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## 1

**Editor's Note: Rounding up this issue's contents**

*By* Careful readers of this edition may wonder why our publication is suddenly fixated upon  
*Luke Eric* Romania.

*Peterson*

However, the confluence of stories about Romania is purely coincidental.

Our opening two items reveal that the European Commission is seeking to intervene in a third arbitration at the International Centre for Settlement of Investment Disputes (ICSID), a claim by a series of Swedish claimants (Micula and others) against Romania. As we explain below, a little-noticed jurisdictional holding in the Micula case may be of particular concern to the EC (and, indeed, to certain government respondents in investment treaty disputes).

Elsewhere in this issue, we report briefly on the resolution of a challenge to an arbitrator in another case: *S & T Oil Equipment v. Romania*. The challenged arbitrator has stepped aside prior to any ruling by the other members of the tribunal, and a new arbitrator has been appointed by the claimants.

A further three items in this edition of *IAReporter* have some Romanian flavour: our reports on a series of new investment treaties re-negotiated between the Government of Canada and three Eastern European nations.

Moving on to other regions, we highlight several new disputes under NAFTA's Chapter 11 on investment, as well as a move to arbitration in a CAFTA claim pitting a US mining company against the Republic of El Salvador.

Also, we report on the appointment of a tribunal in an ICSID case which could see a battle over the meaning of the Most-Favoured Nation (MFN) clause in the Germany-Argentina bilateral investment treaty. Readers may recall that arbitrators in a pair of earlier cases under that treaty have taken sharply-diverging views as to whether that ambiguous clause should permit German investors to reach into other treaties for more favourable arbitration remedies.

Of course, not all investment treaty arbitrations are destined to grapple with interesting legal and policy considerations; as we report in this issue, a pair of cases – *Mittal v. Czech Republic* and *TransGlobal Petroleum v. Jordan* – have been discontinued in recent weeks.

Finally, we are delighted to have another round-up of the latest investment treaty related articles and books from our regular contributor Prof. Andrew Newcombe of the University of Victoria in Canada.

## 2

**European Commission moves to intervene in another ICSID arbitration, *Micula v. Romania* - a dispute hinging on withdrawal of investment incentives by Romania**

*By Luke Eric Peterson* The Executive arm of the European Union (EU) has expressed interest in presenting legal arguments in a third investor-state arbitration taking place at the International Centre for Settlement of Investment Disputes (ICSID).

*IAReporter* can reveal that the European Commission (EC) has sought permission to present arguments in an ongoing dispute between a number of Swedish claimants and the Government of Romania.

Over the coming weeks, the parties to the dispute will brief the arbitral tribunal on their respective postures towards EC intervention in the case. Following this, arbitrators will decide whether to accept legal arguments by the EC.

In recent months, the European Commission has expressed concern about the growing incidence of certain types of foreign investment claims brought against new members of the European Union (EU).

Specifically, the Commission fears that new EU member states in Eastern and Central Europe are facing claims for breach of foreign investment protection treaties when they alter policies or arrangements in order to comply with the demands of the EU's internal legal regime.

In the Romania case currently pending at ICSID, a pair of Swedish nationals, and several related companies, are seeking more than \$1 Billion (US) for alleged breaches of the Sweden-Romania bilateral investment treaty.\*

As previously reported in this newsletter, the claimants invested some 200 Million Euros in Romania, establishing a series of food processing and manufacturing businesses in a disadvantaged part of the country.

The claimants contend that Romania has since rescinded a series of subsidies and exemptions (from taxes and customs duties), citing the country's obligation to limit so-called "state aids" under EU law.

Following a jurisdictional decision last autumn, the case is currently being heard on the merits.

As noted in a separate analysis report below, the claimants have sought to order Romania to reinstate particular laws which had benefited the claimants; the arbitrators in the case have signaled that restitution of a legal framework falls within their competence, although it remains to be seen whether such an order will be made in this case.

### EC also intervening in Hungary energy disputes

The recent move by the EC follows on the heels of interventions in two ongoing investment treaty arbitrations against Hungary. As revealed by an earlier *IAReporter* investigation\*\*, the European Commission petitioned for amicus curiae status in a pair of separate arbitration claims brought by multinational energy companies AES and Electrabel.

In these cases, foreign power producers are objecting to changes by Hungary to electricity prices under long-term power purchase agreements. In turn, Hungary has pointed to a determination by the European Commission which has held such long-term agreements (negotiated prior to Hungary's EU entry) to run counter to EU rules on state aid.

