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Editor's Note

Some information about the outcome in the closely-watched Energy Charter Treaty arbitration between Plama Consortium Limited v. Bulgaria has come to light in recent days, following the issuance of a press release by counsel acting for Bulgaria. In our latest issue, *IAReporter* is pleased to offer a fuller account of the outcome in the Plama case – based upon our own investigation and drawing upon information in the still unpublished arbitral award - including the notable findings by the tribunal that the investor violated international law and international public policy in its dealings with Bulgarian officials.

Also in this issue, we reveal that a Notice of Intent has been filed against the Government of Canada by a US investor who is threatening to sue Canada under NAFTA Chapter 11 for roadblocks allegedly placed in the path of a proposed private surgical facility. While a number of questions remain unanswered about the investments alleged to be at issue, the Notice of Intent is sure to focus the minds of Canadian Government lawyers given the perennially sensitive nature of health care policy in Canada.

Elsewhere, we report on a new jurisdictional decision at ICSID which paves the way for the US energy company Occidental to proceed with a $3 Billion arbitration against the Republic of Ecuador for the alleged expropriation of an Amazonian oil concession.

Finally, we follow up on information disclosed by *IAReporter* in an online forum last week: that the executive branch of the European Union has applied for amicus curiae status in a pair of ongoing ICSID arbitrations against Hungary. Following Hungary's having joined the European Union, the EC has frowned upon a series of long-term Power Purchase Agreements (PPAs) concluded by a Hungarian state-owned entity with various energy generation companies during the 1990s. At the same time, several of the companies which have entered into these PPAs are suing Hungary at ICSID, alleging that the Government is wavering from its commitments under these agreements. The European Commission turned up the heat on Hungary in June of this year, when it called upon the Hungarian Government to terminate the PPAs altogether.

1. Bulgaria exonerated of any Energy Charter Treaty breaches in ICSID case; tribunal finds that misrepresentations by Plama Consortium Ltd and its owner underlay approval of refinery purchase; tribunal holds that misrepresentations by investor are fatal to its claim

By Luke Eric Peterson

An ICSID tribunal has issued an award in favour of the Republic of Bulgaria – dismissing all legal claims advanced by a Cyprus-based company, Plama Consortium Limited (PCL), and holding that the investor did not operate in good faith in dealings with the Bulgarian Government.*

In addition to rejecting the investor's claim for $146 Million in damages for alleged breaches

of the Energy Charter Treaty, the tribunal of Albert Jan van den Berg, V.V. Veeder, and Carl Salans (President), also ordered the claimant to pay slightly more than half of Bulgaria's own legal costs.

(The award may come at a welcome time for Bulgaria, as the country has lately endured unfavourable international press coverage following a European Commission report critical of the country's efforts to tackle corruption and alleged deficiencies in the country's court system.)

The dispute giving rise to the ICSID arbitration between PCL and the Republic of Bulgaria arose out of the 1998 purchase by the claimant, from another investor, of a recently-privatized refinery, Nova Plama. Although the claimant had hoped to rehabilitate the struggling business, the facility only operated for small windows of time in 1999 before falling into bankruptcy, and, ultimately, liquidation.

Of critical importance for the ICSID arbitration, the tribunal determined that the claimant and its owner, a French national, had made misrepresentations to the Bulgarian agency charged with approving PCL's acquisition of shares in the Plama refinery.

Whereas the owner of PCL had initially approached Bulgaria on behalf of Norwegian and Swiss companies interested in acquiring Nova Plama, those parties ultimately withdrew prior to the consummation of the sale to PCL - without the knowledge of the Bulgarian authorities. As such, Bulgaria alleged in the ICSID arbitration proceedings, that misrepresentations by PCL and its owner violated Bulgarian law, international law and international public policy and rendered Bulgaria's consent to the investment invalid. Furthermore, Bulgaria argued that this meant that there was no "investment" eligible for protection under the Energy Charter Treaty.

