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## NEWS: PLAMA CONSORTIUM LIMITED V. REPUBLIC OF BULGARIA: HONESTY IS THE BEST POLICY

By Elizabeth Whitsitt

In a 27 August 2008 decision, a tribunal has concluded that Plama Consortium Limited (PCL), a Cyprus firm, was not entitled to protections afforded under the Energy Charter Treaty (ECT), given that it had fraudulently misrepresented itself when it invested in a privatized refinery, Nova Plama AD. In addition, the Tribunal found that even if PCL were entitled to certain ECT protections, the Republic of Bulgaria did not breach its treaty obligations. As a result, PCL was ordered to pay all the fees and expenses of the Tribunal and ICSID's administrative charges, as well as USD\$ 7 million in legal fees and other costs incurred by Bulgaria.

PCL had sought some USD\$ 122 million in damages plus interest for alleged breaches of obligations under the ECT and Cyprus-Bulgaria bilateral investment treaty, after Nova Plama AD had its assets liquidated to meet creditors' claims. Specifically, PCL argued that Bulgaria (i) failed to create stable, equitable, favorable and transparent conditions for the investment, (ii) failed to provide the investment with fair and equitable treatment, (iii) failed to provide the investment constant protection and security, (iv) subjected the investment to unreasonable and discriminatory measures, (v) breached its contractual obligations vis-à-vis PCL, and (vi) subjected the investment to measures having an effect equivalent to expropriation.

In defense, Bulgaria raised objections to the Tribunal's jurisdiction over the

admissibility of PCL's claims by arguing that the company's investment in Nova Plama AD involved misrepresentations in violation of Bulgarian law. As a result, Bulgaria asserted that the investment was void *ab initio* (from the beginning) under Bulgarian law and, therefore, not an "investment" as contemplated by the ECT.

*"While the Tribunal went on to dismiss the PCL's allegations against Bulgaria, the importance of this decision lies in the Tribunal's unequivocal rejection of claims made by dishonest investors."*

While the Tribunal found that Bulgaria's allegations of misrepresentation did not deprive it of jurisdiction to hear this case, they did bar PCL from seeking protection under the ECT given that its investment in Nova Plama AD was obtained by fraud. The Tribunal concluded that "[t]he investment in Nova Plama was . . . the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities . . ." required to continue with its operations.

Consequently, the Tribunal determined that PCL's investment violated not only Bulgarian law but international

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law, including the principle of good faith, the principle of *auditor propriam turpitudinem allegans*—that nobody can benefit from his own wrong and international public policy—and that a contract obtained by wrongful means should not be enforced by a tribunal.

While the Tribunal went on to dismiss the PCL's allegations against Bulgaria, the importance of this decision lies in the Tribunal's unequivocal rejection of claims made by dishonest investors. Similar to the adage originating in the English courts of equity that "he who

comes to equity must come with clean hands", the Tribunal's decision affirms that if investors want to seek refuge under international treaties, honesty is the best policy.

## NEWS: US OIL COMPANY PASSES JURISDICTIONAL HURDLE IN ARBITRATION WITH ECUADOR

By Damon Vis-Dunbar

A tribunal has accepted jurisdiction in a dispute that pits two petroleum companies against the Government of Ecuador, allowing the case to proceed to the merits stage. The two claimants, Occidental Petroleum Company (OPC) and Occidental Exploration and Production Company (OEPC), are seeking more than US\$ 3 billion after a contract to explore and exploit oil was severed by Ecuador.

The Occidental companies are alleging breaches of a contract with Ecuador and the Ecuador-United States bilateral investment treaty.

OEPC had transferred a portion of its stake in an Ecuadorian oil field to another foreign investor, a subsidiary of the Canadian company Encana, in exchange for payments that would contribute to capital investments and operating costs. However, the move eventually spurred the Minister of Energy and Mines to terminate its contract with Occidental, on the grounds that the company had not received ministerial approval for the transfer, nor had it fulfilled the terms of its contract by, among other things,

failing to invest adequately in the oil field.