The cases are being arbitrated in private, however it is known that in the AES case arbitrators gave permission to the EC to file an amicus curiae legal brief. That brief was filed in January of this year, although the EC has not released the brief to the public.

Meanwhile, on April 28, 2009 arbitrators in the Electrabel case signaled that they will also accept a legal brief from the EC.

\* Micula and others v. Romania, see items 4 and 5 in our October 1, 2008 edition for more information on the Micula case and the jurisdictional decision at: <http://www.iareporter.com/Archive/IAR-10-01-08.pdf>

\*\* See item #7 in our September 17, 2008 edition at: <http://www.iareporter.com/Archive/IAR-09-17-08.pdf>

### 3

## ANALYSIS: Are stakes higher in Micula v. Romania case given tribunal's signal that it could order restitution of legal framework?

By  
*Luke Eric  
Peterson*

In recent months, the European Commission has made a habit of intervening in investment treaty arbitrations where EU member-states profess to be torn between their obligations under investment treaties and EU law.

Several foreign investors have filed claims against new members of the EU, alleging breach of investment treaty provisions when those EU member-states have dismantled policies or regulations that were deemed by Brussels to run counter to the terms of EU law.

Although the EC does not disclose details of the legal arguments which it seeks to make in such arbitration cases, the Commission's interests are clear: to emphasize the obligations of member-states under EU law, and to argue for the primacy of such obligations.

Some foreign investors insist that there is no clash of international obligations; EU member-states can heed the dictates of EU law - so this argument goes - but may need to

compensate foreign investors if long-standing international investment treaty obligations are breached in the process.

However, what happens when compensation is a consolation prize, and foreign investors would prefer to see the clock turned back – and more generous policies reinstated by order of international arbitral tribunals?

In all likelihood, political considerations might deter arbitrators from ordering that EU member-governments reinstate policies or regulations that had been removed at the behest of the European Commission.

Nevertheless, in recent months, one ICSID tribunal has signaled that it has jurisdiction to order such a course of action – should it choose to do so.

This may explain, in part, why the European Commission is keen to have its voice heard in that pending arbitration, *Micula, et. al. v. Romania*.

The *Micula* case arises out of a series of steps taken by Romania which altered or withdrew certain investment incentives which had earlier been tendered to a group of Swedish investors so as to encourage investment in an economically-disadvantaged area of Romania.

For its part, Romania has stressed that some of the incentives – including exemptions from customs duties and certain taxes – run contrary to European Union rules on so-called State Aid, thereby obliging Romania to cease offering such incentives as part of the country's accession to the EU.

Notably, at the jurisdictional phase of the ICSID arbitration, Romania challenged the claimants' request for "restitution of the legal framework" which had prevailed in the late 1990s when Romania was seeking to attract investment to under-developed regions. That legal framework was later altered by Romania as the country acceded to the EU.

As an alternative to restitution of the legal framework, the claimants in the pending ICSID arbitration have also argued that financial compensation should be ordered by the tribunal.

### **Romania argues that arbitrators cannot order states to restore certain laws**

Romania countered that arbitrators lacked the power to order Romania to restore certain laws that had been changed, observing "that it would be absurd and unjust for Romania to reinstate an old regulatory regime that would likely breach the EC Treaty".

Indeed, Romania queried whether arbitrators in investment treaty disputes have the basic power to order "specific performance", and, furthermore argued that "no form of restitution can be awarded (whether by way of order or declaration) when that would impinge on the state's regulatory sovereignty"

However, in their jurisdictional ruling in the case, the tribunal noted that Romania had conceded that restitution was a remedy available under the ICSID Convention – even if

rarely ordered in practice. (The tribunal conceded that enforcement of such a remedy posed additional problems, but that this did not impact upon the power of arbitrators to order such a remedy).

Additionally, the tribunal held that restitution was a remedy available under the Sweden-Romania bilateral investment treaty – while stressing that the appropriateness of restitution would be a question for the merits phase of the proceedings.

Although the tribunal's holdings on this point have not attracted particular attention, they highlight a striking feature of many bilateral investment treaties: they open the door to international tribunals to order changes or revisions to national laws.

*IAReporter* readers may recall that a small number of international investment agreements, such as the North American Free Trade Agreement (NAFTA), circumscribe the power of tribunals in this context. For instance, Article 1135 of the NAFTA provides for restitution only in relation to property, and further provides that NAFTA governments can offer monetary compensation in lieu of actual restitution of property.

