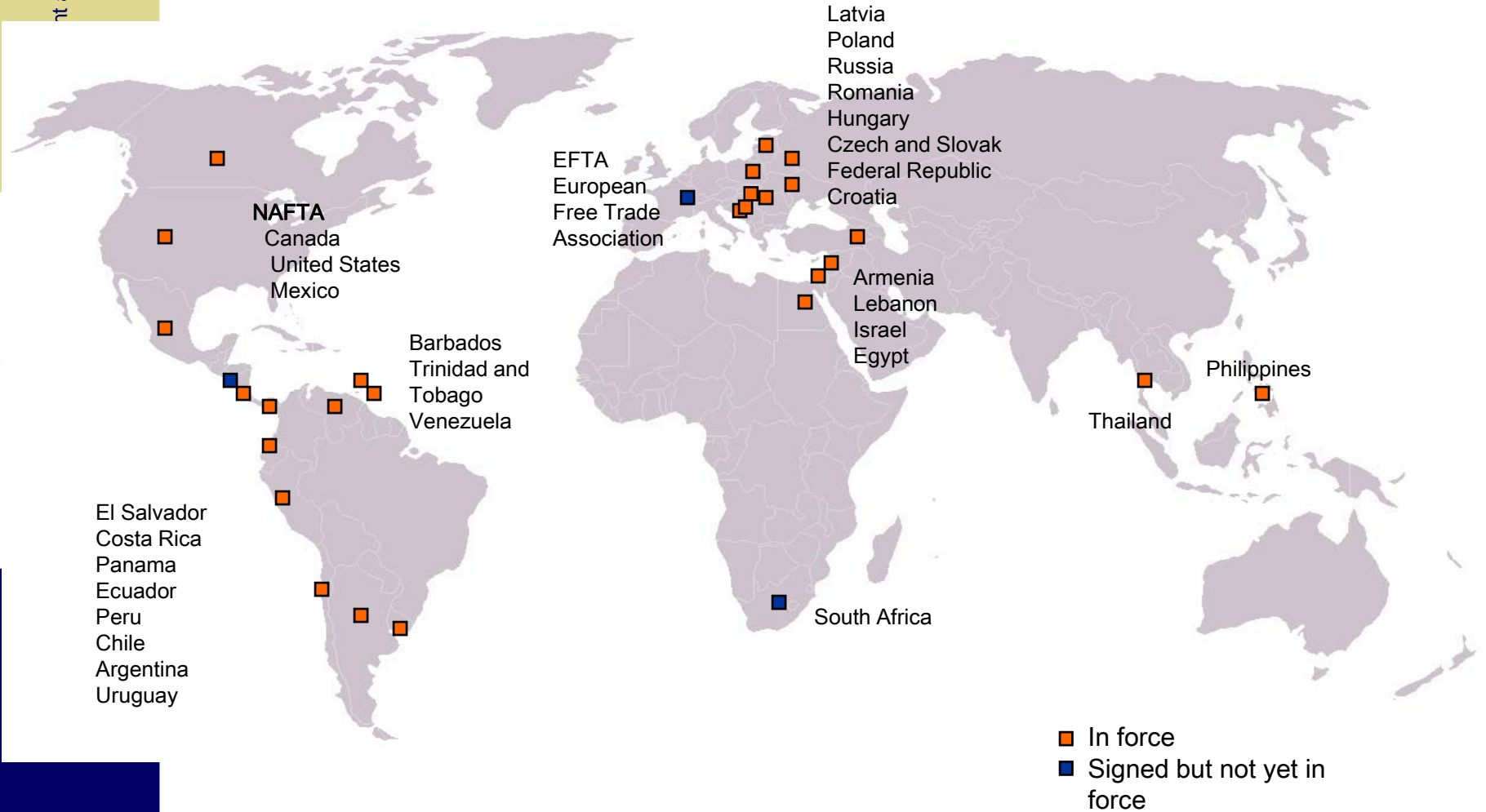
# Nuanced Issues

## Investor State Protection – consider at structuring stage

- Canadian investors should structure their foreign direct investment (FDI) in a manner that secures the best available investment treaty protection, as efforts to obtain treaty protection after the fact usually fail. Consider this “due diligence” for FDI planning.
- Canada began negotiating *Foreign Investment Protection Agreements* – FIPAs or BITS – in the 1990’s. Canada also has equivalent investor protection in some of its *Free Trade Agreements* – FTAs – such as the NAFTA and the Canada-Chile FTA.
- When problems begin to arise, investors should thoroughly review all available local remedies and treaty remedies, to determine the most efficacious course of action and to avoid taking steps that will be prejudicial to the potential treaty claim.
- Investor-State arbitration should be considered a remedy of last resort. In many cases it may be the only remedy, but it should only be pursued in serious cases where other suitable solutions are lacking.

# Nuanced Issues

## Canada's Investment Protection Agreements (FTAs and FIPAs)





# Contractual Issues

- Understand applicable local requirements before negotiating (local ownership, resident directors, minimum capitalization, etc.)
- Language
  - ◆ Of contract (pick one if possible)
    - Are contracts public or registrable?
  - ◆ Of negotiation
- Improper payments and anti - corruption prohibition
- Currency of contract
  - ◆ Currency risk?
  - ◆ Currency controls?
  - ◆ What if controls are implemented in the future?

# Contractual Issues

- **Choice of law and choice of jurisdiction**
  - Will make a difference to how contract is drafted
  
- **Arbitration**
  - Include provisions?
  - Domestic, international, or regional alternatives?
  - What kind of international arbitration?
  - How does host country accommodate arbitration provisions?
  - How does the counter party accommodate arbitration provisions?

# Contractual Issues

- **Export controls**
  - Are they relevant to your transaction?
  - proper analysis might be nuanced
  
- **Change of laws**
  
- **What is a fundamental breach of contract?**
  
- **Force Majeure**
  - Detailed consideration
    - ◆ What flexibility do you have to negotiate?