*"This dispute is one of a string of recent arbitrations launched by foreign investors in the oil and gas sector against the government of Ecuador."*

The case was registered with the International Centre for the Settlement of Investment Disputes (ICSID) in 2006, but Ecuador argued that the tribunal lacked jurisdiction for two reasons: (i) that adjudication was governed by the contract, and the contract directed that disputes of this nature be settled under Ecuadorian law rather than international arbitration; (ii) that the Claimants failed to abide by a mandatory six-month waiting period before filing for arbitration.

The tribunal dismissed both arguments in its 9 September 2008 decision. On

the first, it concluded that the contract in question did not explicitly bar disputes from entering international arbitration. On the second, the tribunal concluded that the dispute stretched back to 2004, and that "attempts at reaching a negotiated solution were indeed futile ..." Thus, Ecuador could not argue that the Occidental companies had rushed to arbitrate.

This dispute is one of a string of recent arbitrations launched by foreign investors in the oil and gas sector against the government of Ecuador. Indeed, it is the second time that Occidental has sued Ecuador; in 2004, Ecuador was found liable to Occidental for more than US\$ 75 million in damages in a separate arbitration.

Ecuador is currently defending itself in nine arbitrations at the Washington-based International Centre for the Settlement of Investment Disputes, an arbitration facility that operates under the auspices of the World Bank. Most of the claims relate to the 2006 "Ley 42", which levied a 50% tax on oil company windfall profits.

## NEWS: CANADA FACES A POTENTIAL LAWSUIT AS A US INVESTOR COMPLAINS OF EXPROPRIATION OF INVESTMENTS IN HEALTH-CARE FACILITIES

By Damon Vis-Dunbar

An American businessman has revived long-held suspicions that the North American Free Trade Agreement's investment chapter may hinder Canada's ability to regulate its public health-care system.

In a letter sent to the Canadian government in July 2008—a so-called Notice of Intent—Melvin J. Howard accuses provincial authorities of putting up “politically motivated” roadblocks to investments in health-care facilities, in breach of the government's commitments to American investors under NAFTA. The letter sets in motion a 90-day period which must elapse before formally serving a claim.

Mr. Howard alleges breaches of the national treatment and most-favoured-nation treatment provisions in NAFTA's Chapter Eleven, and seeks nearly US\$ 160 million in damages.

The letter refers to a lack of “uniformity” among provincial health-care agencies in Canada. “There are serious inconsistencies throughout Canada in terms of the Canada Health Act and Provincial health care programs,” writes Mr. Howard. “Centurion and its counter parties seek to be compensated for damages for barriers to entry and expropriation.” Mr. Howard also argues that efforts to set up private surgical facilities in the city of Vancouver were sabotaged by community activists, “in their belief that no American company should be providing surgical services.”

One of the investments proposed by Centurion Health Corporation, a company chaired by Mr. Howard, was a hospital on Vancouver Island. Centurion was advocating for a public-private partnership—an arrangement that the Provincial Government of British Columbia began experimenting

with in 2002—in which responsibilities that had previously been performed solely by government agencies were contracted to the private sector. A 2006 preliminary five-year financial forecast for this particular hospital, sent to ITN by Mr. Howard, estimated that the total capital costs would amount to some \$180 million, including construction costs.

*“The degree to which government policies in the health-care sector are immune from NAFTA investment claims has been a matter of debate in Canada.”*

While the Notice of Intent is dated 11 July 2008—with Canada acknowledging receipt of the notice that same month—news of the threatened arbitration broke in September in an op/ed in Canada's Embassy Magazine\*. It soon roused the attention of defenders of Canada's public health-care system who have warned in the past that NAFTA could restrict government policies in the sector.

The Canadian Union of Public Employees (CUPE) said: “... the federal government has been ignoring concerns that NAFTA investment rules put the Canadian health care system at risk. Now, these concerns are becoming substantiated ...”

The degree to which government policies in the health-care sector are immune from NAFTA investment claims has been a matter of debate in Canada. An annex of the NAFTA carves out all health-care policies in place prior to January 1, 1994, but commentators have argued that

changes to health-care policies made after 1994 could become to object of a NAFTA claim.