By contrast, many BITs are silent on this issue, which leaves the door open for arbitrators – at least in principle, if not in practice – to order governments to change or alter laws or policies.

While the likelihood seems slim that the ICSID tribunal hearing the *Micula v. Romania* case would order Romania to re-instate an earlier set of laws – particularly where Romania contends that these would breach the country's EU law obligations - the mere prospect of this may have galvanized the European Commission to intervene in the pending ICSID arbitration.

Arbitrators in the *Micula v. Romania* case are Stanimir Alexandrov (claimants' nominee), Dr. Claus-Dieter Ehlermann (Romania's nominee), and Dr. Laurent Levy (President).

Dr. Ehlermann is an expert on EU law, and a former official at the European Commission. More recently, he served as a member of the WTO Appellate Body from 1995-2001. His involvement in investment treaty arbitration matters appears to have been limited; however he was an expert witness for the Methanex Corporation in its NAFTA Chapter 11 case against the US Government.

Mr. Alexandrov has represented various parties in investment treaty arbitrations, including the Governments of Turkey, Peru, Costa Rica, as well as Vivendi, Fireman's Fund, Tate & Lyle and Archer Daniels Midland. He was also counsel for Cargill in a recent arbitration under the US-Poland treaty, where Poland contended that certain measures were taken in furtherance of the country's accession to the EU. Although details of that case have been discussed in past issues of *IAReporter*,\* the final award has yet to be put into the public domain.

Dr. Levy is a Partner in the boutique arbitration firm of Levy-Kaufmann-Kohler in Geneva. He sits as arbitrator in a pair of investment treaty claims brought against Turkey

at ICSID, and in a large number of commercial arbitration cases.

\* On the Cargill v. Poland arbitration see item 5 in our July 16, 2008 edition, <http://www.iareporter.com/Archive/IAR-07-16-08.pdf>, as well as a more recent report on the payment by Poland of the arbitral award in question, <http://www.iareporter.com/Archive/IAR-04-17-09.pdf>.

## 4

### **Arbitrator steps down following challenge by Romania at ICSID; replacement appointed by claimant, S & T Oil Equipment & Machinery Limited**

*By Luke Eric Peterson* A member of an arbitral tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has stepped down following a challenge by the Government of Romania.

The challenge, details of which were first revealed in these pages, was initiated by Romania following the disclosure by Mr. John Savage, that his law firm was representing a foreign investor with a dispute against Romania.

Proceedings in the S & T Oil Equipment v. Romania case were suspended so that the parties might present arguments to the two remaining members of the tribunal, Hans van Houtte and Brigitte Stern, who would have to adjudicate on the challenge request.

However, rather than see this process play out, Mr. Savage opted to step down from his position as arbitrator in the case.

The two remaining members of the tribunal accepted his resignation, which paved the way for the claimants to appoint a replacement arbitrator: Dr. Horacio Grigera Naon, a former Secretary General of the International Chamber of Commerce Court of Arbitration, and a current faculty member at American University in Washington D.C.

Dr. Grigera Naon has sat in past investment treaty arbitrations, including Tecmed v. Mexico, Encana v. Ecuador. Currently, he is party-appointed arbitrator in two other pending ICSID matters, Murphy v. Ecuador and Repsol v. Ecuador, and at least one known UNCITRAL matter: Sergei Pauskhok, CJSC Voshtokneftegaz, and CJSC Golden East v. Mongolia.

## 5

### **Canada releases texts of new BITs with several EU member-states; multiple revisions made to comply with EU requirements and Canada's desire for more transparency and safeguards**

*By Luke Eric Peterson* After more than a half-decade of on-again off-again negotiations, the Government of Canada has finalized a series of re-negotiated bilateral investment treaties with several Eastern European governments.

Last week, Canada's Trade Minister Stockwell Day signed new bilateral accords with three countries: Latvia,\* Romania\*\* and the Czech Republic\*\*\*; re-negotiated accords with Slovakia, Hungary and Poland are also in the offing.

The texts of these agreements were released last week by Canada (a separate pair of analysis reports in this newsletter discuss some of the key features and exceptions contained in these re-negotiated pacts).

### **Background to re-negotiations**

Certain long-standing investment treaties with Eastern European European nations became a source of some friction when these countries joined the European Union (EU) in 2003.

The EU's Executive branch, the European Commission cited potential incompatibilities between the treaties and EU law, and pressed the new EU members to revise certain aspects of their pre-existing treaties with certain third-countries (including Canada, the US and Japan), or terminate those treaties altogether.

