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NEWS: TRIBUNAL FINDS ECUADOR IN BREACH OF BIT FOR ITS JUDICIARY'S SLOW HANDLING OF TEXACO LAWSUITS

By Fernando Cabrera Diaz

An international tribunal has found Ecuador in breach of the Ecuador-United States BIT for the failure of its courts to reach a timely resolution in seven breach-of-contract lawsuits filed by Texaco Petroleum in the early 90s. The tribunal awarded Chevron Corporation, who bought Texaco in 2001, almost US$700 million in compensation subject to adjustments for taxes and pre-award interest.

As reported previously by ITN, Chevron initiated the arbitration against Ecuador in May of 2006, alleging that the Ecuadorian judicial system's failure to resolve the Texaco lawsuits in a reasonable time amounted to a denial of justice under customary international law. Additionally, Chevron argues that Ecuador has violated several obligations under the Ecuador-U.S. BIT including its obligations to provide U.S. investors with fair and equitable treatment, and an effective means for them to assert claims and enforce their rights.

From the outset Ecuador raised several defenses, most notable of which was that Chevron should be barred from pursuing their claim due to abuse of process.

According to Ecuador, Chevron's attack on its judiciary contradicted previous statements made by Texaco to a U.S. District Court in the *Aguinda v. Texaco* case. Ecuador also accused Chevron of inappropriately using the arbitration as a means to discredit its courts ahead of future arbitration Chevron was planning (and has since filed) in relation to the Lago Agrio environmental damages lawsuit being litigated in Ecuador.

> *"According to the tribunal the delays by Ecuadorean courts in deciding the seven Texaco contract claims, which by the time arbitration began in 2006 had all been pending for at least 13 years, exceeded the allowable threshold under Article II(7)."*

The Aguinda case was a 1993 lawsuit launched by Ecuadorian citizens against Texaco in U.S. District Court over environmental damage in the Lago Agrio region of Ecuador.* Texaco convinced that court that Ecuadorean courts were fair and competent and were the proper venue to hear that dispute. After Texaco prevailed a similar lawsuit was then initiated in Ecuador and is now in its final stages (Lago Agrio litigation).

In its March 30 decision the tribunal ultimately sided with Chevron finding that Ecuador violated Article II(7) of the BIT by not providing the company an effective means of asserting claims and enforcing its rights.

In reaching this conclusion the tribunal found that Article II(7) provided a "distinct and potentially less-demanding test" than the "high

Continued on page 9

NEWS: TRIBUNAL HEARS ADDITIONAL CHALLENGES TO ITS JURISDICTION IN *RAILROAD DEVELOPMENT CORPORATION V. REPUBLIC OF GUATEMALA*

By Elizabeth Whitsitt

The hearing on preliminary objections to jurisdiction in the *Railroad Development Corporation (RDC) v. Republic of Guatemala* arbitration took place from Monday, March 1, 2010 through Wednesday, March 3, 2010.

Consistent with the transparency provisions of CAFTA-DR, the hearing conducted in early March was open to the public, except with respect to issues involving confidential matters. The hearing was broadcast live in a conference room of the World Bank.

In 1997 RDC, through its Guatemalan subsidiary Compania Desarrolladora Ferroviaria, S.A. (FVG), won a public bid and signed a contract with the Guatemalan state-owned railway system, Ferrocarriles de Guatemala (FEGUA). Under the terms of that contract, RDC agreed to resurrect a transit system which required significant refurbishment.

While RDC was somewhat successful in its restoration of Guatemala's railway system, it began commercial arbitral proceedings in Guatemala in June of 2005. Specifically, RDC asserted that Guatemala had failed to clear squatters from railway properties thus violating provisions of the contract between FVG and FEGUA. A little more than a year later, the Guatemalan government adopted the so-called Lesivo resolution, which declared the contract with FVG injurious to the state.

In July 2007, RDC filed a claim with ICSID claiming breaches of CAFTA-DR and some US $65 million in damages. Specifically, RDC contends that after the adoption of the Lesivo resolution, FEGUA broke its agreement with FVG when it missed trust-fund payments and failed to remove squatters from the railway tracks.

With local and international arbitration proceedings between the parties pending, Guatemala unsuccessfully attempted to challenge the CAFTA-DR tribunal's jurisdiction in the spring of 2008. At the heart of Guatemala's jurisdictional challenge was the fact that the local arbitration proceedings had not been discontinued. Guatemala argued that it had only consented to arbitrate CAFTA-DR disputes that were not being decided in other forums.

