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**Contact information:**

IISD, International Environment House 2  
9 chemin de Balexert  
1219 Châtelaine, Geneva, Switzerland  
[itn@iisd.org](mailto:itn@iisd.org)



Institut international du développement durable

International Institute for Sustainable Development

## NEWS: ICSID TRIBUNAL APPLIES AD HOC APPROACH TO CONFIDENTIALITY IN ARBITRAL PROCEEDING

By Ugo Ukpabi\*

In *Giovanna A Beccara and Others v. The Argentine Republic* a tribunal composed of Pierre Tercier, Georges Abi-Saab, and Albert Jan Van den Berg has decided that questions of confidentiality and transparency in ICSID arbitrations should be determined on a case by case basis.

The dispute – one of many arising out of Argentina's response to response to its financial crisis – concerns debt security issued by Argentina and held by numerous non-Argentine and Argentine creditors, including the claimants. In late 2001, Argentina was unable to meet its financial obligations and failed to pay amounts owed under those bond instruments. As an alternative to meeting its obligations under the bond issue, the Argentine Republic launched an Exchange Offer (the "Exchange Offer"). Under the terms of the Exchange Offer, the previous bondholders could exchange their bonds (on which Argentina had already suspended payment) for new debt instruments to be issued at a later date.

The claimants refused to participate in that Exchange Offer. Rather, they argued that the respondent's action amounted to a violation of its obligations under the applicable Argentina – Italy Bilateral Investment Treaty (the BIT). As a result, in the fall of 2006, the claimants commenced arbitral proceedings against Argentina seeking compensatory damages.

The procedural questions raised in this case centered around the disputing claims by the parties on questions of confidentiality. In that regard,

the crux of the dispute centered on the appropriate disclosure and use of personal information relating to individual claimants in the case.

*"...unless there [is] an agreement of the [p]arties on the issue of confidentiality/transparency, the Tribunal shall decide on the matter [questions of confidentiality and transparency] on a case by case basis..."*

Disagreements between the parties began in March of 2008 when Argentina requested production of certain electronic information regarding different claimants in the arbitration. Argentina's request was grounded in arguments that the format of the information previously provided to it by the claimants was not "in a format easily accessible" and therefore impeded its defence rights.

In response, the claimants stressed that they had already provided the respondent information in a computer-readable and searchable format. However, the claimants indicated that they were willing to provide Argentina with the data requested as long as it agreed to sign a confidentiality agreement. The parties were unable, however, to agree on the proper scope of the claimants' proposed confidentiality agreement.

As the stalemate between the parties continued, preparations for arbitral

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## NEWS: A MERITS HEARING TAKES PLACE IN PROTRACTED NAFTA DISPUTE OVER US TOBACCO SETTLEMENTS

*By Elizabeth Whitsitt*

A three-member tribunal, composed of Mr. Fali S. Nariman, Professor S. James Anaya, and Mr. John R. Crook, has heard arguments on the merits of the dispute between Grand River Enterprises Six Nations, Ltd., et al. and the United States.

A hearing on the merits of the dispute took place last month some six years after arbitral proceedings in the long-running NAFTA Chapter 11 case began. Over the years, arbitral proceedings have been delayed several times due to jurisdictional and arbitrator challenges.

In fact, just three months ago it seemed that proceedings might be halted once again when the claimants wrote to the tribunal asking to reschedule the merits hearing.

The request arose out of concerns related to the initiation of a federal criminal prosecution of Mr. Montour and other Grand River founders, Kenneth Hill and Jerry Montour, for “trafficking” and for “conspiracy to traffic” cigarettes under US law. Specifically, the claimants were concerned that the US would use evidence, provided by Mr. Arthur Montour during the merits hearing of the NAFTA dispute, in its criminal prosecution of Messer’s Hill and Montour.

Seeking to safeguard Arthur Montour’s due process rights against self-incrimination, the claimants requested that the tribunal reschedule the hearing until after the pending criminal trial was concluded. Alternatively, the claimants sought a declaration from the tribunal that it would not strike or accord less weight to Mr. Montour’s testimony should he abstain from participating in the merits hearing.

Ultimately, however, the tribunal refused the claimants’ request. In a letter dispatched to all parties on

December 14, 2009, the tribunal confirmed that hearings on the merits of the NAFTA dispute would take place in February 2010. With respect to Arthur Montour’s due process rights, the tribunal expressed its expectation that Mr. Montour would participate in the hearing. Additionally, the tribunal confirmed counsel’s right to object to any questions that might require Mr. Montour to provide evidence that would be prejudicial to his position in the pending criminal case.

As a result, the merits hearing commenced on February 1st. Due to snow storms in Washington D.C., however, the proceedings were interrupted for approximately one week and finally concluded on February 14th.

Grand River Enterprises is a Canadian corporation involved in the manufacture and sale of tobacco products. Its dispute with the US 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.

Under the MSA, 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 heart of the dispute centers on provisions in the MSA related to – Non-Participating Members (NPMs) – companies that refused to sign on the agreement. In order to prevent those companies from benefiting from the lower costs inherent in their non-participation, the MSA required states to adopt a so-called model law.

