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TRIBUNAL PIERCES THE CORPORATE VEIL IN JURISDICTIONAL DECISION INVOLVING ARGENTINA

By Damon Vis-Dunbar

Two out of three members of an ICSID tribunal have declined jurisdiction in a claim brought by TSA Spectrum de Argentina S.A. (TSA) against the Argentine Republic under the Netherlands-Argentina bilateral investment treaty, having determined that TSA is not covered by the treaty because it is owned by an Argentine citizen.

TSA, an Argentine company that took over Argentina's newly privatized radio spectrum, is a subsidiary of TSI Spectrum International N.V., a corporation registered in the Netherlands. However, after unraveling the complicated corporate structure that lay behind TSA, the tribunal determined that it was owned by an Argentine citizen, Mr. Jorge Justo Neuss.

It is not unusual for investments to be routed through a third country, in order to benefit from preferential tax regimes, not to mention the extensive BIT portfolios of countries' like the Netherlands. Nonetheless, the question facing the tribunal was whether TSA could access the Argentina-Netherlands BIT by virtue of its affiliation with the Dutch incorporated TSI, or whether the tribunal was compelled to peel back the corporate layers until they arrived at the final owner.

In coming to a decision, the tribunal wrestled with the intent of the Article 25(2)(b) of the ICSID Convention, which sets out the Centre's jurisdictional domain. The article provides two categories of "nationals of another Contracting State": those that hold foreign citizenship, or company's under foreign control. Given that TSA did not qualify for the first category—it is a Argentine company owned by an Argentine national—the question was whether it met the criteria for the second, i.e., was it a foreign controlled enterprise?

> *"The award and dissenting opinion are notable for their conflicting views on whether ICSID tribunals are compelled to 'pierce the corporate veil' in an effort to determine who, ultimately, controls the investment under dispute. "*

Split tribunal pierces the corporate veil

The award and dissenting opinion are notable for their conflicting views on whether ICSID tribunals are compelled to 'pierce the corporate veil' in an effort to determine who, ultimately, controls the investment under dispute.

Two members of the three person tribunal, Judge Hans Danelius and Professor Georges Abi-Saab, sided in favour of "piercing the veil and going for the real control and nationality of the controllers." Indeed, given that ICSID is intended to settle disputes between foreign investors and host

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states, the two arbitrators argued that this approach was particularly important "when ultimate control is alleged to be in the hands of nationals of the host State, whose formal nationality is also that of the Claimant corporation."

In his dissenting opinion, Grant D. Aldonas rejected the notion that either the ICSID Convention or the Argentina-Netherlands BIT moved the tribunal to look beyond where TSA's parent company was incorporated. "To do so would substitute our judgment for that of the two sovereign states ...," wrote Aldonas, who argued that the BIT was clear in its wording that it protected companies lawfully incorporated in the Netherlands, regardless of the nationality of the owner.

While the majority decision on TSA's foreign control settled the question of the tribunal's jurisdiction, three additional objections to jurisdiction were also raised by Argentina: 1) that TSA relinquished its access to ICSID arbitration under the BIT by signing a concession contract with its own dispute settlement procedures; 2) that TSA did not respect an 18 month period in which the claimant was to seek a settlement through local administrative and judicial remedies; 3) and finally, that TSA employees engaged in corrupt activities in Argentina, and therefore the investment was not made in accordance with Argentine law.

On the first, the tribunal held that the dispute resolution mechanism in the contract did not prevent the claimant from accessing arbitration under the BIT. A distinction could be drawn, said the tribunal, between claims arising out of a breach of the contract and claims arising out a breach of the BIT.

On the second, the tribunal acknowledged that TSA's claim was premature, but since only three months out of the eighteen month period remained, it concluded that it would be overly formalistic to decline jurisdiction on this ground.

Finally, the tribunal declined to voice an opinion on the corruption charges introduced by Argentina, given that it had already declined jurisdiction over the matter of foreign control.