In rejecting Guatemala's challenge, the CAFTA-DR tribunal ultimately determined that there was no overlap between the measures underlying the domestic and international arbitration claims. As a result, the tribunal ordered that the proceedings move to a consideration of the merits of RDC's claims.

In the summer of 2009, approximately one month after RDC filed its written pleadings on the merits of the dispute, Guatemala raised additional jurisdictional objections and asked that its concerns be addressed by the tribunal before continuing with the merits phase of the proceedings.

In a procedural order dated August 24, 2009, the tribunal consented to Guatemala's request. Proceedings on the merits were suspended pending a decision on Guatemala's additional jurisdictional objections.

This case is one of four known arbitral proceedings initiated under the Central American – Dominican Republic – United States Free Trade Agreement (CAFTA-DR) in the summer of 2007.*

* Aside from *Railroad Development Corporation v. Guatemala*, other CAFTA-DR arbitrations include: *Pacific Rim Cayman v. El Salvador*, Commerce Group Corporation and *San Sebastian Gold Mines, Inc. v. El Salvador*, and *TWC Group .v. Dominican Republic*

Previous Related ITN Reporting:

"Tribunal refuses to clarify decision on jurisdiction in *Railroad Development Corporation v. Republic of Guatemala*," By Damon Vis-Dunbar, Investment Treaty News, 20 January 2009, available here: http://www.investmenttreatynews.org/cms/news/archive/2009/01/20/tribunal-refuses-to-clarify-decision-on-jurisdiction-in-railroad-development-corporation-v-republic-of-guatemala.aspx

"Guatemala's objection to jurisdiction dismissed in DR-CAFTA arbitration," By Damon Vis-Dunbar, Investment Treaty News, 26 November, 2008, available here: http://www.investmenttreatynews.org/cms/news/archive/2008/11/26/guatemala-s-objection-to-jurisdiction-dismissed-in-cafta-arbitration.aspx

"US railway investor's claim against Guatemala tests CAFTA transparency provisions," By Fernando Cabrera Diaz and Luke Eric Peterson, Investment Treaty News, 7 September, 2007, available here: http://www.iisd.org/pdf/2007/itn_sep7_2007.pdf

NEWS: *CEMEX V. VENEZUELA:* PROVISIONAL MEASURES ALLOWED IN CIRCUMSTANCES OF NECESSITY AND URGENCY

By Elizabeth Whitsitt

An ICSID tribunal has refused a request for provisional measures by the world's third largest cement-producer. In its decision dated March 3, 2010, the tribunal confirms that provisional measures may only be granted in circumstances of "… necessity and urgency to avoid an irreparable harm."

Arbitral proceedings between Cemex and Venezuela began in October 2008 - months after Hugo Chavez, President of the Bolivarian Republic, announced the nationalization of the country's cement industry. In the context of a state-wide housing shortage and concerns about unaffordable housing, President Chavez's nationalization of Venezuela's cement industry was reportedly done to increase the availability and affordability of construction supplies to Venezuela's domestic market.*

Since that time, Dutch-incorporated Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. (Cemex) has asserted that it has been deprived of the ownership rights over their investment without fair and effective compensation and appropriate procedures for expropriation.**

Cemex filed a request for provisional measures with the tribunal on September 1, 2009. Specifically, Cemex sought to restrain Venezuela from attempting to seize three cement carriers which it had sold to the Mexican firm Sunbulk Shipping, N.V. In support of its application, Cemex argued that Venezuela's efforts to seize the vessels would "severely aggravate" the dispute and increase Cemex's damages as it would have to refund Sunbulk the money paid for the carriers.

In response, Venezuela grounded its arguments on the language of the ICSID Convention and its Arbitration Rules. Among other things, Venezuela asserted that the granting of provisional measures "must be based upon circumstances of necessity and urgency to avoid an irreparable harm" and "must relate to the preservation of the requesting party's rights and to the subject matter of the case before the tribunal…" According to Venezuela, Cemex ignored those legal standards, choosing instead to rely on the principle of non-aggravation as the basis for its application. In Venezuela's view, however, "'the principle of non-aggravation'…[could] not be used as a substitute for the requirements of necessity, urgency and irreparable or non-compensable harm."