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 to 25 years as insurance in case an NPM is ever sued by one of the states.

Soon after their implementation, states saw problems with the Escrow Statutes. Specifically states felt that NPMs could pay significantly less sums if they concentrated their cigarette sales on just a few states, and that the statutes were hard to enforce against foreign manufacturers.

States responded to these concerns by enacting two new laws. 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 Statutes were amended to increase escrow requirements to NPMs, such as the claimants, which had adopted a regional strategy.

As a result, Grand River Enterprises is seeking between US\$ 300 – 600 million for alleged violations of NAFTA Articles 1102 (national treatment), 1103 (most-favored-nation treatment), 1104 (better of national or most-favored-nation treatment), 1105 (minimum standard of treatment under international law) and 1110 (expropriation).

Sources: Letter to Parties Reconfirming February 2010 Dates for Merits Hearing, available here: <http://www.state.gov/documents/organization/133833.pdf>

Letter from Respondent Regarding Claimants’ request to Reschedule February 2010 Merits Hearing,

## NEWS: ECUADORIANS BATTLE CHEVRON IN U.S. COURT OVER BIT ARBITRATION IN LONG-RUNNING ENVIRONMENTAL DAMAGE DISPUTE

By Fernando Cabrera Diaz

Chevron and Ecuadorian citizens are in U.S. court in the latest chapter of a 16 year battle over environmental damage in Lago Agrio allegedly caused by Texaco Petroleum (TexPet), which Chevron acquired in 2001. In January of this year, a group of Ecuadorian plaintiffs which is suing the company in Ecuador asked a U.S. District Court to enforce Texaco's alleged promise to that Court that it would submit to the jurisdiction of Ecuadorian courts where a lawsuit is currently under way. The move came in response to a BIT arbitration initiated in September 2009 by Chevron against Ecuador. In its notice of arbitration, Chevron alleges, among other things, that Ecuador and its courts have unfairly favoured the Lago Agrio plaintiffs.

The dispute stems from a 1993 lawsuit launched by Ecuadorian citizens in the U.S. District Court for the Southern District of New York alleging that Texaco, through its subsidiary TexPet, discharged billions of gallons of contaminated "formation water" from the Lago Agrio oil field into the local water supply causing environmental and health problems in the area.

Texaco argued that the case needed to be tried in Ecuadorian courts, which it characterized as adequate. The U.S. Court of Appeals, Second Circuit agreed with the company and sent the case (*Aguinda v. Texaco*) to Ecuador in 2002 on the condition that Chevron accept jurisdiction there. A group of Ecuadorian citizens responded by filing a new lawsuit in Ecuador.

As reported previously by ITN, Chevron had a different view of Ecuadorean courts when it initiated a previous arbitration against Ecuador in May of 2006 alleging that the country had violated the Ecuador-U.S. Bilateral Investment Treaty (the BIT) because its courts had failed to deal fairly with multiple breach-of-contract cases

filed against the state by Texaco Petroleum.

*"The dispute stems from a 1993 lawsuit launched by Ecuadorian citizens in the U.S. District Court for the Southern District of New York alleging that Texaco discharged billions of gallons of contaminated "formation water" from the Lago Agrio oil field into the local water supply causing environmental and health problems in the area."*

Ecuador had argued that Chevron was merely using this first arbitration to discredit Ecuadorian courts ahead of future arbitration if the Lago Agrio lawsuit in Ecuador did not go its way. Chevron for its part argued that after 2004 the Ecuadorian courts ceased to be independent in the wake of several political purges of Ecuador's Constitutional, Electoral and Supreme Courts.

Meanwhile the lawsuit in Ecuador continues. Chevron has argued that Petroecuador and the Ecuadorian government are responsible for cleaning any environmental damage in Lago Agrio because Texaco and its subsidiary TexPet were released from any liability shortly after they ceased operations in the region in 1992. During the 1970s and 1980s Texaco and its subsidiary were minority members of the consortium that explored for and produced oil in Lago Agrio under contracts with Ecuador and state-owned oil company, Petroecuador.

ITN spoke to Steven Donziger, an American lawyer representing the plaintiffs in the Lago Argio dispute who said that the agreements releasing Texaco from liability do not apply to private claims such as those being pursued by his clients.

Mr. Donziger also argues that these releases were obtained fraudulently by Texaco, accusing the company of lying to the government about its cleanup efforts which he says consisted of running dirt over a small number of waste pits without cleaning them of toxins. Though a minority partner in the project, Texaco was the exclusive operator of the oil fields and therefore responsible for 100% of the environmental damage, says Mr. Donziger.

Kent Robertson, media relations advisor at Chevron, says that private plaintiffs had no legal grounds to bring this sort of a claim for damages to public lands prior to a 1999 law that is now being applied retroactively and in direct contradiction to Ecuador's constitution that forbids the retroactive application of law.