Whereas the US Government agreed protocols which amended US treaties with Eastern European governments in a more limited, surgical fashion, the three BITs signed last week between Canada and Latvia, Romania and the Czech Republic have been re-negotiated altogether. Indeed, the new pacts exhibit a large number of changes from the texts which had been negotiated between the parties in the early to mid-1990s.

Among the key changes are a series of measures designed to make the resolution of investor-state disputes more open and accessible to outside observers.

In addition, a number of exceptions, limitations and safeguards – including in relation to sensitive economic sectors, and certain government functions – have been introduced into the re-negotiated treaties.

Following their recent signature, the treaties are expected to come into effect in the near term. Once they are in effect, bilateral investment relations will be governed by the new treaties, and the earlier treaties will terminate automatically.

However, disputes initiated prior to the entry into force of the re-negotiated treaties will be governed by the provisions of the earlier 1990s era pacts.

\* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/LatviaFIPA-eng.pdf>

\*\* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/RomaniaFIPA-eng.pdf>

\*\*\* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/CzechFIPA-eng.pdf>

## 6

**ANALYSIS 1 of 2: Taking a closer look at substantive and procedural features of the new Canadian BITs with Czech Republic, Romania and Latvia**

*By Luke Eric Peterson* A series of re-negotiated investment treaties released this week by the Canadian Government introduce a wide range of changes – altering in significant ways earlier treaties concluded with three Eastern European countries.

The following analysis takes a look at some of the key features. A subsequent item in this newsletter discusses some of the numerous exceptions contained in these BITs.

**Indirect Expropriation clarified so as to shelter legitimate welfare regulations**

In keeping with a key negotiating objective of Canada, all three treaties contain an annex which “clarifies” the definition of indirect expropriation. In particular, it is stressed that only in rare circumstances will legitimate public welfare measures (such as health, safety and environment) be deemed an indirect expropriation.

Both Canada and the US have pursued variations on this language in more recent treaties in an effort to minimize the likelihood that arbitrators would deem legitimate public welfare regulations to constitute a compensable expropriation.

**Czech treaty offers more limited establishment and post-establishment protection**

Following the post-NAFTA template used in Canada’s mid-1990s treaties with Romania and Latvia, the re-negotiated treaties between these countries continue to grant certain “establishment” protections for those wishing to acquire investments, or establish a new investments. (By contrast, the overwhelming majority of bilateral investment treaties do not provide any treatment at the establishment or entry phase)

Under Canada’s re-negotiated BITs with Latvia and Romania, foreigners wishing to invest in the other country’s territory are put on a level playing field with local investors and those from third-countries, when it comes to permission to acquire or establish investments. (however, it is important to note that a series of exceptions in these treaties may operate so as to limit the reach of these or other protections in relation to key sectors and with respect to dispute settlement.

By contrast, the establishment provisions of Canada’s treaty with the Czech Republic are more circumscribed than those of the Latvian and Romanian pacts.

The Czech treaty affords only some Most-Favoured Nation (MFN) treatment when it comes to establishment and acquisition. Either country remains free to accord preferential treatment to its own investors when it comes to the establishment of new enterprises or purchase of existing ones.

Moreover, even with respect to post-establishment treatment (i.e. once an investment has been established in the host territory) the Czech treaty extends national treatment to foreign investors only “to the extent possible and in accordance with (the host state’s)

laws and regulations.”

### **Exceptions made to comply with EU obligations**

The re-negotiated investment pacts are notable for incorporating a series of changes which defer to the EU member-status of the European parties.

The Latvian and Romanian agreements place certain restrictions on the imposition of performance requirements; states are forbidden, for example, from obliging foreign investors to use a certain percentage of domestic content or local goods and services. However, these performance requirements prohibitions in the Latvia and Romania BITs do not extend to measures which are necessary to meet certain EU obligations in relation to the common agricultural policy (CAP).

Notably, the re-negotiated Czech treaty keeps with its pre-NAFTA forebear insofar as the pact does not place any limits on the imposition of performance requirements by a host state.

Another instance where the re-negotiated treaties nod to the desires of the EU (and also those of Canada) is in relation to investments in the so-called cultural industries: a broad grouping of sectors that includes publishing, radio and television broadcasting, and various other forms of media. Each of the re-negotiated treaties contains a complete carve-out of cultural industries.

In the Czech context this is particularly noteworthy, as several major arbitrations brought by foreign investors against the Czech Republic have been in relation to the broadcasting sector.\*

### **Greater transparency of dispute settlement, with some caveat on Czech side**

In a notable move for Latvia, Romania and the Czech Republic, each country has agreed to much greater transparency of the investor-state dispute resolution process.