Ultimately the tribunal, composed of Judge Gilbert Guillaume, Professor Georges Abi-Saab and Mr. Robert von Mehren, sided with Venezuela. In coming to this conclusion, the tribunal canvassed the jurisprudence of the International Court of Justice (ICJ) and ICSID tribunals with respect to provisional measures. In so doing, the tribunal made a number of observations. In particular, the tribunal noted that the ICJ had consistently determined that provisional measures should only be granted in circumstances where there was "…an urgent necessity to prevent irreparable prejudice…" to the rights which were the subject of the dispute.

Similarly, the tribunal noted that when determining whether to grant provisional measures ICSID tribunals tended to follow this same standard even where different formulations of the same criteria were applied. Thus, the tribunal considered that the relevant ICSID cases made a distinction between situations where: (i) the alleged prejudice could be compensated by awarding damages and (ii) the alleged prejudice could not be fully compensated (i.e. cases where there is a serious risk of destruction of a going concern that constitutes and investment).

In light of this analysis the tribunal saw no reason to stray from the standard consistently applied by the ICJ and past ICSID tribunals. Specifically the tribunal found that should Venezuela seize the cement carriers, Cemex would suffer a financial loss that could be compensated by a damages award. As a result, the tribunal opined that Cemex's alleged harm was not "irreparable" and therefore did not meet the requirements of "urgency" and "necessity" needed to grant the requested provisional measures.

Sources:

* "Chavez Plans to Nationalize Venezuela Cement Industry," By Steven Bodzin and Thomas Black, Bloomberg.com, 4 April 2008.

** Cemex Company Press Release dated 20 August 2008, available on the company's website at: http://www.cemex.com/qr/mc_pr_082008.asp

Decision on Provisional Measures in *Cemex v. Venezuela* is available here: http://ita.law.uvic.ca/documents/Cemex.pdf.

Previous ITN Reporting:

"*Cemex v. Venezuela*: challenges to ICSID arbitrators must be made "promptly"," By Elizabeth Whitsitt, Investment Treaty , 13 January 2010, available here: http://www.investmenttreatynews.org/cms/news/archive/2010/01/12/cemex-v-venezuela-challenges-to-icsid-arbitrators-must-be-made-promptly.aspx

NEWS: OIL TRANSPORT COMPANY TIDEWATER INC. INITIATES ICSID ARBITRATION AGAINST VENEZUELA OVER EXPROPRIATED ASSETS

By Fernando Cabrera Diaz

New Orleans-based Tidewater Inc. has initiated arbitration against Venezuela at ICSID over the latter's alleged take-over of 15 of the company's vessels in May and July of 2009. According to the company these and other seizures of the company's assets amount to expropriations in violation of Venezuela's bilateral investment treaty obligations and Venezuela's investment law.

Tidewater Inc. provides transportation services to petroleum companies, principally for offshore operations. In Venezuela the company was providing support to national oil company Petróleos de Venezuela, S.A. (PDVSA).

According to a February 17, 2010 regulatory filing with the U.S. Securities Exchange Commission (SEC), Tidewater claims that in May and July of 2009 PDVSA took possession and control of fifteen of the company's vessels, most of which were in support of PDVSA's operations in the Lake Maracaibo region of Venezuela.

During the same period Tidewater says PDVSA took over its operations in Lake Maracaibo and the Gulf of Paria, as well as other assets.

Before filing its claim, which it did on February 16, 2010, the company sent Venezuela a notice of dispute and requested consultations but it did not receive a response.

ITN contacted Oscar Garibaldi, of Washington DC-based Covington Burlington LLP, who represents Tidewater.

Given that there is not bilateral investment treaty between Venezuela and the U.S., Mr. Garibaldi explained that two of the claimants are protected under the Barbados-Venezuela bilateral investment treaty, while "[a]ll of the claimants invoke ICSID jurisdiction under Art. 22 of the Venezuelan Investment Law and assert claims based on Venezuelan law and customary international law."

He indicated those investors covered under the BIT accuse Venezuela of: (i) breaching the standard of fair and equitable treatment; (ii) breaching the obligation not to impair by arbitrary or discriminatory measures the operation, management, maintenance, use, enjoyment or disposal of the treaty claimants' investments; (iii) failing to accord treatment no less favorable than that accorded to nationals or companies of Venezuela or a third State; and (iv) expropriating Tidewater's the investments without observing the obligations imposed by the Treaty.