For its part, PCL and its owner insisted that they had not engaged in misrepresentations, and were under no duty to inform Bulgaria of the identity of PCL's shareholders.

Although the allegations of misrepresentation by the investor had been raised during the jurisdictional phase of the arbitration, the tribunal held in a 2005 jurisdictional ruling that it would address such arguments during the merits phase. And in the as-yet-unpublished Award of August 27, 2008, a copy of which has been examined by *IAReporter*, the tribunal held that the Bulgarian Government clearly thought that the claimant, PCL, was a special purpose vehicle used by the Norwegian and Swiss companies to purchase Nova Plama – and that the true owner of PCL "did nothing to remove this misunderstanding, of which he was undoubtedly aware."

One practical upshot of this misunderstanding was that the Bulgarian Government gave approval to the purchase in the mistaken conviction that PCL was owned by a pair of "major companies having substantial assets". Indeed, the tribunal opined that "Bulgaria would not have given its consent to the transfer of Nova Plama's shares to PCL had it known that it was simply a corporate cover for a private individual with limited financial resources."

Of particular interest, given the lively and evolving ongoing debate as to the obligations of foreign investors seeking to invoke the protection of international investment protection treaties, the ICSID tribunal held that the claimant had a clear obligation to inform the Bulgarian authorities as to important changes in circumstances which were material to Bulgaria's decision to approve the sale.

As for whether the misrepresentations should be fatal to the ability of the claimant to invoke the protections of the Energy Charter Treaty, the tribunal noted that the treaty does not contain a provision which limits protected investments to those made in accordance with the law – as is the case in many bilateral investment treaties. Nonetheless, the tribunal took the view that the ECT should be interpreted in a manner that encouraged respect for the rule of law, and that the protections could not be extended to investments "that are made contrary to law."

Tribunal surveys legal obligations of investor, and other relevant ICSID cases

The tribunal went on to survey a series of international law principles deemed applicable to any arbitration under the Energy Charter Treaty, including the principle of good faith; the principle that no one should benefit from their own wrongdoing; and the principle of international public policy. With respect to the last of these concepts, the tribunal noted that this principle had been central to several other recent ICSID cases where wrongdoing on the part of investors had been fatal to their arbitration claims, Inceysa Vallisoletana v. El Salvador and World Duty Free Company Limited v. Kenya.**

Ultimately, the tribunal would hold that the claimant's conduct was contrary to each of the above-mentioned international law principles.

With respect to good faith, the tribunal held that this principle includes an "obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State's approval of the investment."

Meanwhile, with respect to international public policy, the tribunal also held that a contract "obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal."

Although the claimant's conduct ultimately jettisoned the ICSID claim, the tribunal did proceed to examine – and signal its rejection of – all of the substantive claims advanced by PCL.

Indeed, in a summation of its views on the merits, the tribunal observed that this was a case where PCL and its owner "undertook a high risk project, without having the financial assets of their own to carry it out." However, for reasons unattributable to Bulgaria, the plan did not work, and the project fell into bankruptcy.

When contacted by *IAReporter*, counsel for the claimant indicated that PCL was not inclined

to make a statement at this time. However, the claimant is disappointed with the decision, and disagrees with it.

In a press release issued this week, White & Case partner Abby Cohen Smutny, who acted for Bulgaria, said : "This case is another in an important series of decisions demonstrating that the conduct of investors matters in the investment treaty context. An investor whose investment is premised on the investor's own fraud cannot present claims to an international tribunal about alleged State misconduct."

The next item in this edition of *IAReporter* examines the tribunal's views as to how PCL's claims for treaty breach should be handled on the merits.

2. Merits claims in Plama v. Bulgaria took issue with environmental and tax liabilities, and worker "riots"; tribunal finds that none of the claims would have succeeded on their merits

By Luke Eric Peterson

Although not strictly obliged to do so, the tribunal in Plama v. Bulgaria devoted considerable space in its recent ICSID award to offering its view of the various substantive claims advanced by the claimant.