For example, two Canadian researchers wrote in 2003: “This situation could arise if public health care in Canada were to be expanded to new areas such as prescription drugs or dental care. US private health insurance companies and pharmaceutical companies with a presence in Canada would likely use Chapter 11 of NAFTA (the investor-state provisions of the Investment chapter) to sue for billions in compensation for lost business.”\*\*

Mr. Howard's claim relates to a different scenario. Having allowed private investors into the health-care market, Mr. Howard contends that the provincial government of British Columbia was bound to treat American and Canadian investors with the same standard of treatment. He argues that they were not.

For its part, the Canadian government has only provided a brief comment, saying that they are “currently assessing this claim and is consulting with the Government of British Columbia”. Canada is gearing up for an election on 14 October 2008, and a spokesperson for the Department of Foreign Affairs and International Trade said they would not issue any comments that could be used to stoke partisan debates.

\*“US Investor Threatens First Ever Health Care Suit”, By Luke Eric Peterson, Embassy, 17 September 2008

\*\* “Competition in the WTO and FTAA: A Trojan Horse for International Trade Negotiations”, By Marc Lee and Charles Morand, The Canadian Centre for Policy Alternatives, August 2003

## NEWS: CANADIAN LUMBER COMPANY FAILS TO VACATE NAFTA CHAPTER 11 AWARD IN US COURT

By Damon Vis-Dunbar

A bid by a Canadian lumber company, Tembec, to vacate a NAFTA Chapter 11 award was dismissed in August by a United States District Court.

This is the second time Tembec has turned to the United States District Court for the District of Columbia. In 2005, Tembec made an attempt to vacate an order which consolidated Tembec's claim against the United States with two other similar claims by Canadian lumber companies.

Tembec later agreed to dismiss its petition before the US district court—as well as withdraw its NAFTA chapter 11 claim—following a political agreement between the United States and Canada over the softwood lumber

dispute. The next day, however, the United States submitted to the NAFTA tribunal that Tembec bear all the costs associated with the arbitration. The NAFTA tribunal ultimately decided that Tembec should pay all the costs; a decision that contrasts with many investment-treaty arbitrations, in which the costs are shared between the parties.

In 2007, Tembec filed another petition before the US District Court for Columbia to vacate the NAFTA award on costs. But in a decision dated August 14th, the district court rejected the petition on two grounds: *res judicata* and collateral estoppel.

Essentially, the petition was dismissed on the grounds that the court has already ruled on this matter. "By filing this suit [Tembec Inc. et al] attempts the proverbial second bite of the apple," wrote the court, which argued that Tembec was using "the very same nucleus of facts raised in the First Petition ...".

Under the doctrine *res judicata*, "a judgment on the merits in a prior suit bars a second suit involving identical parties or their privies based on the same cause of action." Under the doctrine of collateral estoppel (aka issue preclusion) "an issue of fact or law that was actually litigated and necessarily decided is conclusive in a subsequent action between the same parties ...".

## NEWS: DOMINICAN REPUBLIC TARGET OF POTENTIAL TREATY CLAIMS IN TOLL ROAD DISPUTE

By Fernando Cabrera Diaz

The Dominican Republic faces two possible treaty claims in a dispute with a consortium it hired to extend and operate an important highway connecting the capital with the eastern part of the island.

The dispute centres on a 2001 concession contract signed between the Concesionaria Dominicana de Autopistas y Carreteras, S.A. (CODACSA), a consortium of American, Spanish and Dominican investors, and the Dominican Republic. The contract called for CODACSA to operate a toll highway connecting Santo Domingo to San Pedro de Macoris and to expand the highway further east to the popular tourist destination La Romana.

CODACSA says the concession contract calls for construction costs to be paid from toll revenues in the long run, but that initially the company was

required to borrow capital to finance the expansion. Given that the financing would be obtained in US dollars while the tolls are collected in Dominican pesos, the contract required, among other things, that the Dominican Republic provide a devaluation guarantee in case the peso fell by more than 7% in a year against the dollar. The concession contract also required the Dominican Republic to adjust the tolls in accord with inflation or pay a "shadow toll."