Tidewater has yet to quantify the amount of damages it seeks, but will do so at a later stage of the proceedings.

Though Venezuela has in the past made offers to provide some compensation to foreign companies for taken assets, Mr. Garibaldi says that no such offers have been made to Tidewater.

Sources:

Tidewater Inc. February 17, 2010 filing to the SEC: http://ccbn.10kwizard.com/xml/download.php?repo=tenk&ipage=6770887&format=RTF

NEWS: AD HOC COMMITTEE CONFIRMS THAT KAZAKHSTAN IS ON THE HOOK FOR US$ 125 MILLION

By Elizabeth Whitsitt

An ad hoc committee, established pursuant to the ICSID Arbitration Rules, has rejected the annulment application of the Republic of Kazakhstan. The former Soviet Republic's bid for annulment came after an ICSID tribunal ordered Kazakhstan to pay Rumeli Telekom A.S. (Rumeli) and Telsim Mobil Telekomunikasyon Hizmetleri A.S. (Telsim) US$ 125 million in damages for breaches of the Kazakhstan-Turkey BIT.

Problems between the parties began in the summer of 1998 when Rumeli and Telsim, through their 60% shareholding in Kazakh company KaR-Tel, won a bid to hold a license to operate the second mobile telephone network in Kazakhstan. Around October 1998, KaR-Tel started to negotiate with the State Committee on Investment an agreement that would grant KaR-Tel investment incentives.

Those negotiations led to the conclusion of an investment contract between KaR-Tel and the Kazakh investment committee some months later. The investment contract obliged KaR-Tel to make investments, to apply advanced technology and to provide the investment committee with regular and detailed information on the progress of its investment. In return, KaR-Tel was granted tax and other benefits, including a five-year total exemption from corporate and property tax, and reduced rates for the five years thereafter. The investment contract was to expire on July 31, 2009.

In 2001 various differences arose between the parties to the agreement, which culminated in the unilateral termination of the investment contract by the Kazakh investment committee. Challenging this maneuver, Rumeli and Telsim commenced arbitral proceedings in July of 2005.

Specifically, the claimants maintained that their agreement with the state investment committee was wrongful as they had met their obligations under

Continued on page 8

NEWS: RSM PRODUCTION CORP. FILES SECOND ARBITRATION AGAINST GRENADA, SUES FRESHFIELDS

By Fernando Cabrera Diaz

On March 16, the International Centre for Settlement of Investment Disputes (ICSID) registered a second arbitration initiated by Denver-based RSM Production Corp against Grenada over the latter's termination of the company's exclusive oil rights off the coast of the island nation. RSM has claimed that corrupt Grenadian officials bribed by a Russian company terminated the company's exclusive oil exploration rights.

A day after initiating its second arbitration against Grenada the company sued renowned international law firm Freshfields Bruckhaus Deringer LLP in U.S. Federal Court over the firm's involvement in defending Grenada during the first arbitration.

RSM lost that first arbitration when an ICSID tribunal found in March of 2009 that the company's exclusive rights had either expired or were legally terminated by Grenada.* In July of 2009 RSM initiated annulment proceedings at ICSID seeking to overturn the March 2009 decision. These proceedings are currently under way.**

According to The National Law Journal, in its Federal Court lawsuit against Freshfields RSM alleges that the firm knew or should have known that the fees it received for Grenada's defense were being paid by Global Petroleum Group, a company with corrupt ties to the government of Grenada.

Russian investors, among them a convicted felon, created Global Petroleum Group to bribe Grenadian officials in order to obtain RSM's oil exploration rights, claims the company. RSM also argues that Freshfields would have known that law firm DLA Piper had previously turned down representing Grenada after due diligence revealed the Global Petroleum Group connection.

Global Petroleum Group has since been awarded the oil exploration rights off the coast of Grenada lost by RSM.

ITN contacted Freshfields and was told by a firm spokesperson that "the claim is without foundation and we will be defending it." The spokesperson declined to comment further on the case.

ITN also contacted Kelly Pride Hebron who reportedly represents RSM in its suit against Freshfields, but did not receive a response by press time.

RSM had previously made allegations of corruption during an October 16, 2009 procedural hearing in its annulment request at ICSID. At the hearing RSM requested that the committee investigate suspicions of corruption on the part of Grenadian officials. In particular RSM claimed that Gregory Bowen, the then Attorney-General of Grenada, was bribed by Global Petroleum Group in order to terminate Grenada's contract with RSM.