Perhaps not surprisingly, given that such a ruling was not strictly necessary, the tribunal did sidestep certain thorny issues, such as the proper interpretation to be given to certain common treaty provisions, (for e.g. whether the full protection & security standard offers only "physical" security and protection for assets, or a more generalized guarantee of "legal" stability and security for investments.) Ultimately, whether one took a narrow or more generous construction of the treaty protections owed to investors, the tribunal held that Bulgaria's actions would not serve to violate those provisions on the facts alleged by PCL.

Indeed, the tribunal would go on to hold that none of the claimant's arguments would have borne out a breach of the Energy Charter Treaty.

Of some interest, one of the claims advanced by the claimant was an argument that a change in Bulgaria's environmental laws had created new liabilities for the claimant, leading to financial harm to the project, and a breach of the treaty. Specifically, the claimant objected to a change in law which could have obliged PCL to bear the cost of remedying environmental damages created whilst Nova Plama was still a state-owned company.

However, the tribunal took the view that the Energy Charter Treaty did not protect investors against any and all changes in the law. While the fair and equitable treatment standard might protect the reasonable and justifiable expectations of investors, there was no evidence in this case that the state had made any promises to freeze its environmental laws.

Indeed, the tribunal made clear that certain obligations fell on the foreign investor to ascertain

the actual state of environmental laws when making its investments, and to make itself aware of later changes being debated in the country's parliament.

Moreover, the tribunal could find no clear evidence of financial losses on the part of the investor arising out of the allegedly unfavourable changes to Bulgaria's environmental legislation.

Worker "riots" and tax claims also rejected

The claimant also alleged that a series of "worker riots" were incited by a court-assigned bankruptcy official – thus implicating the Bulgarian Government – and that the local police failed to prevent these riots (and the consequent losses of the investor). Bulgaria retorted that the so-called "riots" were peaceful protests by unpaid workers, and that the police supervised these events, and that the refinery had already ceased to operate at the time of the allegedly harmful protests.

For its part, the tribunal noted that the widely-diverging accounts of the events in question made it impossible to draw a conclusion as to what really transpired. Given, however, that the burden fell on the claimant to establish its case, the tribunal held that no treaty violation could be established.

Finally, the tribunal's review of the merits also took in a claim by PCL that it had incurred certain tax liabilities thanks to failures and omissions by the Government. However, the tribunal noted that (in contrast with many typical bilateral investment treaties) Article 21 of the ECT excluded most taxation-related claims from the scope of the treaty. What's more, the tribunal held that the onus fell on the claimant in the specific circumstances to be aware of the tax liabilities which might fall on its investment.

On the question of costs, the tribunal clearly viewed the misrepresentations of the claimant – and its failure to prevail on any of its claims - as grounds for obliging the claimant to bear the costs of the ICSID proceeding itself ($948,061.82) as well as a "reasonable" proportion of Bulgaria's legal costs. Bulgaria incurred costs of some $13.2 in its defence, and the tribunal held – without elaboration – that $7 Million of this should be paid by the investor. The claimant had initially sought some $300 Million (US) in compensation from Bulgaria, perhaps contributing to a decision by Bulgaria to take seriously the claim and devote considerable resources to defence of the case. Indeed, the award chronicles a long series of procedural machinations and hearings which appear to have contributed to the length and complexity of the arbitration. A period of three and a half years elapsed from the date of the jurisdictional ruling in the case, to the release of the final award.

* Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24

** Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26 and World Duty Free Company Limited v. Republic of Kenya Case No. ARB/00/07

3. ANALYSIS: Award of costs to government in Plama case is latest in a handful of known treaty-based arbitrations to oblige investors to repay governments for some costs associated with unsuccessful claims; Meanwhile Canadian forestry firm fails in its own bid to duck costs order in NAFTA dispute with US Government

By Luke Eric Peterson

Based on available evidence, it is rare for tribunals to order investors to pay some or all of the legal costs of governments, in the event of unsuccessful investment treaty claims on the part of investors. While tribunals often award costs to investors who have succeeded in suing governments under an investment treaty; only in a small minority of cases are governments awarded some portion of their own legal costs when they prevail in investment treaty arbitrations.