    - ◆ Supply chain interruption?
    - ◆ State Intervention?

# Other Issues

## Political Risk

- Is insurance available? (EDC)
- What happened if there is a change in risk?

## ■ Overall Risk of Transaction

## ■ Expropriation?

- Are investor state protection mechanisms available – consider when structuring?



# What is the Association of International Petroleum Negotiators (AIPN)?

The AIPN “is a non-profit organization founded in 1981 to enhance the professionalism of cross-border energy negotiators throughout the world. AIPN is now comprised of approximately 2200 members in 79 countries, representing numerous international oil and gas companies, host governments, law firms and academic institutions.”

Web site: <http://www.aipn.org/>



# Why is the AIPN relevant?

**“Energy negotiators throughout the world are choosing to join and actively participate in AIPN because of its emphasis on providing networking opportunities and on creating valuable educational programs and tools. For instance, members find the AIPN model agreements an excellent aide for their international oil and gas negotiations.”**



# What is the Model Agreements Project?

**A systematic development of models for agreements required for international oil and gas development.**

**Buy in from many industry groups and stake holders**

# AIPN Model Agreements

- Accounting Procedure
- Confidentiality Agreement
- Consultant Agreement for Business Development in a Host Country
- Farmout Agreement
- Gas Sales Agreement
- Gas Transportation Agreement
- International Dispute Resolution Agreement
- Joint Operating Agreement (JOA)
- Lifting Agreement
- Secondment Agreement
- Study and Bid Group Agreement
- Unitization and Unit Operating Agreement
- Service Contracts
  - Master Service Arrangements (MSA)
  - Seismic Acquisition Contract
  - Well Services Contract



# AIPN Model Agreements

**... Plus contracts in development**

**... Plus some translated agreements**



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**THANK YOU!**

**Borden Ladner Gervais LLP**

Julio Arboleda

Partner

Borden Ladner Gervais LLP

1000 Canterra Tower

400 – 3<sup>rd</sup> Avenue S.W.

Calgary, AB, Canada T2P 4H2

<http://www.blgcanada.com>

[jarboleda@blgcanada.com](mailto:jarboleda@blgcanada.com)

Direct tel: 403.232.9601

Fax: 403.266.1395