Though the annulment committee ultimately rejected RSM's request as being outside its limited jurisdiction, it did confirm that Mr. Bowen had admitted under cross-examination at the original arbitration hearings that Global Petroleum provided Grenada with US$ 2.5 million for the arbitration.

It is unclear whether RSM's latest arbitration seeks to raise the same corruption allegations.

According to Grenada Today, RSM CEO Jack Grynberg previously sued Mr. Bowen and Global Petroleum Group principals Mukhail Fridman, Len Blavatnik and Lev Korchagin in New York District Court for US$ 500 million over the lost exploration rights.

*Read previous ITN reporting on RSM annulment proceedings: http://www.investmenttreatynews.org/cms/news/archive/2010/02/10/icsid-finds-that-corruption-has-no-place-in-annulment-proceedings.aspx)

**Read ITN reporting on ICSID tribunal's March 2009 decision dismissing RSM's first claim against Grenada: http://www.investmenttreatynews.org/cms/news/archive/2009/03/26/icsid-tribunal-dismisses-rsm-production-corporation-s-claim-against-grenada.aspx)

Sources:

"Freshfields Sued in International Racketeering Case," by Jordan Weissmann, The National Law Journal, March 29, 2010

"U.S. Law firm files defense for Bowen," Grenada Today, May 19, 2007: http://www.belgrafix.com/gtoday/2007news/May/May19/US-Law-firm-files-defense-for-Bowen.htm

NEWS: BOLIVIA ORDERED TO SUSPEND CRIMINAL PROCEEDINGS IN ITS ONGOING DISPUTE WITH CHILEAN CHEMICAL FIRM QUIBORAX

By Elizabeth Whitsitt

An ICSID tribunal has granted provisional measures in a dispute between co-claimants Quiborax, Non Metallic Metals (NMM) and Allan Fosk Kalún and respondent state, Bolivia. On February 26, 2010 a three-member panel ordered the central South American state to suspend criminal proceedings against several persons involved in Quiborax's Bolivian operations.

Arbitral proceedings between the parties commenced in October of 2005 with the claimants alleging that Bolivia had expropriated their property, after Bolivia rescinded their mining concession in Salar de Uyuni (southern Bolivia) in 2004. The ulexite mineral concession was being exploited through Quiborax's majority owned subsidiary, NMM.

Seeking US$ 40 million in damages, the claimants allege that Bolivia has violated its obligations under the Bolivia-Chile BIT. Bolivia contends that it rescinded the concession because the claimants withheld information from customs officials, including the volumes of the mineral ulexite it was exporting, in order to evade taxes. The claimants dispute this and instead argue that their license was rescinded due to anti-Chilean sentiments which swelled in Bolivia in 2003. Bolivia and Chile have had troubled relations since Chile blocked Bolivia's access to the Pacific in the late nineteenth century.

As previously reported by ITN, tensions between the parties have continued to escalate during the past five years, despite attempts to settle their differences. Amid rumors of a possible settlement this past fall, the claimants proceeded to file their memorial on the merits of their claim with ICSID along with a request for provisional measures on September 14, 2009.

At the heart of the claimants' application for provisional relief is their concern about criminal proceedings that have been commenced against several persons involved in Quiborax's Bolivian operations.

> *"...the tribunal noted that while Bolivia may have reasons to believe that the persons being prosecuted could have engaged in criminal conduct, the facts presented to the tribunal suggested that the initiation of those criminal proceedings was motivated by the ICSID arbitration."*

Bolivia initiated criminal proceedings after certain irregularities were found in NMM's corporate documents. Specifically, the Bolivian government discovered the existence of the minutes of an NMM shareholders' meeting dated September 11, 2001, which had not been provided to the government during a prior audit of the company's records, and which contained a different list of shareholders from that included in the minutes of a meeting allegedly held two days later. According to Bolivia, the existence of these two contradictory documents suggests that the minutes of the September 13, 2001 meeting may have been forged in order to support claimants' contention that they were shareholders of NMM at the time the arbitral dispute arose, thus allowing them to gain access to ICSID arbitration.