In all three cases, the re-negotiated BITs create a presumption in favour of the release of all documents submitted to, or issued by, an investor-state arbitral tribunal. However, following the pattern of Canada’s model FIPA, this provision does permit the two parties (investor and host state) to a given dispute to over-ride such public disclosure where they wish to do so.

Notably, awards rendered in such arbitrations are considered public documents – a departure from the posture adopted by some of the Eastern European parties in other contexts.

Both the Romania and Latvia treaties provide that investor-state arbitration hearings will be open to the public; however, the Czech Republic treaty leaves that decision in the hands of the respondent state. Annex B of the new Canada-Czech Republic pact dictates that the respondent state will confer with the investor, and then make its own determination as to whether open hearings are in the public interest.

All three treaties provide for arbitration under the UNCITRAL ad-hoc procedural rules or those of the International Centre for Settlement of Investment Disputes (ICSID); this represents a departure for Canada and the Czech Republic insofar as their earlier BIT provided only for UNCITRAL arbitration (which is currently being used by the Canadian investor Frontier Petroleum Services in ongoing arbitration with the Czech Republic)\*\*

\* See for example, *CME v. Czech Republic*; *Ronald Lauder v. Czech Republic*; and *European Media Ventures (EMV) v. Czech Republic* (pending UNCITRAL claim)

\*\* See item 6 in our September 8, 2008 edition:

<http://www.iareporter.com/Archive/IAR-09-08-08.pdf>

## 7

## ANALYSIS 2 of 2: Multitude of safeguards and exceptions make for a very baroque set of Canadian treaties with Romania, Latvia and Czech Republic

By  
*Luke Eric  
Peterson*

PhD dissertations could be devoted to summarizing and analyzing all of the various safeguards and exceptions which feature in three re-negotiated BITs between Canada, and Latvia, Romania and the Czech Republic.

However, the following paragraphs offer a glimpse of certain key exceptions.

Canada's new treaties with Romania and Latvia are especially laden with caveats, because those treaties grant certain substantive protections not included in the Czech treaty (for e.g. prohibition of performance requirements, and more extensive pre-establishment treatment).

As noted in our previous item, the treaties exempt cultural industries from the entire reach of the treaty. In a different vein, all three treaties make clear that subsidies and grants may be granted to local businesses without needing to extend similar perquisites to foreigners.

Moreover, each treaty follows the pattern of recent Canadian treaties in including language similar to the general exceptions contained in Article XX of the WTO's General Agreement on Trade and Tariffs. This language provides shelter for legitimate, non-discriminatory measures designed to conserve "living or non-living exhaustible natural resources" and "to protect human, animal or plant life or health".

(This language is notable for extending across the entire treaty; as such it supplements the earlier-mentioned clarification of the indirect expropriation obligation).

### Financial institutions

Of some relevance given the recent global economic downturn, a series of exceptions are designed to accord governments clear maneuvering room when it comes to ensuring the soundness of financial institutions and the broader stability of a country's financial system.

Furthermore, all three treaties go to particular lengths to limit the range of arbitration claims that may be brought by investors in financial institutions.

Moreover, where a financial institution claim is brought under the Latvian or Romanian treaties, and a state raises as a defence certain financial services safeguards built into the treaty, it may demand that arbitrators consult with the two contracting parties (home and host state) to determine whether the host state has advanced a “valid defence” to the claim of the investor. If the two states do not agree, the question will be referred to an arbitration panel – whose report will be binding upon the investor-state tribunal hearing the investor’s claim.

### **Taxation measures**

With respect to taxation, the Romanian and Latvian treaties follow the pattern of other recent Canadian treaties in limiting the treaty’s application to tax measures, and of introducing state-filters in two instances (discussed below) where taxation measures may be challenged as a potential breach of the treaty.

Before arbitrators could hear a claim that is predicated on the alleged breach of some other agreement between an investor and the host state (for e.g. a tax stabilization pledge), the tax authorities of the home state and host state will have a six month window in which to determine whether the disputed measures contravene that specific investor-state agreement. Where the taxation authorities agree that there is no breach, the claim may not advance to arbitration.