CANADIAN PHARMACEUTICAL COMPANY ALLEGES DENIAL OF JUSTICE IN CLAIM AGAINST THE UNITED STATES

By Damon Vis-Dunbar

A Canadian pharmaceutical company delivered a notice of arbitration to the United States government in December 2008 under NAFTA's Chapter 11 on investment. The US$8 million claim is rooted in the complicated legislation that governs how generic medications can be introduced to the U.S. market.

Apotex Inc., which claims to be the largest Canadian owned pharmaceutical company, alleges that a series of legal blunders by U.S. courts have frustrated its efforts to sell a generic antidepressant medication.

The dispute relates to Apotex's generic version of the antidepressant medication

> *"Apotex Inc., which claims to be the largest Canadian owned pharmaceutical company, alleges that a series of legal blunders by U.S. courts have frustrated its efforts to sell a generic antidepressant medication."*

commonly known as Zoloft, or sertraline hydrochloride by its generic name. Although the pharmaceutical giant Pfizer held several patents for the drug, Apotex sought to gain approval from the US Food and Drug Administration to bring its generic version of the drug to market before one of these patents expired in 2006. To do so, Apotex triggered an 'artificial' act of patent infringement, in an effort to draw Pfizer into a dispute that would provide a judgment, one way or the other, on the legality of Apotex's aspiration to sell the antidepressant.

When Pfizer declined to take the bait, Apotex filed for a declaratory judgment—a common legal tactic in patent litigation. However, U.S. Federal Courts refused to rule on the matter, citing lack of subject matter jurisdiction. In particular, the courts concluded that they lacked a "reasonable apprehension" that Pfizer would launch a suit for patent

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TRIBUNAL REFUSES TO CLARIFY DECISION ON JURISDICTION IN RAILROAD DEVELOPMENT CORPORATION V. REPUBLIC OF GUATEMALA

By Damon Vis-Dunbar

The tribunal hearing a dispute between the Railroad Development Corporation (RDC) and Guatemala under the Dominican Republic – Central America – United States Free Trade Agreement (DR-CAFTA) has declined to clarify its 17 November 2008 decision on jurisdiction, following a petition by Guatemala.

Guatemala had contested the tribunal's jurisdiction to hear RDC's claim—the first investment claim under the 2004 DR-CAFTA—on the grounds that local arbitration proceedings launched by the RDC's subsidiary in Guatemala were already dealing with the same complaints. (Under DR-CAFTA rules, the RDC waived its right continue proceedings that pertain to the same measures alleged to constitute a breach of DR-CAFTA.)

In accepting jurisdiction, however, the tribunal held that the RDC's waiver was only "partially defective". In the tribunal's view, the RDC had submitted a package of multiple claims, some of which overlapped with local arbitration proceedings, while others concerned measures that occurred after these proceedings had begun. As such, the tribunal decided to proceed by distinguishing between the two: judging the merits only of those claims which were not being handled through local arbitration.

> *"Guatemala offered that its concern could be assuaged if the tribunal declined jurisdiction in respect to the RDC's claim of an alleged violation the Minimum Standard of Treatment article in DR-CAFTA."*

In a subsequent response to the tribunal, Guatemala said that it was "gravely concerned" by the decision, and sought clarification on what claims had been excluded as a result of the partially defective waiver. Guatemala offered that its concern could be assuaged if the tribunal declined jurisdiction in respect to the RDC's claim of an alleged violation the Minimum Standard of Treatment article in DR-CAFTA. This particular claim, according to Guatemala, contains "impermissible overlap" between the local arbitration proceedings and the DR-CAFTA proceedings.

In a 13 January 2009 decision, Guatemala's petition has been rejected. The decision on jurisdiction "is not vague or internally inconsistent," wrote the tribunal. Furthermore, the tribunal considered that it would be "inappropriate" for it to exclude the claim based on Minimum Standard of Treatment before considering its merits, given that the standard is "general and wide ranging."