CODACSA alleges that it has not been allowed to adjust the tolls or receive the required 'shadow toll', which has prevented the company from obtaining the financing it needs to complete the project.

CODACSA initiated a contract-based arbitration under the auspices of the International Court of Arbitration

in June. The same month, two letters of intent were sent to the Dominican Republic, one on behalf of the American investors under the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR) and the other on behalf of the Spanish investors under the Dominican Republic-Spain Bilateral Investment Treaty. These letters set in motion a six-month period which must elapse before a claim can be submitted under either treaty.

According to Claudia Salomon of DLA Piper, counsel for CODACSA, the consortium is alleging, among other things, expropriation and breach of the fair and equitable provisions of both treaties.

The Dominican Republic, for its part, counters that CODACSA has breached the concession agreement. Speaking

## NEWS: AMERICAN INVESTOR SUES KAZAKHSTAN OVER OIL-FIELD DISPUTE

By Damon Vis-Dunbar

A US citizen, Devincci Salah Hourani, has launched a lawsuit against the government of Kazakhstan over a failed contract to explore and exploit oil in the country.

Mr. Hourani, who holds a 92% stake in the Kazakh firm Caratube International Oil Company (CIOC), has alleged breaches of the United States-Kazakhstan bilateral investment treaty in a claim registered with ICSID in August.

Few specifics about the case have emerged, so far. According to the law firm Allen & Overy, who act as counsel for the claimant, “the dispute concerns

Kazakhstan’s arbitrary, discriminatory and unlawful expropriation of CIOC’s long term rights under a contract for the exploration and development of hydrocarbons in the Aktobe Oblast region of Kazakhstan.” The claimant is also alleging that Kazakhstan authorities harassed Mr. Hourani, his family and employees.

The alleged damages are “very substantial”, given the production stage of the contract was expected to yield at least US\$ 2 billion, said lawyers with Allen & Overy.

Kazakhstan is defending itself in one other arbitration at the ICSID

facility - Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan. In this case, Liman Caspian Oil, a Dutch subsidiary of the Canadian company Aurado Energy Inc., is alleging breaches of the fair and equitable treatment and expropriation provisions of the Energy Charter Treaty (ECT) - a multilateral agreement that governs investments in the energy sector.

Liman argues that it obtained the license to extract oil and gas in 2002 from its original holder, Aral, but that Kazakhstan courts annulled the transfer on wholly specious grounds,” according to a statement provided by counsel for Liman.

## INTERVIEW: AN INTERVIEW WITH PROFESSOR JOHN RUGGIE, UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL ON BUSINESS & HUMAN RIGHTS

*ITN: Since becoming the UN Special Representative of the Secretary General on Business & Human Rights, you and your team have delved into a number of quite specific areas of international investment law, including bilateral investment treaties, the rules of investor-state arbitration, and stabilization clauses. What has drawn you to this particular area of international economic law?*

J.R.: My work on investment is part of examining the role of states in regulating and adjudicating corporate activities vis-à-vis human rights, as requested in my initial mandate. All throughout this examination I have found a lack of policy coherence within and among states in dealing with business and human rights issues. The domain of human rights policy tends to be segregated within its own conceptual and (typically weak) institutional box—kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, corporate

law and securities regulation. Investment policy also fits into that list.

As we’ve seen in a number of recent cases, the investment regime can have a significant impact on human rights issues. Our drawing attention to this nexus has engaged constituencies that have not generally been active in business and human rights before—such as private law firms, international organisations like UN Commission on International Trade Law, the International Finance Corporation, and even civil society organizations like IISD itself.

*ITN: You have commented on the imbalance in bilateral investment treaties: i.e., that they provide legal protections to foreign investors, without taking a similar regard for a state’s duty to protect the public interest. Are there remedies that you would suggest?*

J.R.: In my view, if there are serious negative consequences of BITs for the protection of human rights,

those should be corrected. As with stabilization provisions, investor protection should be achieved in a way that at a minimum does not hinder the fulfilment of the state’s human rights obligations.