He disputes Mr. Donziger's allegations that Texaco obtained releases through fraud. "At the time of Texaco Petroleum's remediation, sampling and analysis was performed by the government at every site to determine if the clean-up complied with Ecuador's requirements," says Mr. Robertson. "Moreover, two of Ecuador's Prosecutor Generals have commissioned subsequent analysis of remediated sites and both concluded that the remediation work was effective and complied with the applicable standards," he adds.

He also notes that since Texaco left Lago Agrio, Petroecuador has run the oil field in an "environmentally-deplorable fashion" causing numerous

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## ECUADORIANS BATTLE CHEVRON...

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spills in the area for which Chevron is not responsible.

In September of 2009, with the lawsuit not going well for it in Ecuador, Chevron launched a second arbitration against Ecuador.

In its September notice of arbitration the company accuses Ecuador of not respecting the agreements it signed releasing Texaco from liability in violation of Article II(3)(c) of the BIT. Chevron also accuses Ecuador of interfering on behalf of the plaintiffs in the lawsuit in violation of the fair and equitable treatment provisions of the BIT. It asks the arbitral panel to declare that Ecuador is liable “for any judgement that may be issued in the Lago Agrio Litigation.”

“Because Ecuador’s judicial system is incapable of functioning independently of political influence, Chevron has no choice but to seek relief under the treaty between the United States and Ecuador,” said Hewitt Pate, Chevron’s vice president and general counsel in a company press release.

This arbitration is taking place at the Court of Arbitration in The Hague under the Rules of the United Nations Commission on International Trade Law.

In response to this second arbitration, Ecuador and the Ecaudorian plaintiffs filed separate suits in December and January, respectively, at the U.S. District Court for the Southern District of New York. Both sets of plaintiffs allege that by filing this latest arbitration Chevron violated a promise made to that court in the previous lawsuit that it would respect any decision of Ecaudorian courts in the dispute.

Mr. Robertson argues that Chevron was not a party to the *Aguinda v. Texaco* lawsuit and that in any event Texaco made no promises it had to

abide by a ruling from Ecuador. Chevron has since filed a motion asking the court to dismiss the lawsuits, arguing that U.S. courts are not authorized to hear requests to bar parties from pursuing arbitrations under international investment treaties.

Mr. Donziger though argues that his clients are not asking the court to intervene in the arbitration, but instead to hold the company to the promise it made to that court that it would abide by a ruling in Ecuador.

A hearing is scheduled March 10 in New York, where all three parties will present preliminary oral arguments.

A new development in the dispute arose on February 9, when Chevron asked the Lago Agrio court hearing the lawsuit to dismiss court-appointed expert Richard Cabrera who had recommended in a report that the court award US\$ 27 billion against the company.

In particular, the company claims Mr. Cabrera hid the fact that he is “the co-founder, general manager, majority stockholder, and legal representative of an oilfield remediation company, *Compañía Ambiental Minera-Petrolera S.A.*” which would stand to gain from a decision against the company.

The plaintiffs argue that Ecuador court rules prohibit Mr. Cabrera and other experts in the case from taking part in any clean-up should one result, and that Cabrera’s involvement in remediation in Ecuador is precisely why he was qualified to issue the report he did.

“Our opinion is that it is not a conflict of interest, and that this is just part of Chevron’s media strategy to discredit the report. In fact the company filed 29 motions in the last

2 years seeking to disqualify Cabrera, and none have been found to have a legal basis,” says Mr. Donziger

“Mr. Cabrera’s conflict of interest is clear and he knowingly and repeatedly concealed his remediation interests from the court,” counters Mr. Robertson.

Sources:

Decision in *Aguinda v. Texaco Inc.* available at: <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=2nd&navby=case&no=017756>

Chevron notice of arbitration of filed September 23, 2009: <http://www.chevron.com/documents/pdf/EcuadorBITEn.pdf>

Chevron company press releases: <http://www.chevron.com/news/press/release/?id=2009-09-23>; <http://www.chevron.com/news/press/release/?id=2010-02-09>

“Chevron, Ecuador Plaintiffs Spar Over Arbitration In Court,” By Mercedes Alvaro, *Dow Jones Business News*, February 2, 2010.

Previous ITN Reporting:

“Chevron launches investment-treaty claim against Ecuador,” By Damon Vis-Dunbar, *Investment Treaty News*, 2 October 2009, available here: <http://www.investmenttreatynews.org/cms/news/archive/2009/10/01/chevron-claims-denial-of-justice-in-investment-treaty-claim-against-ecuador.aspx>

“Chevron warns Ecuador on BIT claim as contract and environmental disputes persist”, By Damon Vis-Dunbar, *Investment Treaty News*, 26 July 2006, available here: [http://www.iisd.org/pdf/2006/itn\\_july26\\_2006.pdf](http://www.iisd.org/pdf/2006/itn_july26_2006.pdf)

## NEWS: TRIBUNALS HAVE BEEN CONSTITUTED IN ICSID CASES INVOLVING EGYPT, CAMBODIA AND ARGENTINA

By Elizabeth Whitsitt

In the past two months, arbitral tribunals have been convened in a few ICSID arbitrations.