The RDC is an American company that deals in railway investment and management. Its dispute with Guatemala relates to an agreement between its Guatemalan subsidiary Compañia Desarrolladora Ferroviaria (FVG) and a state owned-company responsible for managing Guatemala's railway services. In 2005, FVG initiated arbitration proceedings in Guatemala for alleged breaches of contract. Guatemala subsequently terminated its agreement with FVG, declaring it injurious to the state.

RDC is seeking some $US65 million in lost profits and damages in its DR-CAFTA claim, which is being conducted under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID).

CANADIAN PHARMACEUTICAL COMPANY ALLEGES DENIAL...

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infringement. Apotex's efforts to convince the Supreme Court to overturn the Federal Court decisions have also failed.

In its notice of arbitration, Apotex argues that the U.S. courts "misapplied" statutory and constitutional law in multiple decisions, in what amounts to a violation of NAFTA commitments on National Treatment, Minimum Standard of Treatment, and Expropriation and Compensation.

This marks the first notice of arbitration under NAFTA Chapter 11 to be served to the United States in over two years.

Apotex has elected to arbitrate under the UNCITRAL Arbitration Rules.

THE UNITED KINGDOM TIGHT-LIPPED OVER DISPUTE WITH AN INDIAN INVESTOR

By Damon Vis-Dunbar

The United Kingdom has formally declined to release a notice of arbitration delivered by an Indian citizen under the UK-India bilateral investment treaty, explaining that it would likely "prejudice relations between the United Kingdom and an international organisation; UNCITRAL."

UNCITRAL is a United Nations body responsible for international business law whose arbitration rules are commonly used to settle investment disputes between host states for foreign investors.

In this case, the UNCITRAL Arbitration Rules have been applied to a dispute between an Indian citizen and the United Kingdom. In 2006, an Indian lawyer named Ashok Sancheti served the UK with a notice of arbitration, complaining of "blatant discrimination by different organs and functions of the United Kingdom in dealing with me as an inward investor." This is the only investment-treaty claim currently pending against the UK, according to the UK's Foreign and Commonwealth Office (FCO).

"Ultimately, the FCO concluded that "the public interest in withholding the material outweighs the public interest in disclosure."

The arbitration proceedings became public in 2008, when UK courts described the dispute in rulings related to a separate case between Sancheti and the City of London. ITN subsequently requested a copy of the notice of arbitration, as well as any other decisions or awards which may have been submitted by the tribunal. However, the UK's Foreign Office has formally declined the request, citing provisions on confidentiality in the UNCITRAL rules.

In coming to a decision, the FCO said it had considered "the desirability for disclosure based on the grounds of transparency and accountability of a public authority." However, the FCO also weighed "factors favouring withholding the material—in particular the public interest in maintaining good relations with UNCITRAL."

Ultimately, the FCO concluded that "the public interest in withholding the material outweighs the public interest in disclosure." The FCO explained that it risked censor from the Tribunal hearing the arbitration, given that the parties had not agreed to publicly disclose documents submitted in the arbitration proceedings.

The UNCITAL arbitration rules state that "Hearings shall be held in camera unless the parties agree otherwise" and "The award may be made public only with the consent of both parties."

The UNCITRAL rules of arbitration—popular for settling commercial and treaty-based investment disputes—have come under increased scrutiny in the last couple years, as governments are currently in the process of revising the rules for the first time since they were adopted in 1976. As ITN has previously reported, certain civil society groups—including the IISD, the publishers of ITN—have called for revisions that would increase the level of transparency with regards to investor-state arbitrations under international investment agreements.

CONTINENTAL CASUALTY COMPANY MOVES TO ANNUL AWARD FAVOURABLE TO ARGENTINA

By Damon Vis-Dunbar

The Illinois-based Continental Casualty Company has moved to annul an ICSID award that was largely in favour of the Republic of Argentina.