However, in a small number of instances, tribunals have awarded costs to governments in investment treaty disputes, including in (but not limited to) the above-discussed case of Plama v. Bulgaria, as well as: Generation Ukraine v. Ukraine; Alex Genin v. Estonia; Link Trading v. Moldova; Methanex v. United States; Tembec v. United States; Inceysa v. El Salvador case; Telenor v. Hungary; and the Thunderbird v. Mexico case.*

Notably in the Thunderbird v. Mexico case, the tribunal split on the question of costs. The majority held that the claimants should pay three quarters of the costs of the arbitration proceedings, as well as three quarters of Mexico's legal costs. Meanwhile, the dissenting arbitrator devoted an extensive opinion to reviewing the prevailing practice of not awarding such costs in investment treaty cases.

When it comes to collecting on these occasional cost awards, states can hope that claimants will pay voluntarily – as was the case, for example, in the Methanex v. United States and the Telenor v. Hungary arbitrations – or they can turn to the courts in order to enforce the award against the claimant.

Claimants, for their own part, may try to vacate such awards by turning to the courts – if the proceeding is governed by a set of arbitral rules which provide for some control by domestic courts (for e.g. the UNCITRAL rules or the Additional Facility rules of the ICSID).

Indeed, Thunderbird has sought to challenge the unfavourable 2006 award rendered against it in the U.S. District Court for the District of Columbia, and, then in a U.S. appeals court – thus far without success. A lawyer with the company tells *IAReporter* that Thunderbird is currently taking stock of its legal options. The firm could appeal to the US Supreme Court in a last-ditch effort to overturn the award, and the costs order therein.

Meanwhile, another investor, the Canadian forestry company Tembec has had a similar lack of success in overturning a costs award in another recent NAFTA arbitration. As is discussed below, a recently-released judgment of the US District Court of the District of Columbia has upheld a costs award issued against Tembec in a NAFTA arbitration with the US Government.

Canadian forestry firm sees setback in bid to duck costs order in favor of US Gov't

In 2005, three separate NAFTA Chapter 11 claims against the US Government were consolidated under a single arbitration tribunal. This consolidation arose following a US request that the three cases – all of which alleged breaches of NAFTA Chapter 11 in relation to US treatment of Canadian softwood lumber companies – be heard under a single tribunal.

While two of the claimants, Canfor and Terminal Forest Products acquiesced to a consolidation ruling issued by a special tribunal convened to hear the US request, a third company, Tembec, elected to challenge the consolidation through recourse to the United States District Court for the District of Columbia.

When Canada and the US ultimately reached a political settlement of their softwood lumber disputes in 2006, Tembec's challenge to the consolidation order was dropped. However, the firm later sought to restart the challenge, insisting that it had been misled by the United States Government into signing off on a deal that entitled the US to seek legal costs from Tembec. In April of 2007, a US District Court Judge issued a ruling rejecting Tembec's bid to revive the case, and held that the United States had not knowingly misled Tembec.

The US then moved to recoup legal costs from Tembec. Ultimately, the arbitral tribunal, which had earlier consolidated the three NAFTA Chapter 11 softwood lumber cases, issued a ruling in July of 2007, wherein it held Tembec liable for the US Government's legal costs incurred in defending Tembec's NAFTA Chapter 11 claim. Because Tembec had discontinued its claim on the eve of jurisdictional hearings, the tribunal viewed it as an "unsuccessful" party and determined that it should be held liable for the US Government's costs.

Tembec then returned to the US District Court for the District of Columbia, and sought to vacate the consolidation ruling, as well as the subsequent July 2007 costs award by the arbitral tribunal.