For their part, the claimants contend that the criminal proceedings are solely motivated by Bolivia's goals in the arbitration, one of which is to force them to give up their claims. As a result, the claimants requested provisional measures on the grounds that the criminal proceedings impaired the following rights: (1) the right to exclusivity of the ICSID proceedings; (2) the right to preservation of the status quo and non-aggravation of the dispute; and (3) the right to the procedural integrity of the arbitration proceedings.

In response, Bolivia contended that the alleged criminal proceedings did not impair any of the claimants' rights. Additionally, Bolivia argued that provisional measures could not be granted in the case because the criminal proceedings did not affect any of the claimants' rights "in the dispute" (i.e. the rights that are the subject matter of the ICSID arbitration).

In siding with the claimants, the tribunal - composed of Professor Gabrielle Kaufmann-Kohler, the honorable Marc Lalonde and Professor Brigitte Stern – first confirmed its prima facie jurisdiction to order provisional measures in the dispute. While this part of the tribunal's reasoning only spans one page of the decision, the tribunal's confirmation of jurisdiction is noteworthy given Bolivia's renunciation of the ICSID Convention in 2007. Any concerns that Bolivia might not be subject to the center's jurisdiction were easily disposed of by the tribunal, which noted that Bolivia was still a signatory to the ICSID Convention when this dispute was initiated.

Continued on page 7

BOLIVIA ORDERED TO SUSPEND CRIMINAL PROCEEDINGS...

Continued from page 6

The tribunal went on to address Bolivia's preliminary contention that the rights protected by provisional measures may only be the rights "in dispute." Citing previous ICSID decisions, the tribunal confirmed that the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the status quo and to the non-aggravation of the dispute.

Applying this principle to the facts of the case, the tribunal determined that there was "...a direct relationship between the criminal proceedings and the ICSID arbitration that [might] merit the preservation of the [c]laimants' rights in the ICSID proceeding." In coming to this conclusion, the tribunal was careful to recognize Bolivia's sovereign right to prosecute crimes committed within its territory. However the tribunal also found that, based on the evidence, the criminal proceedings were related to and perhaps motivated by the ICSID arbitration.

The tribunal proceeded to examine whether any or all of the three rights invoked by the claimants merited protection by way of provisional measures. While the tribunal rejected the claimants' assertions with respect to the first two rights, it ultimately found that provisional measures were warranted given the existence of a threat to the procedural integrity of the arbitral proceedings. Specifically, the tribunal considered that the criminal proceedings might be impairing the claimants' right to present their case, in particular with respect to their documentary evidence and witnesses. In particular, the tribunal noted that since the initiation of the criminal proceedings Bolivia had deprived the claimants of their corporate records. Additionally, the tribunal observed that the nature of the criminal proceedings were bound to negatively affect the willingness of potential witnesses to cooperate in the ICSID proceedings.

Noting that provisional measures may only be granted in circumstances of "urgency and necessity", the tribunal went on to consider the claimants' application on those grounds.

With respect to "urgency", the tribunal found that when provisional measures are intended to protect the procedural integrity of an arbitration, especially with respect to access to or the integrity of evidence, the measures are, by definition, urgent.

Similarly in assessing whether provisional measures were "necessary" in this case, the tribunal considered that "....any harm caused to the integrity of ICSID proceedings, particularly in relation to a party's access to evidence or the integrity of the evidence adduced could not be remedied by an award of damages." According to the tribunal, however, the necessity requirement obliged it to balance the harm caused to the claimants by the criminal proceedings against the harm that would be caused to Bolivia if those proceedings were stayed or terminated.

Despite assurances from Bolivia that it would cooperate with the claimants regarding access to evidence for the arbitral proceedings, the tribunal found in favour of the claimants. In so doing, the tribunal took great pains to insist that it did not question Bolivia's sovereign right to conduct criminal proceedings but noted that this case was "exceptional".

Specifically, the tribunal noted that while Bolivia may have reasons to believe that the persons being prosecuted could have engaged in criminal conduct, the facts presented to the tribunal suggested that the initiation of those criminal proceedings was motivated by the ICSID arbitration.

Accordingly, the tribunal determined that once the arbitration between the parties is finalized, Bolivia would be free to continue its criminal proceedings.