Most recently, a tribunal was constituted in a dispute initiated by an American investor against the Republic of Egypt in relation to the alleged expropriation of its investment in the Arab Republic's hotel and tourism industry.

In the H&H Enterprises Investments, Inc. v. Egypt matter, under the US - Egypt BIT (1992), the claimant selected Veijo Heiskanen, and the respondent nominated Hamid G. Gharavi. Spanish lawyer and arbitrator, Bernardo M. Cremades will serve as President.\*

Additionally, in an ICSID case commenced by Spanish investor Grupo Marsans over Argentina's alleged expropriation of the country's largest airline, Aerolineas Argentinas, the claimants have nominated Henri C. Álvarez and the respondent has chosen Kamal Hossain. Thomas Buergenthal has been selected as President of the Tribunal.\*\*

Finally, in a claim involving Cambodia's electricity generation and distribution sector, the claimant has appointed John Beechey, and the respondent has selected British lawyer, Toby Landau. UK lawyer and arbitrator Neil Kaplan will serve as President of the tribunal. \*\*\*

\* Bernardo M. Cremades is a partner at the Spanish law firm B. Cremades y Asociados and Catedrático of Universidad de Madrid. Mr. Cremades has acted as counsel, party-appointed arbitrator and president of arbitral tribunals in a number of disputes. Currently, he is a panel member in a variety of ICSID cases, including Fraport AG Frankfurt Airport v. Philippines, Gustav F W Hamester v. Ghana, Marion Unglaube v. Costa Rica, Reinhard Hans Unglaube v. Costa Rica, Quadrant Pacific v. Costa Rica, and Inmaris Perestroika v.

Ukraine. Mr. Cremades has also presided over tribunals in many disputes, including the consolidation tribunal in Corn Products International. v. Mexico, Liberian Eastern Timber Corporation v. Liberia, Lanco v. Argentina, Waste Management v. Mexico, Société d'Exploitation des Mines d'Or de Sadiola S.A. v. Mali, and Archer Daniels Midland Company v. Mexico.

Veijo Heiskanen is a partner with Swiss law firm, Lalive. He specializes in international arbitration, including investment arbitration, and public international law. He has acted as counsel and arbitrator in numerous international arbitration proceedings. It appears that this is Mr. Heiskanen's first ICSID tribunal appointment.

Hamid G. Gharavi is founding partner of the firm Derains & Gharavi. He has been appointed to the LCIA Court, the Commission on Arbitration of the ICC and the Panel of ICSID Arbitrators. In addition to H&H Enterprises v. Egypt, Mr. Gharavi is an ICSID arbitrator in Shell Nigeria Ultra Deep Limited v. Nigeria.

\*\* Judge Buergenthal is the American judge serving on the International Court of Justice. In addition, he has been a panelist in numerous ICSID arbitrations, including Vivendi v. Argentina, Lucchetti v. Peru, and Maffezini v. Spain. Judge Buergenthal also served on the annulment committee in Gruslin v. Malaysia and is currently presiding in the ICSID dispute between Chevron and Bangladesh.

Mr. Alvarez is a Partner with the law firm of Fasken Martineau. He also sits as an arbitrator in ongoing ICSID disputes against Argentina and Turkey (i.e. Total S.A. v. Argentina and Libananco Holdings v. Turkey). Mr. Alvarez has also sat on arbitral panels in Compagnie Minière Internationale v. Peru, Aguas del Tunari v. Bolivia, Camuzzi v. Argentina, Compañía General de Electricidad.

v. Argentina, and Noble Energy v. Ecuador. Mr. Alvarez was also President of the ICSID tribunal in Motorola Credit Corporation v. Turkey.

Mr. Hossain, is a Bangladeshi lawyer and arbitrator, who also sits as arbitrator in the pending ICSID cases, Caratube v. Kazakhstan and Impregilo (II) v. Argentina. Along with Judge Buergenthal, Mr. Hossain sat on the Gruslin v. Malaysia annulment committee. Mr. Hossain also sat as arbitrator in Vacuum Salt Products v. Ghana.

\*\*\* Neil Kaplan has recently been appointed to fill a vacancy in Perenco v. Ecuador (see "Perenco-nominated arbitrator disqualified for interview comments in ICSID dispute with Ecuador," By Fernando Cabrera Diaz, Investment Treaty News, 14 February 2010, at: <http://www.investmenttreatynews.org/cms/news/archive/2010/02/10/perenco-nominated-arbitrator-disqualified-for-interview-comments-in-icsid-dispute-with-ecuador.aspx>. Mr. Kaplan was also President in the ADC Affiliate Limited v. Hungary arbitration.

Toby Landau is a UK barrister who is currently serving as an arbitrator in GEA v. Ukraine. Mr. Landau has also been a panelist in two other ICSID arbitrations: *Impregilo v. Pakistan* and *Bewater v. Tanzania*.

John Beechey is a UK national and a Partner at the law firm of Clifford Chance. Mr. Beechey has served as counsel and arbitrator in numerous ICC cases. Previously he sat as an ICSID panelist in the Ares International and MetalGeo v. Georgia arbitration.