However, in an August 14, 2008 judgment, the District Court once again rejected a bid by Tembec, holding that the company's claim was barred by res judicata and collateral estoppel.

Tembec had tried to persuade the District Court that the issues had not already been decided in the earlier ruling of the court, because the company's second application also encompassed "a new and different award never previously before the Court" i.e. the 2007 costs award.

However, the court rejected this argument, holding that Tembec sought to vacate this costs award "based on the very same nucleus of facts raised in the First Petition, contending the NAFTA Tribunal's consolidation order was invalid, that the NAFTA Tribunal panel itself was improperly constituted, and that the NAFTA Tribunal lacked jurisdiction."

(A copy of the recent US District Court judgment is now available on Prof. Andrew Newcombe's Investment Treaty Arbitration documents database: http://ita.law.uvic.ca/documents/Tembec-dismissal.pdf)

* For a description of many of the pre-2006 cases where costs awards were rendered against investors, see: Stephan Schill, “Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration”, Journal of World Investment and Trade, Vol.7, No.5, October 2006, pp 653-698

4. US citizen files notice of intent to sue Canada over alleged NAFTA breaches in relation to private surgical facility; details of threatened claim are limited, and many questions unanswered about investments said to be at stake

By Luke Eric Peterson

An *IAReporter* investigation reveals that a US citizen. Melvin J. Howard, has filed a formal Notice of Intent to submit a claim to arbitration against the Government of Canada. Mr. Howard alleges that investments by his US firms in Canada’s health care sector have suffered discrimination and expropriation contrary to Canada’s obligations under Chapter 11 of the North American Free Trade Agreement (NAFTA).

The Notice of Intent dated July 16, 2008 set in motion a 90 day process during which Canada and the investor can consult informally on the claim. Following this 90 day window, the investor can file a formal Notice of Arbitration, and request the creation of an arbitral tribunal to hear the claim.

Although many questions are unanswered about the dispute with Canada, the filing of the Notice of Intent is noteworthy for marking the first instance where a US investor has set in motion a process which could challenge elements of Canada’s politically-sensitive health care system (See analysis piece in this issue for more background).

Few details about the claim – and the underlying investments - are provided in the Notice of Intent seen by *IAReporter*. However, the Notice sets forth a demand to be compensated for alleged barriers to entry and expropriation of investments in “private surgical facilities”. The Notice alleges that “Municipalities or city officials have put up numerous roadblocks such as zoning and by law requirements that is (sic) politically motivated instead of merit base (sic).”

The Notice further alleges that the investors in the so-called Regent Hills Health Center project have “suffered numerous set-backs including deposits on 5 separate lots completely lost”. In addition, the Notice claims that the investors encountered opposition from “community activists” opposed to US investment in private surgical facilities – notwithstanding the fact that Canadians have been allegedly permitted, under some circumstances, to own and operate such facilities.

At the Notice of Intent stage, potential claimants are not obliged to document all such allegations.

When contacted by *IAReporter*, Mr. Howard elaborated in general terms on the alleged ill-treatment suffered, while noting that he is postponing plans to negotiate with Canada’s

Federal Government in advance of the October 14th Federal election in Canada.

Mr. Howard says that he and a group of investors have attempted over a period of "five or six years" to establish a private surgical facility in the Canadian province of British Columbia (B.C.). However, Mr. Howard says that his plans encountered a series of "roadblocks" imposed by various municipalities, ultimately thwarting those investments. Among the sites that Mr. Howard mentioned as desired homes for his project are the city of Vancouver, and the nearby communities of Surrey and Richmond.

In terms of next steps, Mr. Howard could lodge a formal notice of arbitration under NAFTA Chapter 11 as early as mid-October. Such a process can lead to the constitution of an arbitral tribunal to hear the claim.

A spokesman with Canada's Department of Foreign Affairs tells *IAReporter* that the filing of a Notice of Intent "does not establish the merits of a challenge". If Mr. Howard moves forward, the spokesman noted that Canada will "vigorously defend" its interests.