Similarly, before an investor could claim that a tax measure amounts to an expropriation, the relevant taxation authorities of the home and host state will be asked to weigh in on this question. (*IAReporter* readers may recall that a similar provision in the NAFTA operated so as to preclude a claim by a group of US investors in a recent dispute with Canada\*)

### **Denial of benefits**

Another potential brake upon the reach of Canada’s treaties with Latvia and Romania is a provision which provides that a party may deny the benefits of the treaty to certain investors, where they are owned or controlled by nationals of a third country and have no substantial business activities in the putative home state. For example, a Latvian shell company owned and controlled by Russian interests might fall afoul of this provision.

Notably, however, this denial of benefits is subject “to prior notification and consultation” obligations on the part of the state wishing to deny treaty benefits to an investor.

\* See item 6 in our June 16, 2008 edition: <http://www.iareporter.com/Archive/IAR-06-18-08.pdf>

## 8

**Hochtief v. Argentina case likely to see clash over whether German investors can use MFN clause to dispense with treaty clause calling for recourse to local courts for 18 months prior to international arbitration**

By  
*Luke Eric  
 Peterson*

An arbitral tribunal has been constituted in a claim against the Republic of Argentina at the International Centre for Settlement of Investment Disputes.

The case, brought by the Germany multinational Hochtief, was registered by ICSID in December of 2007. An arbitral tribunal was formally constituted only on April 30, 2009.

The dispute arises out of a highway construction dispute which was exacerbated by the Argentine financial crisis earlier this decade. Hochtief was part of an international consortium selected to construct and operate a road and bridge link between the Argentine cities of Rosario and Victoria.

The company says that measures taken during Argentina's financial crisis served to breach contract commitments which provided for the calculation of road-tolls in US Dollars, and for periodic adjustments of toll charges in line with US inflation indices.

**Case could see debate on Siemens and Wintershall approaches to MFN clause**

Notably, arbitrators in the case may grapple with an issue that has divided other arbitral tribunals hearing claims under the Germany-Argentina bilateral investment treaty: whether foreign investors can invoke the Most-Favoured Nation (MFN) provisions of that treaty so as to dispense with a treaty requirement that investors pursue claims for at least 18 months in local courts prior to turning to international arbitration.

According to a source familiar with the case, Hochtief's Request for Arbitration filed with ICSID expressly refers to an earlier ICSID jurisdictional ruling in the Siemens v. Argentine Republic case (<http://ita.law.uvic.ca/documents/SiemensJurisdiction-English-3August2004.pdf>), where a tribunal ruled that the MFN clause of the Germany-Argentina treaty applied to dispute settlement matters, and that the German claimant could draw upon more favourable arbitration provisions in the Chile-Argentina bilateral investment treaty.

Indeed, Hochtief's nominee to the tribunal which will hear the dispute with Argentina, Judge Charles N. Brower was a member of the earlier tribunal in the Siemens v. Argentina case. Other members of the arbitral tribunal which will hear the Hochtief case are J. Christopher Thomas, and Vaughan Lowe. (Further information about all three arbitrators appears in a separate section below).

In recent months, the Siemens tribunal's reading of the Germany-Argentina BIT's MFN provision was criticized by an ICSID tribunal in the case of Wintershall v. Argentina.

As previously reported\*, arbitrators in the Wintershall case declined jurisdiction over a claim under the Germany-Argentina investment treaty on the grounds that the investor had failed to pursue recourse in the local Argentine courts for at least 18 months. The

tribunal pointedly declined Wintershall's request to dispense with this requirement through the use of the treaty's MFN clause – taking a very different approach than that seen in the earlier Siemens case.

The upshot of this divergence in the Siemens and Wintershall cases is that arbitrators in the Hochtief case may be asked to endorse one or the other case's analysis of the MFN issue. (Another case is currently pending at ICSID under the Germany-Argentina BIT, Daimler Financial Services v. Argentina. The jurisdictional issues have been joined to the merits in that case; Argentina filed its counter-memorial in late April, with hearings to follow after a second exchange of briefs).

In an interesting sidebar, Judge Brower, a member of the Hochtief v. Argentina (and the earlier Siemens v. Argentina) tribunal, has recently issued a separate opinion on MFN issues in arbitration pending under the Spain-Russia treaty (Renta 4 and others v. Russian Federation). This opinion canvassed the approach taken by various tribunals in relation to MFN clause interpretation.

Of particular note, Judge Brower expressly criticized the more restrictive approach taken in the Wintershall v. Argentina case, where MFN clauses are unclear on their face as to their application to matters of dispute settlement.