For previous related ITN reporting see:

"ICSID registers claim by Spanish investor against Argentina over airline dispute," By Fernando Cabrera Diaz,

## NEWS: CANADIAN MINING FIRM ACCUSED OF LINKS TO MURDER OF PROTESTER, HAS CHIAPAS MINE SHUT DOWN

By Fernando Cabrera Diaz

Calgary-based mining firm Blackfire Exploration has reportedly threatened Mexican officials in Chiapas with NAFTA Chapter 11 arbitration in response to the closure of its barite mine in the southern Mexican state of Chiapas. The mine's closure came on the heels of intense local protests against the mine following the murder of a local activist who led opposition to the mine.

On November 27, 2009 Mariano Abarca, leader of the Mexican Network of those Affected by Mining (REMA by its initials in Spanish) was assassinated in front of his home. Mr. Abarca led a local movement against Blackfire's barite mine near the town of Chicomuselo Chiapas. Locals accuse the mine of contaminating area farms and using up water resources.

According to the Globe and Mail three men have been arrested by Mexican police in connection with the slaying, one a current Blackfire employee and two others who worked for the company in the past. Company President Brent Willis has denied the company had any connection to the killing and has repeatedly stated that the Chiapas mine is being run in an environmentally responsible way that meets Canadian standards.

Less than two weeks after Mr. Abarca's murder and amidst growing protests, on December 7th state environmental authorities in Chiapas ordered the temporary closure of the mine. Chiapas officials denied the murder played a role in their decision and instead cited pollution and toxic emissions as the reason.

According to reports in Mexican Daily Milenio, Blackfire has threatened to launch NAFTA Chapter 11 arbitration against Mexico seeking almost US\$ 800 million as compensation for the illegal closing of its mine in Chiapas. Citing an unnamed Blackfire spokesperson

the paper says the company is still willing to negotiate with the Chiapas government over the re-opening of the mine or appropriate compensation if this is not possible.

ITN contacted Blackfire who refused to answer questions related to the dispute. However, the company did provide information contained in previous press releases including the following statement: "It is a bad rumour that we are taking legal action against the government. Rather we are looking at every option possible to resolve our various issues and to get back to work as a mining venture in Mexico."

The Blackfire controversy is providing more ammunition to proponents of Bill-C300 in Canada introduced last February by Canadian Member of Parliament John Mackay. Also known as the Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act, the bill would hold Canadian companies who receive support from the Canadian government responsible in Canada for human rights and environmental abuses in developing countries.

In a bizarre twist to the story, The Globe and Mail obtained legal documents of a complaint against the Congress of Chiapas in June 2009 alleging that the company was being extorted by Chicomuselo mayor Julio Cesar Velazquez Calderon.

According to the Globe and Mail, in its complaint Blackfire says that it paid the mayor a total of over US\$ 17,000 in monthly instalments to prevent members of a co-operative farm near the mine from "taking up arms" against the company and that it stopped paying the bribes when the mayor's demands escalated to include a sexual evening with Mexican nude model Niurka Marcos.

In a previously released statement provided to ITN Blackfire says that in May 2009 it "filed a formal claim to the congress of the State of Chiapas seeking their assistance to determine if a donation of funds to the Chicomeuselo Annual Fair had been inappropriately diverted from their intended purpose."

Meanwhile, a coalition of Canadian NGOs and labour rights groups including Common Frontiers-Canada, MiningWatch Canada, the Council of Canadians and United Steelworkers, have called on the Royal Canadian Mounted Police to investigate the company's alleged corruption of Mexican officials and intimidation of protesters citing the Canadian *Corruption of Foreign Public Officials Act*.

Sources:

"Empresa canadiense, inconforme con el cierre de mina de titanio, Demandarán al gobierno de Chiapas por 800 mdd," Milenio Online, February 10, 2010: <http://impreso.milenio.com/node/8716870>

"RCMP asked to investigate Canadian mining company," Vancouver Sun, December 19, 2009

"The mayor, the model and the mining company; Canadian firm Blackfire unearths more controversy by alleging politician sought cash bribe and 'sexual evening,'" By Andy Hoffman, The Globe and Mail, December 12, 2009.

"Citing environment, Mexican state shuts down Canadian-run mine after slaying of activist," By Manuel de la Cruz, Canadian Press, December 9, 2009.

Text of Bill C-300: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3658424&Language=e&Mode=1&File=27#1>

## NEWS: HEARINGS TAKE PLACE IN DISPUTE BETWEEN ELECTRABEL AND HUNGARY DESPITE SNOWY WEATHER

By Elizabeth Whitsitt

Despite snow storm interruptions a tribunal, composed of Mr. V.V. Vedeer, Ms. Gabrielle Kaufmann-Kohler, and Ms. Brigitte Stern, heard the merits of the dispute between Belgium-based energy firm Electrabel SA and Hungary last month.

Along with AES Summit Generation Limited v. Republic of Hungary, the Electrabel SA v. Republic of Hungary arbitration is one of two Energy Charter Treaty (ECT) disputes, arising from Hungary's efforts to restructure its electric power sector in the wake of its accession to the European Union (EU).