In a 5 September 2008 ruling, Continental Casualty was awarded US$2.8 million, a small part of the US$112 million that the firm claimed from Argentina after its investment in an insurance company plummeted in the midst of the Argentine financial crisis.

Argentina had successfully applied the essential security provision

"The award stands in contrast to some earlier ICSID rulings involving Argentina, where tribunals have held the government to a higher standard of "state of necessity" found under customary international law."

found in the United States-Argentina bilateral investment treaty, which states that the treaty does not prevent the parties from undertaking measures necessary for maintaining peace, public order or essential security. The award stands in contrast to some earlier ICSID rulings involving Argentina, where tribunals have held the government to a higher standard of "state of necessity" found under customary international law.

In its effort to annul the award, Continental Casualty argues that the tribunal "manifestly exceeded its powers" and the award "failed to state the reasons on which it is based." These form part of the

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PARTIES FILE MEMORIALS IN LONG-RUNNING NAFTA DISPUTE OVER U.S. TOBACCO SETTLEMENTS

By Fernando Cabrera Diaz and Damon Vis-Dunbar

The Canadian tobacco manufacturer Grand River Enterprises Six Nations and the United State have filed memorials in a long-running NAFTA Chapter 11 dispute. The arbitration proceedings, which began in April of 2004, have been delayed several times due to challenges to jurisdiction and to one of the arbitrators.

The Grand River dispute revolves around the Tobacco Master Settlement Agreement (MSA) signed in 1998 between the four major American tobacco manufacturers and the Attorneys General of 46 U.S. states.

The MSA settled lawsuits brought by 46 Attorneys General against the big 4 tobacco companies for their alleged youth-targeted advertising and conspiracy to withhold evidence on the addictive nature and adverse health consequences of smoking. As part of the settlement, the tobacco companies agreed to certain marketing and advertising limitations, as well as perpetual annual payments in exchange for protection against future lawsuits by the states.

The MSA included provisions that allowed other, smaller tobacco companies to join the agreement. Companies that signed up within 90 days of the MSA's execution were offered exemption from settlement payments, as long as their market share did not exceed their 1998 market share.

Companies that joined after the 90-day period — called Subsequent Participating Members (SPMs) — were required to make annual settlement payments based on their market share.

More controversially, the agreement included a model law which signing states agreed to adopt in order to prevent companies that refused to participate in the MSA—referred to as Non-Participating Members (NPMs) —from benefiting from the lower costs inherent in their non-participation.

The model law, implemented by states as so-called Escrow Statutes, required NPMs to make annual deposits into escrow accounts based on their cigarette sales. The amounts reflected what an NPM would have paid as an annual settlement amount if it were part of the MSA. Escrow funds are to be held for up 25 years as insurance in case an NPM is ever sued by one of the states.

Soon after the implementation of the model law, the states saw problems with the Escrow Statutes: they felt their design allowed NPMs to pay significantly less sums if they concentrated their sales on just a few states, and the statutes were hard to enforce against foreign manufacturers.

In response to these problems, states enacted two sets of legislation. To deal with the perceived enforcement problems, Contraband Laws were enacted, requiring cigarette manufacturers to certify each year that they were complying with the Escrow Statutes, or else have their cigarettes automatically banned as contraband. Second, the Escrow Statues were amended to increase escrow requirements to NPMs, such as the Claimants, which had adopted a regional strategy.

Parties clash over allegations of discrimination and expropriation

According to the Claimants, the amended Escrow Statutes violate NAFTA Chapter 11's National Treatment and Most-Favored-Nation Treatment provisions because they require the Claimants to deposit funds into escrow; while SPMs (those that joined the MSA within 90 days) are exempt. In this respect, the Claimants do not allege discrimination between foreign and domestic cigarette companies, but rather that a general class of competitors enjoyed a competitive economic advantage.