In terms of remedying any potential negative impact that BITS can have on the state duty to protect, I believe that innovative ideas should come from engagement with stakeholders from all sides, including investors, states, international institutions, and civil society. This is one of the issues I will continue to explore during my current mandate.

*ITN: Can you point to any specific areas where, in your view, the international investment law regime works against the promotion of human rights?*

J.R.: The three-part framework for business and human rights that I proposed in my most recent report to the Human Rights Council, and which the Council unanimously welcomed

## JOHN RUGGIE...

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last June, comprises the state duty to protect against human rights abuse by all parties, including business; the corporate responsibility to respect human rights; and more effective access to remedies for those who believe their rights have been abused.

We have tried to understand better whether and how the international investment law regime may hinder the state's ability to protect rights, through legislation and/or regulatory measures. In our joint project with the IFC, we have focused on stabilization clauses as one such mechanism. Our

work indicates that these clauses can impede a state's duty to protect in two ways. Sometimes they are drafted to make investors exempt from new social and environmental laws over

the lifetime of an investment project. And sometimes these clauses are drafted to provide the investor with compensation or an opportunity to claim compensation for compliance with new social and environmental laws. Obviously, investors need protection against arbitrary or discriminatory measures by host states. So it is a question of balance and precision, ensuring that provisions in agreements don't lend themselves to misuse by either side.

Another issue I have looked at briefly is transparency for investor-state arbitration. The UN promotes transparency as a fundamental precept of good governance. I consider that to hold true in the investment realm as well. If the public does not know of disputes between the state and a foreign investor, and therefore cannot inform itself of how the public interest may be impacted by the dispute, it makes it all the more difficult to hold the state to account.

*ITN: This brings us to your support for greater transparency in investor-state arbitration governed by the UN*

*Commission on International Trade Law's rules of arbitration, which has led to significant debate and opposition from some quarters.*

J.R.: I don't believe that my support for greater transparency in investor-state dispute resolution has triggered significant opposition. On the contrary, the UNCITRAL decided by consensus in June of this year that addressing transparency in investor-state dispute resolution will be the next priority of the Working Group on Arbitration.

*"We have tried to understand better whether and how the international investment law regime may hinder the state's ability to protect rights, through legislation and/or regulatory measures."*

As I indicated in my statement to UNCITRAL in June of this year, adequate transparency where human rights and other state responsibilities are concerned is essential if the public is to be aware of proceedings that may affect the public interest. It lies at the very foundation of what the United Nations and other authoritative entities have been promulgating as the precepts of good governance.

Again, the issue is one of balance, because some commercial matters do need to remain confidential. But the exceptions should be specifically tailored to address legitimate needs and not blanket the entire process.

I am pleased that UNCITRAL will be considering this important issue. There is now a unique opportunity to focus on how the principle of transparency should be integrated into investor-state dispute resolution. I will follow their proceedings with great interest.

## DOMINICAN REPUBLIC TARGET OF POTENTIAL TREATY...

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to the newspaper *Listin Diario* on 24 August, Public Works Minister Díaz Rúa accused the company of failing to adequately invest in the project, and instead directing only a small portion of its toll revenues — RD\$ 35 million (approx. US\$ 1 million) out of RD\$ 1,000 million (approx. US\$ 29 million) collected over seven years — towards developing the project.

According to Mr. Díaz Rúa, this has resulted in an over four year delay in the highway extension.

Gaela Gehring Flores of Arnold & Porter LLP, which represents the Dominican Republic, echoed the minister's sentiments, telling ITN that "in general the claimant's position misrepresents the rights and obligations of the parties under the concession contract."

She explained that CODACSA had seriously breached the contract by its failure to complete works in accordance with the planned schedule of construction, by not living up to its maintenance commitments and by its failure to take the basic steps necessary to obtain financing for the project.

Ms. Gehring Flores added that, in her view, this was a contract dispute which was already being heard by the International Court of Arbitration, and she failed to see how the investors' claims rose to the level of treaty violations.

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