With claims totaling in excess of US\$ 700 million, both arbitrations address the Hungarian government's efforts to minimize the anti-competitive effects of long-term power purchase agreements entered into before Hungary's accession to the EU on May 1, 2004.

While the parties written submissions are not publicly available, reports indicate that Hungary is defending itself in part on the ground that it was obliged to make changes to those long-term contracts. Apparently, the European Commission determined that those agreements were illegal under EU law because they unnecessarily

impeded competition. Specifically, the Commission found that the power purchase agreements provided state aid to power generators and prevented new entrants into Hungary's energy sector.

*"With claims totaling in excess of US\$ 700 million, both arbitrations address the Hungarian government's efforts to minimize the anti-competitive effects of long-term power purchase agreements..."*

Interestingly, in both cases the ECT tribunals have permitted participation by the European Commission, a non-participating party in the dispute.

While the Commission's intervener submissions are not publicly available, it is widely known that the Commission intervened to defend Hungary's actions as being required by EU Community law. Apparently the Commission also sought to challenge the jurisdiction of the tribunal, on grounds that portions of the dispute, and the underlying

contracts from which the dispute arose, were subject to EU law, and thus subject to Commission's jurisdiction.

Sources: The European and Middle Eastern Arbitration Review 2010 (Global Arbitration Review)

"European Commission to intervene in ICSID dispute," 15 December 2008 (Global Arbitration Review)

"ICSID tribunal will permit European Commission to file legal brief in Energy Charter Treaty arbitration," Investment Arbitration Reporter, 11 December 2008.

"European Commission moves to intervene in another ICSID arbitration," Investment Arbitration Reporter, 11 May 2009.

Previous ITN Reporting on Non-Disputing Party Procedure:

"Innovative Steps are Introduced Into Non-Disputing Party ICSID Procedure," By Elizabeth Whitsitt, Investment Treaty News, 3 November 2009, available here:

<http://www.investmenttreatynews.org/cms/news/archive/2009/11/01/innovative-steps-are-introduced-into-non-disputing-party-icsid-procedure.aspx>

### A MERITS HEARING TAKES PLACE...

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available here: <http://www.state.gov/documents/organization/133832.pdf>

Letter from Claimants requesting to Reschedule February 2010 Merits Hearing, available here: <http://www.state.gov/documents/organization/133831.pdf>

Previous ITN Reporting: "Parties file memorials in long-running NAFTA dispute over U.S. tobacco settlements; Canada intervenes with opinion on customary international law related to

aboriginal rights," By Fernando Cabrera and Damon Vis-Dunbar, Investment Treaty News, 29 January 2009, available here: <http://www.investmenttreatynews.org/cms/news/archive/2009/01/29/parties-file-memorials-in-long-running-nafta-dispute-over-u-s-tobacco-settlements-canada-intervenes-with-opinion-on-customary-international-law-related-to-aboriginal-rights.aspx>

"Despite time-bar ruling in NAFTA arbitration, Grand River claim will proceed in part", By Fiona Marshall,

Investment Treaty News, 10 August 2006, available here: [http://www.iisd.org/pdf/2006/itn\\_aug10\\_2006.pdf](http://www.iisd.org/pdf/2006/itn_aug10_2006.pdf)

For a description of the U.S. objections to one of the arbitrators see: "US persists with challenge to arbitrator in Grand River Enterprises NAFTA case; arbitrator's human rights work assisting Native Americans in spotlight", By Luke Eric Peterson, 15 November 2007, available here: [http://www.iisd.org/pdf/2007/itn\\_nov15\\_2007.pdf](http://www.iisd.org/pdf/2007/itn_nov15_2007.pdf)

## IN BRIEF: PROCEEDINGS ARE SUSPENDED IN DISPUTE BETWEEN FRENCH OIL COMPANY AND ECUADOR

Thomas Bingham, President of the ICSID tribunal in *Perenco Ecuador Limited v. Ecuador* has resigned.

At the center of the dispute between Perenco and Ecuador is a windfall tax enacted in 2006 (Law 42) by the South American Republic. According to Ecuador, Perenco owes some US\$327 million under Law 42. Perenco, on the other hand, contends that the law is in violation of its contract with Ecuador and the France-Ecuador BIT.

Mr. Bingham's resignation came on February 17, 2010, only month after

UK lawyer and arbitrator Neil Kaplan was chosen by Perenco to replace Judge Charles Brower. Following the resignation of Thomas Bingham, proceedings in the case are suspended until the vacancy on the ICSID panel has been filled.