Sources:

Decision on Provisional Measures in Quiborax S.A., Non Metallic Minerals S.A. and *Allan Fosk Kaplun v. Plurinational State of Bolivia* is available here:

http://ita.law.uvic.ca/documents/2010-02-26DecisiononProvisionalMeasures.pdf

Previous ITN Reporting:

"Quiborax claim against Bolivia continues; may provide first decision on effects of ICSID exit," By Fernando Cabrera Diaz, Investment Treaty Newsletter,

3 November 2009, available at:

http://www.investmenttreatynews.org/cms/news/archive/2009/11/01/quiborax-claim-against-bolivia-continues-may-provide-first-decision-on-effects-of-icsid-exit.aspx

"Chilean chemical firm launches ICSID suit against Bolivia", By Damon Vis-Dunbar and Luke Eric Peterson, Investment Treaty Newsletter, March 14, 2006, available at: http://www.iisd.org/pdf/2006/itn_mar14_2006.pdf

AD HOC COMMITTEE CONFIRMS...

Continued from page 4

the investment contract. According to claimants, once KaR-Tel's success was assured, the respondent devised a scheme to orchestrate their expulsion from KaR-Tel in a definitive manner and to keep all of KaR-Tel for their sole benefit. Thus, Rumeli and Telsim argued that Kazakhstan had breached obligations it owed to foreign investors under international law and the Kazakhstan-Turkey BIT.

On July 29, 2008 an ICSID tribunal unanimously sided with Turkish claimants finding that: (i) it had jurisdiction over the dispute; (ii) Kazakhstan had breached its obligation to accord Rumeli and Telsim fair and equitable treatment; and (iii) Kazakhstan had expropriated Rumeli and Telsim's investment.

Some three months later Kazakhstan sought an annulment of the tribunal's award. Grounding its application on Articles 52(1)(b) and 52(1)(d) and 52(1)(e) of the ICSID Convention, the Republic argued that: the tribunal had manifestly exceeded its powers; there had been a serious departure from a fundamental rule of procedure; and the tribunal failed to state the reasons upon which its decision was based. Specifically, Kazakhstan took issue with the tribunal's decision regarding: jurisdiction, collusion, causation and damages.

As seen in other annulment decisions*, the ad hoc committee in this case began its consideration of those arguments by clarifying the scope of its power to review decisions. Addressing the contradictory views of the parties on this point, the committee observed that "[a]n ad hoc committee should not be concerned with upholding the finality of an award or ensuring that the review of the award is as extensive as possible... but should simply act within the confines of the task devolved upon it by the ICSID Convention." Moreover, the committee noted that its discretion to annul an award does not depend on whether an alleged breach of Article 52 is "trivial" or "determinative of the claim."

> *"...the committee observed that '[a]n ad hoc committee should not be concerned with upholding the finality of an award or ensuring that the review of the award is as extensive as possible...but should simply act within the confines of the task devolved upon it by the ICSID Convention.'"*

The ad hoc committee, composed of Judge Stephen M. Schwebel, Professor Campbell McLachlan and Dr. Eduardo Silva Romero, then went on to reject all of Kazakhstan's arguments for annulment. In so doing, the committee confirmed that the standard of review applicable to all of Kazakhstan's arguments is very high, thus making successful annulment applications under the ICSID Convention extremely rare.

One example of the ad hoc committee's reasoning in this regard can be seen in its consideration of arguments raised by Kazakhstan regarding the tribunal's damage assessment.

Kazakhstan contended that the tribunal failed to give reasons for its decision on the quantum of damages awarded and that the award should be annulled on that basis. In particular, Kazakhstan asserted that the tribunal's reasons "... were so erroneous, illogical, inconsistent and insufficient..." that it was impossible to determine how the tribunal had reached a damage amount of US$ 125 million. As support for this contention, the Republic took issue with a number of aspects of the tribunal's analysis, calling into question the method and evidence used to value the claimants' investment.

Citing previous arbitral awards, the ad hoc committee noted that annulment under Article 52(1)(e) is concerned with a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. Additionally, the committee took note of the fact that damage assessments are "inherently uncertain" – a fact that results in tribunals being afforded a considerable measure of discretion in determining issues of quantum. Accordingly, the ad hoc committee went on to reject Kazakhstan's bid for annulment.

In particular, the ad hoc committee considered that the tribunal's award of damages was not a decision worthy of annulment "...since the [t]ribunal did not fail to give reasons for its award." Thus, while the committee acknowledged that the tribunal's damage amount was simply stated in the award without any explanation, it found that the tribunal did not "fail to give reasons" because the tribunal had "...set out reasons for its award in terms appropriate to the circumstances of the case and the evidence available to it."