### **Profiles of three arbitrators in Hochtief case**

The claimant's nominee to the tribunal in the Hochtief case, Judge Charles N. Brower sits as a party-appointed arbitrator in a particularly large number of pending investment treaty cases, including Perenco v. Ecuador, Telefonica v. Argentina, Vannessa Ventures v. Venezuela, Renta 4 and others v. Russian Federation, Daimler Financial Services v. Argentina, Bank of Nova Scotia v. Argentina, Hrvatska Elektroprivreda d.d. v. Republic of Slovenia, Azpetrol v. Azerbaijan, Impregilo v. Argentina (water services dispute), and Piero Foresti and others v. South Africa, Turkcell v. Iran, Chevron v. Ecuador, and Chemtura Corporation v. Canada.

Argentina's nominee, Mr. Christopher Thomas is a Canadian lawyer and arbitrator who has served as outside counsel for the Government of Mexico in a number of investment treaty cases. He currently sits as a party-appointed arbitrator in various ICSID cases including Perenco v. Ecuador, Geovanni Allemani and others v. Argentine Republic, and Cementownia v. Turkey. Outside of ICSID, he is also known to sit as a party-appointed arbitrator in the Invesmart v. Czech Republic case and the Vito G. Gallo v. Canada arbitration under NAFTA.

Meanwhile, the tribunal's President, Prof. Vaughan Lowe, is the Chichele Professor of Public International Law at the University of Oxford. He is known to sit in the Mercuria v. Poland arbitration under the Energy Charter Treaty, as well as in several ICSID matters: Ioannis Kardassopoulos v. Georgia, Ron Fuchs v. Georgia, Sistem Muhendislik v. Kyrgyz Republic, Barmek Holding v. Azerbaijan, and Piero Foresti and others v. South Africa. In addition, he was counsel to the Republic of Ecuador in challenge proceedings initiated in the UK courts in an arbitration dispute with Occidental energy

company.

\* See item 2 in our December 11, 2008 edition:

<http://www.iareporter.com/Archive/IAR-12-11-08.pdf>

**9**

## **CAFTA Claim: US subsidiary of Canadian mining company moves to arbitration with El Salvador; environmental impact of project is hotly contested**

*By Luke Eric Peterson* A U.S. subsidiary of the Canadian mining company Pacific Rim has filed a formal notice of arbitration against El Salvador, alleging breach of the US-Central America Free Trade Agreement (CAFTA).

As earlier reported, Pacific Rim filed a Notice of Intent on December 9, 2008, a process which set in motion a 90 day consultation period, after which formal arbitration can be initiated.

The firm says that it has sunk \$77 Million (US) into minerals exploration in El Salvador, but has been stymied by the alleged failure of government regulators to approve an environmental impact statement submitted by the company in 2006. In a series of public statements, Pacific Rim has alleged that government officials are “stalling” the process and have failed to take action in a “timely manner”.

Until the environmental plan is approved, the company cannot obtain a permit necessary for exploiting areas where the company has discovered gold and other deposits.

The proposed El Dorado mine has garnered considerable media publicity, with environmental groups and the local Catholic Church expressing alarm as to its potential health and environmental consequences – including with respect to risks posed to the Lempa River, the country’s main water source.

Recently, the Miami Herald published a news report which chronicles in greater detail the local battle over the project.\*

The Pacific Rim claim against El Salvador is the first to be filed against that country under the US-CAFTA. (In 2006, El Salvador prevailed in an earlier arbitration\*\* under the Spain-El Salvador bilateral investment treaty brought by a foreign investor in the motor vehicle inspections sector.)

\* <http://www.miamiherald.com/127/story/1018403.html>

\*\* [http://ita.law.uvic.ca/documents/Inceysa\\_Vallisoletana\\_en\\_001.pdf](http://ita.law.uvic.ca/documents/Inceysa_Vallisoletana_en_001.pdf)

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**NAFTA Claims: US pulp and paper company notifies Canada of potential claim for expropriation of assets; Mexican trucking association files Notice of Arbitration against US Government**

By  
*Luke Eric  
Peterson*

A pulp and paper company embroiled in a struggle with the Canadian province of Newfoundland has put the Government of Canada on notice of a potential arbitration claim under Chapter 11 of the North American Free Trade Agreement (NAFTA)

Abitibi Bowater clashed with the Province of Newfoundland following an announcement by the ailing company that it would close a pulp & paper mill in the province. The mill was a major source of employment in a small community, and the political fall-out of the closure announcement was swift: the provincial government announced that it would expropriate other assets of Abitibi Bowater, including hydroelectricity and forestry rights of the firm.