5. ANALYSIS: Spectre of NAFTA suit over investments in Canada's health care sector has long been subject of speculation

By Luke Eric Peterson

The filing of a Notice of Intent by a US citizen seemingly keen to sue Canada for allegedly blocking construction of a private surgical facility comes after more than a decade of speculation as to the vulnerability of Canada's health care system to challenge under the NAFTA's Chapter 11.

For its part, the Canadian Government has long maintained that Canada's largely state-financed health care system is carved out of the NAFTA. In a statement to *IAReporter* on the Howard matter, Canada's Department of Foreign Affairs noted:

"Canada's approach to health care is preserved in all of our international trade agreements including the NAFTA where a broad reservation protecting existing and future measures for health care exists."

While the NAFTA does grandfather those government policies which pre-date the 1994 entry into force of the trade pact, academic and legal commentators have long debated the prospect of subsequent policy changes or initiatives by one or more provincial governments exposing Canada's Federal Government to potential legal challenges by aggrieved foreign investors.

A reservation contained in Annex II of the trade pact provides some unclear level of shelter for Canada to adopt new measures with respect to health care "to the extent that they are social services established or maintained for a public purpose". While this reservation applies to the National Treatment and performance requirements provisions of NAFTA Chapter 11, the reservation does not extend to two of the most commonly-used protections available under

NAFTA Chapter 11, those on expropriation and the so-called minimum standard of treatment.

Lately, the spectre of NAFTA lawsuits has loomed over a long series of policy ideas, proposals and discussions – many of them mooted or initiated by individual Canadian provinces, rather than Canada's Federal Government.

Expropriation clause long feared to operate as ratchet (or one-way street)

One particular concern voiced by advocates of state-financed and delivered health care has been that NAFTA's expropriation chapter would serve to ensure investments by U.S. health care corporations in private financing or the private delivery of services in Canada could not be rolled back or reversed at a future date without Canada having to pay full compensation to foreign operators affected by such policy reversals.

This has been described at various times as a "ratchet-effect", whereby private foreign investment could be introduced into Canada's health care system, whilst triggering certain NAFTA protections for such investments in the event that a government later decided to reverse policy course.

While the latter scenario might seem straightforward to arbitration specialists, it has generated sustained debate in Canada – stoking fears that private foreign investment would be a one-way street, with little real scope for democratically-elected governments to alter policy course at a later time, for example in the event that private service-providers failed to meet public needs and expectations.

In 2002, a Government-commissioned panel on the future of Canada's health care system, presented research by outside legal experts which cautioned that a move to expand the types of health services covered by Canada's Medicare program (for e.g. expansion into dental or prescription drug insurance) could clash with the interests of existing private suppliers of such services. Where those private suppliers are foreign-owned, they might have recourse to NAFTA Chapter 11 or other investment treaty protections.

Indeed, Toronto lawyer Jon R. Johnson, and a consultant to the so-called Romanow Commission, famously warned that, if Canada were constrained in the 1960s by its current array of foreign investment protection obligations, "the public health system in its present form would never have come into existence."*

Despite this long-running discussion, actual lawsuits have – until now – shown few signs of materializing. In large measure, this is because Canada has only slowly embraced greater private financing or delivery of health services, thus ensuing that foreign investment in the sector remains quite low.

Oddly, health care disputes do not seem to have given rise to notable investment treaty arbitrations – at least on the basis of publicly available information – in other jurisdictions. (More than a decade ago, a Mexican chemical company threatened to bring a NAFTA Chapter 11 claim against Canada in relation to that country's pharmaceutical regulations and

certain barriers to the sale of generic versions of a popular anti-biotic medicine; however an arbitration claim was never filed in that case).