Previous ITN Reporting:

"Perenco-nominated arbitrator disqualified for interview comments in ICSID dispute with Ecuador," By Fernando Cabrera Diaz, Investment Treaty News, 14 February 2010, available here: <http://www.investmenttreatynews.org/cms/news/archive/2010/02/10/perenco-nominated-arbitrator-disqualified-for-interview-comments-in-icsid-dispute-with-ecuador.aspx>

<http://www.investmenttreatynews.org/cms/news/archive/2009/06/05/ecuador-defies-provisional-measures-in-dispute-with-french-oil-company.aspx>

"Ecuador defies provisional measures in dispute with French oil company," By Damon Vis-Dunbar, Investment Treaty News, 8 June 2009, is available here: <http://www.investmenttreatynews.org/cms/news/archive/2009/06/05/ecuador-defies-provisional-measures-in-dispute-with-french-oil-company.aspx>

## IN MEMORIAM: SIR IAN BROWNLIE Q.C. (1932 – 2010)

*By Elizabeth Whitsitt*

A prominent figure in the field of public international law passed unexpectedly on January 3, 2010 at age 77. According to reports, Professor Brownlie died in a car accident while vacationing with his family in Egypt.

The untimely death of Sir Ian Brownlie some two months ago has undoubtedly left a void in the international legal community. Indeed, news of his tragic passing has been met with great sadness.

With a career spanning more than 40 years, Professor Brownlie was elected three times to the International Law Commission. The esteemed barrister was involved in some of the most significant cases at the International Court of Justice, the European Court of Human Rights and the European Court of Justice. He was also a member of the Institut de droit international, and was knighted for his service in the area of public international law last year.

Ian Brownlie grew up in Liverpool, where he attended Alsop high school. He read law at Hertford College,

Oxford, and was awarded a first-class degree. Subsequently, Professor Brownlie completed a doctorate at Oxford on the use of military force by states, and was called to the bar at Gray's Inn.

Professor Brownlie began his academic career at Nottingham University, in 1957, but he soon returned to Oxford as a fellow and lecturer. In 1976 he became a professor of international law at the London School of Economics. Four years later he was elected to the Chichele chair in public international law, which he held until his retirement from academia in 1999, and to a fellowship of All Souls College, Oxford (he was made a distinguished fellow in 2004).

During the course of his career Professor Brownlie also authored numerous works on a wide range of topics in international law. His first book, *International Law and the Use of Force by States* (1963) identified the United Nations Charter as a significant development for the rules governing military force. Three years later, he published *Principles of*

Public International Law, which is now in its seventh edition, and one of the most widely read discourses on the subject. Ian Brownlie's other writings cover such topics as African boundaries, the law of state responsibility, human rights and the rule of law.

A widely-recognized leader in the field of international law, Professor Brownlie was serving as a panelist in two ICSID arbitrations at the time of his passing.\* Previously, Ian Brownlie had presided in two other ICSID arbitrations: *Occidental of Pakistan, Inc. v. Islamic Republic of Pakistan* and *Compagnie Minière Internationale Or S.A. v. Republic of Peru*. In both instances the parties agreed to settle their disputes resulting in a discontinuance of the arbitral proceedings. Professor Brownlie was also an arbitrator in *Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation*, a case that was dismissed at the jurisdictional stage of the proceedings.

Ian Brownlie is survived by his daughter Hannah and son James;

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proceedings continued. The claimants and the respondent continued to exchange documents and in the spring of 2009 both parties submitted their designation of witnesses, experts and documents for the jurisdictional phase of the proceedings. At this time, new concerns about confidentiality were raised by the claimants when Argentina submitted documents relating to its examination of witnesses and experts designated by the claimants for the jurisdictional hearing that contained expert opinions and transcripts from other arbitral proceedings.

Specifically, the claimants argued that the exhibits sought to be relied on by the respondent ignored confidentiality protections in the other arbitral proceedings. The claimants also contended that Argentina's submission of those exhibits violated the principle of equality of the parties because the claimants did not have access to those proceedings, a reality that could lead Argentina to use such evidence selectively and out of context.

In response, Argentina argued that: (i) it had not submitted any document filed in sealed proceedings, (ii) there was no general rule of confidentiality governing ICSID arbitrations, and (iii) it had never been deprived of using such documents in any ICSID proceeding.

With the parties' continued expression of divergent views on issues of confidentiality in investment arbitration, the tribunal announced in the fall of 2009 that it would make a decision on the matter.

In its ruling, the tribunal started by noting that it had powers to determine the conduct of proceedings brought before it by virtue of Rule 19 of the ICSID Arbitration Rules. As a result, the tribunal reasoned that it had the power to make orders concerning confidentiality.

Having confirmed its jurisdiction, the tribunal went on to discuss the issue of confidentiality in ICSID arbitrations generally. In that regard, the tribunal noted that while various provisions of the ICSID Convention, Administrative and Financial Regulations and Arbitration Rules deal with specific confidentiality duties of tribunals and ICSID, they do not expressly address the actions of parties themselves. Given such silence in ICSID's legal framework, the tribunal determined that:

...unless there [is] an agreement of the [p]arties on the issue of confidentiality/transparency, the Tribunal shall decide on the matter [questions of confidentiality and transparency] on a case by case basis and, instead of tending towards imposing a general rule in favour or against confidentiality, try to achieve a solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents.

