

# ARGENTINE JUDGE ORDERS SEIZURE OF ASSETS OF OIL DRILLERS OPERATING IN THE FALKLAND ISLANDS



**On 27 June 2015 a Federal Judge of Tierra del Fuego, Lilian Herraéz, ordered the seizure of goods and assets, worth US\$156,432,000, of companies alleged to be involved in the illegal exploration and exploitation of hydrocarbons off the Falkland Islands.**

The order follows an announcement in April 2015 by three British oil exploration companies of new oil discoveries to the north of the Falkland Islands (near the Zebedee exploration well, just south of the initial Sea Lion find), and the ongoing sovereignty dispute between Britain and Argentina over the Islands.

This is the first known time the government of Argentina has publically relied on legislation passed in 2013 to prosecute foreign oil companies for allegedly breaking Argentine law by prospecting or extracting oil in, what they claim is, Argentine territory. The law establishes that foreign oil company executives face up to 15 years in prison and heavy fines, if they do not have government permission to carry out the work.

## **The order of 27 June 2015**

On 21 April 2015, the Prosecutors of Rio Grande and the Head of Financial Crime and Money Laundering made a criminal allegation against Falkland Oil and Gas Limited, Premier Oil Plc, Rockhopper Exploration Plc, Noble Energy Inc (and its subsidiary Noble Energy Falkland Limited), and Edison International Spa, alleging the commission of *“illegal activities of exploring, searching and eventual extraction of hydrocarbons in the area of the Falkland Islands”* as these activities had not been carried out *“with the authorisation, concession or pursuant to any permit granted by the competent Argentine authority”*.

On 27 June 2015, the Judge upheld the claim and ordered:

- Seizure of the companies’ goods and assets worth US\$156,432,000, including vessels, a semi-submersible platform and bank accounts.



■ Immediate cessation of exploration or exploitation activities in Argentine territory.

■ The public prosecutor to take measures to bring the matter to the attention of relevant international organisations in order to freeze the assets, goods and bank accounts.

Of this order, a spokeswoman for the UK Foreign Office yesterday commented:

*“We have always been very clear that this is an unlawful assertion of jurisdiction over the Falklands Islands’ continental shelf, which we reject, and we will raise it with the appropriate authorities.”*

*We are satisfied that the Islands have the right to develop their hydrocarbons sector as a legitimate commercial venture with international oil and gas companies, and will continue to support them as they move forward. Argentine domestic law does not apply to the Falkland Islands”*

This was followed by a statement from the Foreign Office Minister Hugo Swire:

*“In the last few days we have seen the latest example of the Argentine authorities’ flagrant and unacceptable campaign to strangle the Falkland Islands hydrocarbons industry.”*

*We have been absolutely clear that Argentine domestic law does not apply in the Falkland Islands nor in the waters that surround them. This politically motivated decision to target company assets is a wholly unacceptable attempt to exercise extra-territorial jurisdiction, and has no legal justification whatsoever.*

*This action, aimed at British and international oil and gas companies, has dangerous implications for global business. The government of Argentina should refrain from unjustified provocations of this kind.*

*The Falkland Islands’ plans to develop their hydrocarbons industry, with the support and expertise of companies from around the world, is a legitimate commercial venture. The Falkland Islanders have every right to decide their own future, including through the development of their economy. As ever, we stand behind them and are confident that the international community will continue to resist these Argentine threats.”*

### **Operating in disputed territorial waters**

The proceedings brought by the Argentine prosecutors are predicated on Argentina’s contention that the Falkland Islands are within Argentine sovereign territory. This stands against the Falkland Islands’ right to self governance and against their own jurisdiction over their waters and continental shelf.

The United Nations Convention on the Law of Sea (**UNCLOS**) (ratified by both the UK (July 1997) and Argentina (October 1984)) provides a state “sovereign rights for the purpose of exploring and exploiting ... natural resources” (article 56.1(a)) and the “exclusive right to construct ... installations ... for economic purposes” (article 60.1(b)), which rights extend to drilling on the continental shelf (article 81). In the event of interference with such rights, a state may take various measures to protect the same, including its right under article 73. Article 73 permits a state to “take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with law and regulations adopted by it in continuity with [UNCLOS].”

However, both states officially carved out issues surrounding the “Question of the Falkland Islands (Malvinas)” which is subject to separate General Assembly Resolutions.