In addition, the Claimants argue that their investments have been expropriated by the amended Escrow Statutes, given that their cigarettes are no longer competitive in comparison with exempt SPMs. They contend that because the amendments were targeted at NPMs such as themselves—i.e., companies benefiting from a regional sales strategy—the measures are discriminatory, further evidence of an illegal expropriation.

According to the Claimants, the Escrow Statures also violate the Fair and Equitable Treatment provisions of the treaty because they offend due process by forcing them to pay up front for a potential court case that may never emerge.

The Claimants allege that the reason for the Escrow Statutes and their subsequent amendments is that states want to protect the market share of companies that signed the MSA, because their settlement payments depend on it.

In response, the United States argues that the Claimants do not have a qualifying investment in the U.S., and are instead simply exporters of Canadian cigarettes.

Moreover, the U.S. highlights that the Escrow Statutes were enacted to "provide security for potential future

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PARTIES FILE MEMORIALS IN LONG-RUNNING NAFTA DISPUTE...

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damages resulting from the sale and use of the NPM's tobacco products." It points out that all amounts in deposited in escrow accounts remain the property of the depositor, who collects all interest earned.

"The Claimants, who are Aboriginal First Nations, and whose business was targeted to Aboriginal communities in the U.S., bolster their argument that the U.S. breached the principle of Fair and Equitable Treatment under customary international law by pointing to a series of treaties and conventions related to Aboriginal rights."

According to the U.S., the Claimants have failed to prove violations of National Treatment and Most-Favored Nation provisions, in light of the fact that the Claimants are being treated like all others in like circumstances— i.e., companies that have chosen not sign the MSA.

As for the Contraband Laws, the U.S. argues that they were necessary to promote compliance with the Escrow Statutes by foreign companies such as the Claimant, who themselves had failed to abide by these laws in states such as Idaho.

Canada rejects Claimants' arguments with respect to conventions on Aboriginal rights

The Claimants, who are Aboriginal First Nations, and whose business was targeted to Aboriginal communities in the U.S., bolster their argument that the U.S. breached the principle of Fair and Equitable Treatment under customary international law by pointing to a series of treaties and conventions related to Aboriginal rights. These include an International Labour Organization convention (ILO Convention 169) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which call on states to facilitate cross-border economic activities between indigenous peoples.

The UNDRIP and ILO convention, argue the Claimants, form part of customary international law, and should, therefore, be considered by the Tribunal in determining whether the U.S. has breached its obligations to provide Fair and Equitable Treatment.

In a 19 January 2009 submission to the Tribunal, Canada intervenes in order to reject the argument that ILO Convention 169 and the UNDRIP fall within the ambit of customary international law.

Canada notes that only 20 of 193 UN Members have ratified the ILO convention in question, while also pointing out that it explicitly stated that the UNDRIP is not a legally binding instrument (Canada, the United States, Australia and New Zealand all voted against adopting the UNDRIP). As such, Canada argues that neither declaration forms part the U.S.'s obligations to provide Fair and Equitable Treatment under customary international law.

The Tribunal will now have the opportunity to hear testimony on these and other issues in dispute at hearings scheduled to begin on 22 June 2009.

As reported previously by ITN, the tribunal has limited its jurisdiction in this case to events which occurred after April 2001, such as the amendments to the Escrow Laws, and are therefore not time-barred by the three year limitations under NAFTA Articles 1116(2) and 1117(2). The tribunal also rejected a U.S. challenge to the claimant-appointed arbitrator Professor James Anaya.

CONTINENTAL CASUALTY COMPANY MOVES TO ANNUL AWARD...

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narrow grounds on which an ICSID award may be annulled.

More specifically, however, Continental Casualty argues that the tribunal: (i) failed "to apply the well-developed customary international law governing the defense of necessity ..."; (ii) failed to properly apply the governing international law by not holding Argentina responsible for compensation for measures taken during its financial crisis, in spite of the essential security defense; (iii) erred by finding that Argentina had breached the Fair and Equitable Treatment provision of the BIT, but then declining to consider if Argentina was also liable for damages for expropriation, even though the amount of damages for the latter should have been higher; (iv) and finally, failed to properly apply the BIT when it determined that Continental Casualty did not have a right to compensation after its investment was prevented from transferring certain assets out of Argentina.