Having previously rejected Kazakhstan's bid for annulment on every other ground, this decision falls in line with prior annulment decisions and confirms that a very high standard of review applies to ICSID annulment applications.

* See Previous ITN Reporting on annulment proceedings:

"Very High Standard of Review for ICSID Annulment Applications Confirmed," By Elizabeth Whitsitt, Investment Treaty Newsletter, 6 December 2009 available here: http://www.investmenttreatynews.org/cms/news/archive/2009/12/04/very-high-standard-of-review-for-icsid-annulment-applications-confirmed.aspx

"Ad Hoc Committee confirms Argentina is on the hook to Azurix for US $165 million" By Elizabeth Whitsitt, Investment Treaty Newsletter, 2 October 2009 available here: http://www.investmenttreatynews.

Continued on page 9

AD HOC COMMITTEE CONFIRMS...

Continued from page 8

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"Argentina must respect award despite ICSID finding that it has errors of law," By Luke Eric Peterson, Investment Treaty News, 15 October 2007, available here: http://www.iisd.org/pdf/2007/itn_oct15_2007.pdf

Sources: Decision of the ad hoc committee in Kazakhstan v. Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri available here: http://ita.law.uvic.ca/documents/RumeliAnnulment.pdf

ICSID TRIBUNAL APPLIES AD HOC APPROACH...

Continued from page 1

threshold" that must be met to establish denial of justice under customary international law.

According to the tribunal the delays by Ecuadorean courts in deciding the seven Texaco contract claims, which by the time arbitration began in 2006 had all been pending for at least 13 years, exceeded the allowable threshold under Article II(7).

The tribunal did find that that Texaco's statements in the Aguinda case qualified as evidence against the company for the purposes of determining if the delays in the cases were unreasonable. But given that Aguinda was decided in August 2002, the tribunal simply concluded that the delays could not be deemed unreasonable before that date.

The tribunal went on to find that the "award of damages in respect of the breach of Article II(7) encompasses any compensation owed with regard to the remaining BIT and custom-based claims," and that it therefore did not need to decide those other claims.

To estimate what damages were owed to Chevron the tribunal found it needed to decide the seven cases "as it determines an honest, independent, and impartial Ecuadorian judge, applying Ecuadorian law, would have done." After doing so it concluded Chevron was entitled to a total of US$ 354,558,145.00.

To this the tribunal added $344,063,759.84 for interest accrued under Ecuadorean law between the filing of each of Texaco's claims and the initiation of the arbitration, resulting in a total sum of US$ 698,621,904.84 as of December 21, 2006.

This total is to be adjusted downward to account for taxes Texaco would have paid on the awards under Ecuadorian law, something the tribunal will do in a separate order due to the complexity involved. Once that adjustment is made, pre-award interest owed under the BIT for the time period between December 21, 2006 and the date of the award will be added.

The dispute was decided by a tribunal composed of Charles Brower, Prof. Albert Jan van den Berg, and Prof. Karl-Heinz Böckstiegel (chairman), under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.

As reported previously by ITN*, on September 23, 2009 Chevron filed a second arbitration against Ecuador. In that claim the company alleges that Ecuador has unfairly favored the plaintiffs in the Lago Agrio litigation abusing the criminal justice system in violation of the U.S.-Ecuador BIT. Chevron alleges several BIT violations including Article II(7). Among other things, the company asks that Ecuador be found liable for any award in the Lago Agrio litigation should Chevron loose that case. An expert in the Lago Agrio litigation recently recommended that Chevron be ordered to pay US$ 27 billion in damages.

*Read previous ITN reporting available at:

"Ecuadorians battle Chevron in US court over BIT arbitration in long-running environmental damage dispute," By Fernando Cabrera Diaz, Investment Treaty News, 11 March 2010, available here: http://www.investmenttreatynews.org/cms/news/archive/2010/03/10/ecuadorians-battle-chevron-in-u-s-court-over-bit-arbitration-in-long-running-environmental-damage-dispute.aspx

Sources:

March 30, 2010 award in first *Chevron v. Ecuador* arbitration, available at: http://ita.law.uvic.ca/documents/ChevronTexacoEcuadorPartialAward.PDF

September 23, 2009 Chevron notice of arbitration in second dispute with Ecuador, available at: http://www.chevron.com/documents/pdf/EcuadorBITEn.pdf