Having refrained from articulating a general principle of law concerning confidentiality questions in ICSID arbitrations, the tribunal went on to categorize the competing claims surrounding confidentiality in the following manner: (a) confidentiality as to the record of the proceedings; (b) confidentiality as to the protection of the claimants' information; and (c) the admissibility, in the present proceedings, of certain confidential information arising in another arbitration proceeding.

(a) Confidentiality as to the record of the proceeding

With respect to this issue the tribunal noted that in their latest request for a confidentiality order, the claimants had asked that the entire proceedings be covered by a general

duty of confidentiality. Specifically, the claimants attempted to limit any disclosure about the case by the parties to "general updates on the status of the case." Not surprisingly, Argentina resisted the claimants' request and reiterated its position that there is no general rule of confidentiality governing ICSID arbitrations.

For its part, the tribunal sought to chart a middle course approach different from the polar opposite positions adopted by the claimants and the respondent. In the Tribunal's view, it was important to take into consideration, the nature of the information at stake because different considerations of confidentiality and transparency may apply, resulting in a differentiated treatment of that information. The tribunal also noted that the stage of the proceedings was another important factor when considering confidentiality issues. In this regard, the tribunal noted that greater caution should be taken while arbitration proceedings are on-going – especially given considerations such as ensuring the orderly conduct of the arbitration, respect for the parties' equality of rights and avoiding the exacerbation of the dispute.

With the above considerations in mind, the tribunal went on to both allow and restrict disclosure of information related to various aspects of the arbitration. For example, with respect to a general discussion of the case, the tribunal determined that the parties could engage in such discussions publicly, provided that any such public discussion is restricted to what is necessary, and is not used to frustrate resolution of the dispute.\*\*

(b) Confidentiality as to the protection of the claimants' information

Going back to the events that kick-started the confidentiality dispute between the parties (i.e. Argentina's request for certain electronic

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information about the claimants), the tribunal noted that it was important to pay heed to the applicable legislation (e.g. Italian Code and EC provisions) protecting the claimants' privacy. As such, while it was willing to grant the respondent complete access to the requested information, it imposed limitations on its use. Specifically, the tribunal determined that: (i) disclosure of the requested information be for the sole purpose of conducting the arbitration, (ii) only persons connected with the arbitration be allowed access to the information, (iii) alterations to the information be disallowed, and (iv) disclosure to unauthorized third parties occur only with the claimants' consent.

(c) Confidentiality of documents used in a different arbitration proceeding

Finally, as to the attempt by Argentina to introduce certain exhibits (i.e. expert reports or transcripts of examinations of those experts) from other arbitral proceedings, the tribunal observed that the exhibits were issued in arbitrations different from the present case. In particular the tribunal noted that the arbitrations involved different claimants, circumstances, BITs and alleged substantive violations of those BITs. As a result, the tribunal concluded that exhibits from those proceedings could not easily be "transposed one to one to the present case" and refused to admit those exhibits as evidence in the present proceedings.

\* Ugo Ukpabi obtained his PhD from (Osgoode Hall) York University, Toronto. He is a member of the Bars

of Nigeria and the Province of Alberta, Canada. Ugo Ukpabi is a sole legal practitioner based in Calgary, Alberta.

\*\* The tribunal also made determinations regarding the parties' disclosure of : awards, decisions, orders and directions of the tribunal (other than awards), the minutes and records of the hearing, pleadings, written memorials, other written submissions, documents and exhibits related to pleadings, written memorials or other written submissions, and correspondence between the parties and/or the tribunal exchanged in respect of the arbitration.

Sources:

Procedural Order No. 3 (Confidentiality Order) in Re Giovanna is available here: <http://ita.law.uvic.ca/documents/BeccaraConfidentialityOrder.pdf>

## TRIBUNALS HAVE BEEN CONSTITUTED...

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Investment Treaty News, 20 February 2009, available here: <http://www.investmenttreatynews.org/cms/news/archive/2009/02/23/icsid-registers-claim-by-spanish-investor-against-argentina-over-airline-dispute.aspx>

"Argentina moves to expropriate airline under threat of US\$1 Billion arbitration claim," By Fernando Cabrera Diaz, Investment Treaty News, 30 November 2008, available here: <http://www.investmenttreatynews.org/cms/news/>

[archive/2008/11/30/argentina-moves-to-expropriate-airline-under-threat-of-us-1-billion-arbitration-claim.aspx](http://www.investmenttreatynews.org/cms/news/archive/2008/11/30/argentina-moves-to-expropriate-airline-under-threat-of-us-1-billion-arbitration-claim.aspx)

## IN MEMORIAM: SIR IAN BROWNLIE...

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his other daughter, Rebecca, was killed in the car accident, in which his wife Christine Appleby was also injured.

\* Following this tragedy, Professor Georges ABI-SAAB (Egyptian) has been

appointed to serve as an arbitrator in Conocophillips' ongoing dispute with Venezuela (ICSID Case No. ARB/07/30). An arbitrator has yet to be appointed in a dispute involving Urbaser S.A. and Consorcio de Aguas

Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa and Argentina over water concession services (ICSID Case No. ARB/07/26).

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