The ICSID secretariat registered Continental Casualty's annulment application on 14 January 2009, and will now be responsible for forming an ad-hoc committee to hear the request.

BOLIVIAN VOTERS APPROVE NEW CONSTITUTION AS THE GOVERNMENT CONTINUES TO NATIONALIZE OIL ASSETS

By Fernando Cabrera Diaz

Bolivian President Evo Morales has claimed victory in the 25 January 2009 national referendum on a new constitution for the Andean nation. The constitution passed just days after the Bolivian leader announced his government was finally taking control of the Chaco Petroleum Company, as part of the ongoing nationalization of the country's natural resources.

The new constitution aims to further solidify government control over the country's vast natural resources and denies the jurisdiction of international tribunals to hear disputes over investments in the hydrocarbons sector.

In particular, Article 351 declares that the State will "assume the control and direction over the exploration, exploitation, industrialization, transport and commercialization of natural resources."

Article 366 states that in the important hydrocarbons sector Bolivia will not recognize any instances of foreign jurisdiction and foreign companies will not be allowed to go to international arbitration.

The new constitution enshrines Bolivia's policy of nationalizing 'strategic resources' which began in May of 2006, when Morales announced that the country would be nationalizing the hydrocarbons sector. After the announcement, Morales began to negotiate agreements with foreign companies in which the state-owned petroleum company YPFB would take a majority ownership in existing projects.

Some of those negotiations ended successfully before the government-imposed 30 April 2008 deadline. In May of 2008, for instance, Bolivia announced that an agreement had been reached with the Spanish company Repsol to nationalize the gas production company Andina.

However in cases where the government was unable to reach an agreement with investors, it proceeded to take control of assets by force. These companies included hydrocarbons logistic company CLHB, owned by Peruvian group Graña y Montero; Chaco Petroleum Company, owned by Pan American Energy, a unit of British Petroleum; and pipeline company Transredes, controlled by Dutch Shell and the Houston-based Ashmore Energy International .

Bolivia ultimately reached deals with Ashmore Energy and Shell to avoid litigation over Transredes, but Peruvian group Graña y Montero announced in November that it may resort to international arbitration seeking US$40 million in compensation over the loss of CLHB. Meanwhile, Pan American Energy announced on 26 January 2009 that it will defend its interests in Chaco in all available forums.

Under Morales, Bolivia also nationalized the country's largest telecommunications company Entel, owned by Telecom Italia. The company responded by commencing a claim at the International Centre for Settlement of Investment Disputes (ICSID). ICSID's jurisdiction is in dispute, however, as Bolivia does not recognize the Centre's jurisdiction, having withdrawn from the ICSID Convention in 2007.

Critics of the nationalization policy and the new constitution warn that Bolivia, the poorest country in South America, risks losing much needed foreign investment.

The constitutional referendum pitted Morales' government, which enjoys broad support from the traditionally marginalized Amerindian majority, against the European-decedent minority based in the natural resource-rich eastern departments of Tarija, Pando, Santa Cruz, and Beni.

In 2007, the governments of these 4 departments began a pro-autonomy movement, which resulted in the passing of autonomy statutes that purport to give these departments more control over their natural resources. The autonomy statutes are not recognized by the federal government, however. With the new constitution giving the federal government more control over natural resources, an escalation in this struggle seems inevitable.

Over 60% of voters approved the new constitution, according to figures released by the National Electoral Court, in a vote that was generally regarded as free and fair by international observers.

In a separate ballot item, voters also overwhelmingly agreed to limit future landholdings to 5,000 hectares, according to the Electoral Court. Bolivia has the highest measured level of income inequality outside sub-Saharan Africa according to the United Nations Development Programme.

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