In media reports, Newfoundland Premier Danny Williams said:

“For a hundred years, Abitibi and its predecessors enjoyed the privilege of Newfoundland and Labrador's natural resources. It simply makes sense if Abitibi are not going to continue the operation of the pulp and paper mill and renege on their commitment to our province, they will no longer have access to our natural resources.”

For its part, Abitibi-Bowater complains in its Notice of Intent that hastily-passed legislation served to expropriate the company's assets, and extinguished the company's right to judicial review in Newfoundland, as well as any claims to compensation for most of the expropriated assets.

The dispute has generated headlines in Canada for several months.

See, for example, this report of the Canadian Broadcasting Corporation (<http://www.cbc.ca/canada/newfoundland-labrador/story/2008/12/16/abiti-announc.html>).

A copy of Abitibi's notice of Intent is available on-line (<http://ita.law.uvic.ca/documents/Abitibi-NoticeofIntent.pdf>)

**Mexican trucking association files Notice of Arbitration against US Government**

In another recent development under NAFTA Chapter 11, a Mexican trucking association has filed a Notice of Arbitration against the US Government.

The association, CANACAR, complains that a variety of long-standing US restrictions on Mexican transport truck access to the US market are in breach of the US Government's NAFTA obligations. CANACAR also alleges that the US Government has committed a further breach of NAFTA Chapter 11 by virtue of its failure to comply with a 2001 state-to-state arbitration ruling which had held the US in breach of certain NAFTA obligations vis a vis Mexican trucking interests.

According to the NAFTA Chapter 11 Notice of Arbitration dated April 2, 2009, CANACAR represents the independent trucking companies in Mexico. The only truckers which the association claims not to represent are those working as the in-house divisions of companies that transport their own goods (for e.g. Coca-Cola's in-house trucking division).

The truckers have nominated a Mexican Partner at the law firm of white & Case as their appointee to the arbitral tribunal that will hear the claim: Thomas Heather Rodriguez.

The broader trucking dispute between Mexico and the United States has received a great deal of mainstream media coverage, including when Mexico slapped a series of retaliatory tariffs on various US exports in March of this year. (See for example this summary of the broader dispute\*).

A copy of the Notice of Arbitration is available on-line at <http://www.state.gov/s/1/c29831.htm>.

\*<http://www.bloomberg.com/apps/news?pid=20601082&sid=aNMnPuyYFV5I&refer=canada>.)

## 11

**Cases Closed: Mittal v. Czech Republic and TransGlobal Petroleum v. Jordan**

*By Luke Eric Peterson* An UNCITRAL-based investment treaty claim between the global steel company ArcelorMittal and the Czech Republic has been settled.

Mittal had turned to arbitration under the Netherlands-Czech Republic BIT in 2005, alleging discriminatory treatment in connection with the privatization of a local steel enterprise Vitkovice Steel.

Thwarted in its bid for the Vitkovice assets, Mittal pursued arbitration before a tribunal consisting of Lord Steyn, Prof. Piero Bernardini and Prof. Christopher Greenwood.

However, the case was recently settled, with the Czech Government agreeing to sell its own 11% stake in ArcelorMittal's Czech subsidiary to Arcelor Mittal.

The move strengthens Arcelor Mittal's ownership stake in ArcelorMittal Ostrova – which (a source familiar with the case indicates) had stood at 71% prior to the recent acquisition of the Czech Government's 11% stake.

In 2008, the Czech Republic prevailed in a separate contract-based arbitration at the International Chamber of Commerce in another dispute with Mittal, this time related to the privatization of the Nova Hut facility.

**TransGlobal-Jordan case ended**

Meanwhile, in another development, an investment treaty arbitration claim between a US investor and the Government of Jordan has been formally discontinued at the

International Center for Settlement of Investment Disputes (ICSID).

According to the terms of a Consent Award made available on the ICSID website, TransGlobal Petroleum and Jordan both deny any wrongdoing or liability, and they have agreed to end their ICSID arbitration – and to forswear other litigation related to their dispute.

For more information on the TransGlobal dispute see item #5 in our January 5, 2009 edition, <http://www.iareporter.com/Archive/IAR-01-05-09.pdf>, where we discuss certain legal issues raised in that case (and in another pending arbitration against Venezuela).

While details of the settlement have not been released, it is understood that the investor continues to own a stake in an energy venture in Jordan. (In the ICSID claim, TransGlobal had claimed to have been pressured out of a larger share in the project).

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*By*            **Recent articles**

*Prof.*

*Andrew  
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