Elsewhere, in 2006, Czech President Vaclav Klaus publicly warned that proposed legislation to reverse earlier privatizations in the health care sector could give rise to investment treaty lawsuits by affected foreign investors, such as insurance companies.**

Unlike NAFTA, most bilateral investment treaties do not contain detailed exceptions or reservations seeking to exempt social services or health services from the reach of certain treaty obligations.

* "How will International Trade Agreements Affect Canadian Health Care?", By Jon R. Johnson, Discussion Paper for the Romanow Commission on the Future of Health Care in Canada, September 2002

** See: "Klaus vetoes bill on non-profit hospitals," CTK News Agency, May 5, 2006 and "Czech lawmakers vote for non-profit hospitals", Agence France Presse, May 23, 2006

6. Path cleared for examination of the merits in Occidental v. Ecuador arbitration at ICSID; jurisdictional ruling issued in Oxy's favour in claim for several Billion Dollars in compensation arising out of oil concession cancellation

By Luke Eric Peterson

A tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has rendered a jurisdictional decision in a major arbitration between the US-based energy giant Occidental and the Republic of Ecuador.

The tribunal has dismissed a pair of jurisdictional objections raised by Ecuador, thus paving the way for a hearing on the merits of the claim.

Two Occidental companies turned to arbitration in 2006 following a formal move by Ecuador to terminate a lucrative exploration and exploitation contract for an oil field in the Amazon rain forest. The companies are seeking upwards of $3 Billion (US) for alleged breaches of the US-Ecuador bilateral investment treaty.

Ecuador had protested that Occidental had breached the terms of its participation contract by striking a side-deal with the Canadian energy company Encana. Under the terms of that 2000 arrangement, Encana made certain payments to Occidental and, in turn, enjoyed a 40% economic interest in the share of production from Occidental's Block 15 site. However, some four years later, when Occidental sought formal approval to grant Encana legal title to 40% of the Block, Ecuadorian authorities rejected such a move.

Furthermore, the authorities accused Occidental of having transferred contract rights and obligations, and of having entered into a "consortium" (with Encana) without ministerial

approval.

Indeed, by this juncture, relations between both companies and the Ecuadorian Government were at a low ebb, as both Occidental and Encana had earlier elected to sue Ecuador under investment treaties in an effort to recoup millions of dollars in contested value-added tax payments made by the companies to Ecuadorian authorities. Encana failed in its arbitration claim, however Occidental prevailed in its separate UNCITRAL-based arbitration. In a July 2004, a tribunal awarded Occidental some $75 Million (US) plus post-award interest. However, Ecuador sought to overturn this award and the two sides engaged in several years of litigation in the UK courts before the Government ultimately agreed to pay the award.

In the interim, relations between the US oil company and Ecuador continued to deteriorate. When Ecuador's Energy Ministry formally terminated Oxy's Participation Contract in May of 2006, Oxy turned to ICSID arbitration a mere two days later.

Indeed, the swiftness with which the US firm resorted to ICSID was at the centre of one of the two jurisdictional objections raised by Ecuador in the ICSID proceeding. According to Ecuador, Occidental had failed to respect a six-month waiting period prescribed under the US-Ecuador bilateral investment treaty. While Ecuador acknowledged that arbitration tribunals have tended to show flexibility in favour of investors with respect to such waiting period requirements, nevertheless the Government argued that this was an "extreme" situation where the investor opted for arbitration without any pretense of seeking to negotiate the dispute.

For its part, Occidental countered that the requirement need not be respected if attempts at a negotiated solution have proven futile – something which the claimants insisted to be the case here.

Indeed, Occidental emphasized before the tribunal that it had sought for some 18 months to dissuade the Government from moving forward with its threat to terminate the participation contract in question.

Ultimately, the tribunal would hold that, "without prejudging the merits, that the attempts at reaching a negotiated solution were indeed futile in the circumstances."

Tribunal also rejects arguments that administrative courts should hear case

Arbitrators also rejected a second jurisdictional argument by Ecuador, which had been debated at much greater length by the parties. For its part, Ecuador had objected to Occidental's claim on the basis that Ecuador's administrative courts had exclusive jurisdiction where a contract was terminated through an order known as a "caducidad".