Argentina has specifically denied the application of UNCLOS in relation to the Falkland Islands and filed various reservations including the following:

*“it neither recognizes nor will it recognize the title of any other State ... or the exercise by it of any right of maritime jurisdiction ... that violates the rights of Argentina over the Malvinas ... and their respective maritime zones. Consequently, it likewise neither recognizes nor will recognize and will consider null and void any activity or measure that may be carried out or adopted without its consent ...”*

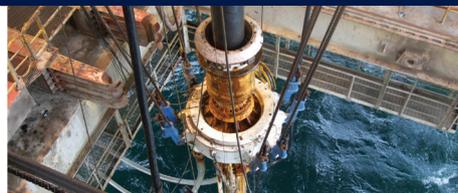
Upon accession to UNCLOS in 1997 the UK specifically rejected Argentina’s declaration and stated they have no “no doubt about the sovereignty of the United Kingdom over the Falkland Islands”.

We have advised various companies in the context of maritime boundaries with a view to licensing and protecting themselves under their contractual arrangements, as well as on receipt of cease and desist letters from states claiming sovereignty over the area of operations.

### **Who is affected by the 27 June order?**

Whilst the order is aimed at the named companies, it has potential ramifications on a wide range of parties including, amongst others:

1. Subcontractors of the named companies.
2. Owners, financiers, and investors of the assets operating in and around the Falkland Islands.
3. Charterers of the assets.
4. Their insurers.
5. Oil service companies.



## What are the implications for the named companies and other parties involved?

The order has serious implications.

Amongst other matters, the named companies and other parties should be aware of the following potential issues which now arise:

- Indemnities and knock for knock liability regimes.
- Third party losses.
- Limitation.
- Exclusion clauses.
- Warranties.
- Force majeure.
- Off-hire.
- Rights to terminate.
- Consequential losses.
- Issues arising out of the licencing contracts.
- Insurance issues.

### Enforcement of the order

Whilst it is understood that the named companies do not have assets in Argentina or use Argentine waters, the government of Argentina is looking to enforce the order on the named companies wherever their goods and assets are located. This may affect



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the companies' commercial relations worldwide, in particular in jurisdictions with reciprocal enforcement treaties with Argentina. It is also likely to have implications for the directors of those companies.

In terms of challenging the order, the International Tribunal of the Law of the Sea at Hamburg has jurisdiction to determine the legality of the order and any subsequent actions. However, this requires the action to be brought by a state and not by a private company (e.g. a vessel's flag state). For private companies the appropriate jurisdiction to challenge the order will depend on a number of factors. In particular, it will depend on where their assets are located. We have advised both states and private companies in similar circumstances.

### Force majeure and early termination

For subcontractors, owners of vessels, rigs, and other offshore equipment utilised in the operations in and around the Falkland Islands, a key question is whether the government action amounts to a force majeure event. The subcontractors' own assets might also be subject to seizure or arrest, and if identifiable might also be targeted in future litigation or by way of cease and desist letters.

Some parties are likely to have contracted on the SUPPLYTIME 1989 and 2005 forms. On the issue of force majeure, clause 32 of SUPPLYTIME 2005 provides:

*"Neither party shall be liable for any loss, damage or delay due to any of other due to any of the following force majeure events and/or conditions to*

*the extent the party invoking force majeure is prevented or hindered from performing any or all of their obligations...provided they have made all reasonable efforts to avoid, minimize or prevent the effect of such events and/or conditions:*

...

*(b) any Government requisition, control, intervention, requirement or interference".*

The Argentine action without doubt would fall within clause 32(b). In addition, the action arguably makes the continuance of operations impossible, given that the judge has ordered the immediate cessation of exploration or exploitation activities *"in Argentine territory"*.

### Insurance

Provided that cover in respect of Argentina is not excluded, the named companies may have cover in respect of the effects of the 27 June order under a political risks policy: specifically, a Confiscation, Expropriation, Nationalisation, Deprivation (**CEND**) policy. CEND policies offer protection where an insured is deprived of its property or has its operations restricted by order, law or decree of a legitimate government or authority. For the subcontractors who own equipment used in the operations in and around the Falkland Islands, contract frustration coverage may also be applicable.

### What next?

The 27 June order gives rise to a wide range of complex issues, which affect both the named companies, subcontractors, and other parties involved in the operations in and around the Falkland Islands. All parties, therefore, should carefully consider the implications of the Order, taking into account their specific contractual arrangements.



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