The tribunal devoted extensive analysis to the terms of the participation contract, ultimately siding with the claimants in finding that the contract did not stipulate that caducidad-related disputes need be reserved to the local courts.

Notably, the tribunal held - as per the earlier ICSID decision in Aguas del Tunari v. Bolivia - that if there is to be a contractual waiver by an investor of its ability to invoke dispute settlement provisions in an international investment treaty, then this waiver must be explicit.

Ultimately, the tribunal would find that it has jurisdiction over the Claimants' claims both under the participation contract, as well as the US-Ecuador bilateral investment treaty.

Ecuador showing increasing skepticism towards ICSID arbitration

Under the leadership of President Rafael Correa, Ecuador has sought to obtain a greater public share of revenues from existing natural resources investments. At the same time, Ecuador has shown increasing skepticism towards international arbitration, particularly under the auspices of the World Bank's ICSID facility.

In late 2007, the country notified ICSID that it did not wish to see certain categories of disputes (those relating to natural resources) arbitrated at the ICSID. However, this notification does not override the terms of bilateral investment treaties where Ecuador has earlier consented to ICSID arbitration (as well as UNCITRAL arbitration in some cases).

Under the terms of a draft constitution widely reported on in the international press - and to be subjected to a national referendum on September 28th - recourse to international arbitration under future Ecuadorian state-contracts with foreign investors might need to take place in a regional forum, rather than in international venues such as ICSID.

7. European Commission seeks to intervene as amicus curiae in ICSID arbitrations to argue that long-term power purchase agreements between Hungary and foreign investors are contrary to European Community Law

By Luke Eric Peterson

The executive branch of the European Union has petitioned a pair of international arbitration tribunals for permission to present certain legal arguments as amicus curiae in ongoing ICSID arbitrations brought by the energy firms AES and Electrabel against the Republic of Hungary.

The arbitrations relate to alleged breaches by Hungary of commitments contained in long term power purchase agreements (PPAs) between the firms and a Hungarian entity, Magyar Villamos Muvek (MVM). In the parallel ICSID proceedings, the claimants are seeking to challenge changes made to the price paid for electricity by MVM at the insistence of the Hungarian Government – alleging these changes to be contrary to protections contained in the Energy Charter Treaty.

In recent years, Hungary has come under fire for having concluded these PPAs with a string of energy providers.

The European Commission (EC) has held that the PPAs – negotiated prior to accession to the

EU by Hungary - are illegal as a matter of European Community Law. *IAReporter* understands that the EC wishes to intervene in the ICSID arbitrations out of a desire to see that EC law is enforced.

In June of this year, the EC issued a press release wherein it announced that it was calling upon Hungary to terminate long-term PPAs, given that these "constitute unlawful and incompatible state aid to the power generators".

The EU's Competition Commissioner Neelie Kroes said that "(t)he phasing out of long term purchase agreements is a crucial step in the liberalization of the electricity market in Hungary."

According to the EC, some two-thirds of electricity generated in Hungary is covered by these long-term PPAs – which were entered into in the mid 1990s, prior to Hungary's accession to the European Union.

The EC insists that these agreements restrict competition by closing off much of the market to new entrants. The Commission has given Hungary until the end of 2008 to terminate the PPAs, and to recoup from the power generators those "revenues which they could not have obtained from the market without PPAs."

While the EC acknowledges the need to compensate power generators for their investments in Hungary prior to that country's EU accession, it says that the PPAs are not an appropriate means insofar as they shelter incumbent operators from competition, rather than assist them in adapting to open competition.

It remains to be seen whether the ICSID tribunals will grant the EC amicus curiae status in the two parallel arbitrations. The claims are being heard by unique tribunals composed of different arbitrators. Although arbitrator Brigitte Stern sits in both cases.

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