



## PAGE 1

NEWS: Philip Morris initiates arbitration against Uruguay over new labeling requirements, taxes

## PAGE 2

NEWS: German investor awarded 29 million Euros in claim against Thailand over highway concession

## PAGE 3

NEWS: ICSID Panel Denies Ukraine's Challenge to Arbitrator

## PAGE 4

NEWS: Pan American Energy takes Bolivia to ICSID over nationalization of Chaco Petroleum

NEWS: Ad hoc committee confirms that Kazakhstan is on the hook for US\$ 125 million

## PAGE 5

NEWS: American gas services firm Exterran files for arbitration against Venezuela over nationalized assets

## PAGE 6

NEWS: Michigan owner and operator of busy trade route prepares to file a second NAFTA claim against Canada

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## NEWS: PHILIP MORRIS INITIATES ARBITRATION AGAINST URUGUAY OVER NEW LABELING REQUIREMENTS, TAXES

By Fernando Cabrera Diaz

Tobacco giant Philip Morris International (PMI) has initiated an ICSID arbitration against Uruguay over new rules requiring that 80% of cigarette pack surfaces be devoted to graphic warnings of the dangers associated with smoking.

The company alleges that the labeling requirements and recent tax increase harm its investments and infringe on its trademarks in violation of the Switzerland-Uruguay bilateral investment treaty. U.S.-based PMI, which has its international headquarters in Lausanne, Switzerland, has turned to the Switzerland-Uruguay BIT to launch its arbitration.

Over the last two years the Uruguayan government has engaged in a public health campaign to lower the smoking rates among its population, which was as high as 50%. As part of the anti-smoking campaign the government implemented a series of measures that it claims are directed at protecting public health. Among these is a new rule increasing mandatory graphic warning labels on cigarette packs to 80% of the pack.

According to a report in the Uruguayan newspaper *El Pais*, a source with Abal Hermanos, PMI's subsidiary in Uruguay, said that the new rule prevents the company from displaying its brands in a reasonable manner.

Another disputed measure adopted by the Uruguayan government, Resolution 514, limits tobacco companies to marketing only one type of cigarette per brand.

Resolution 514 will prevent tobacco companies from marketing "light" or

"mild" cigarettes. These cigarette labels are being banned in many countries, including recently in the United States, for leading to consumer perception that they are safer than other cigarettes. Studies have shown that smokers increase the amount of smoke they inhale when smoking cigarettes with lower amounts of nicotine and tar in order to achieve their normal dose, meaning "light" cigarettes are not considered safer.

In response to these labeling rules, PMI has adopted color-coded labeling, changing Marlboro Lights, which have traditionally come in a gold pack, to Marlboro Gold, and Marlboro Ultra-Lights, which come in a silver pack, to Marlboro Silver. This color-coded approach, which is now limited in Uruguay by Resolution 514, has been criticized as circumventing the rules against "light" and "mild" labeling.

Under the resolution, which went into effect on March 1, 2010, Abal Hermanos can only sell one type of PMI's signature Marlboro cigarette in Uruguay, and not its usual range of Marlboro Red, Gold, Green and Blue. According to the Abel Hermanos source, the company has had to pull 5 of the 12 Philip Morris products it marketed in the country.

Morgan Rees, Director of Regulatory Communications for PMI, said it is the first time that the company has been deprived of its intellectual property rights in such a drastic manner, anywhere in the world.

Of note, Uruguay is a signatory of the World Health Organization's

## NEWS: GERMAN INVESTOR AWARDED 29 MILLION EUROS IN CLAIM AGAINST THAILAND OVER HIGHWAY CONCESSION

By Fernando Cabrera Diaz

An ad hoc tribunal under UNCTRAL Rules has awarded German investor Walter Bau AG more than 30 million Euros in its claim against Thailand over a tollway concession gone sour.

The tribunal found that the failure of Thai authorities to approve toll hikes as contemplated in the concession contract amounted to a violation of the 2002 Germany-Thailand BIT.

Walter Bau, a German company currently in liquidation, invested in a joint venture to construct and operate a tollway from Bangkok to the Dong Muang airport. The joint venture was to be operated by Don Muang Tollway Co. Limited (DMT) in which the claimant had a 10% stake.

Under a 1989 concession contract and subsequent 1996 amendment toll rates could only be increased with the approval of Thai authorities.

According to the claimant, Thai authorities refused to approve toll hikes throughout the existence of the project, which prevented it from making a profit in the venture. The government also made several improvements to existing free highways in the area, which the claimant alleges violated the amended concession contract.

Walter Bau filed for arbitration in September of 2005, alleging violations of the 2002 German-Thailand BIT, as well as its 1961 predecessor, claiming expropriation and a violation of fair and equitable treatment.

In its decision dated July 1, 2009, the tribunal limited its inquiry to whether a breach of the 2002 BIT had occurred after that agreement went into force in October of 2004. In doing so the tribunal rejected arguments by the claimant that a previous 1961

BIT between Germany and Thailand applied, holding that claims under that prior treaty could only be made by Germany as the prior treaty lacked an investor-state arbitration clause. It also denied attempts by the claimant to apply the 2002 BIT to breaches prior to October 2004.

*“...the tribunal ultimately found that Thailand had breached the fair and equitable treatment (FET) provision of the 2002 BIT by violating the claimant’s legitimate expectations.”*

The tribunal also rejected Walter Bau’s claim of creeping expropriation on the grounds that none of the respondent’s actions reached the level of creeping expropriation defined by the tribunal in PSEG Global v Turkey as requiring: “...some form of deprivation of the investor in the control of the investment, the management of day-to-day-operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part.”

However, the tribunal ultimately found that Thailand had breached the fair and equitable treatment (FET) provision of the 2002 BIT by violating the claimant’s legitimate expectations.

The tribunal concluded that the claimant had a legitimate expectation to a reasonable return on its investment, considering that the concession was semi-public and thus heavily regulated, that investors would not contemplate such a long-term investment without a legitimate

expectation of a reasonable return on their investment, and that the tolls received were the only way in which such a return could be achieved.

Principle among the Thai government’s actions that violated the investor’s legitimate expectations was the continuous refusal to approve a hike in the toll rate.

Though that refusal began prior the 2002 BIT going into force, it was crystallized into a BIT violation on December of 2004 when DMT, then controlled by the Thai government, asked for and obtained a toll reduction which had been announced by the Thai Prime Minister at a public rally.

The Thai government’s improvements to the free road networks around the toll road, which went beyond the mere “traffic management” that was allowed under the concession contract, and the short-term closure of the Dong Muang Airport which also affected traffic on the tollway, contributed to violating the investor’s legitimate expectations.

In the end the tribunal awarded the claimant 29.2 million Euros for the FET breach and 1.98 million Euros in partial costs, plus interest.

Sources:

Walter Bau AG v. Kingdom of Thailand award of 1 July 2009, available from the Investment Treaty Arbitration website at: <http://ita.law.uvic.ca/documents/WalterBauThailandAward.pdf>

BIT claim against Thailand clears initial jurisdictional hurdles, By Luke Eric Peterson, Investment Treaty News, 17 January 2008: [http://www.iisd.org/pdf/2008/itn\\_jan17\\_2008.pdf](http://www.iisd.org/pdf/2008/itn_jan17_2008.pdf)

## NEWS: ICSID PANEL DENIES UKRAINE'S CHALLENGE TO ARBITRATOR

By Elizabeth Whitsitt

On March 19, 2010 two members of an ICSID arbitral tribunal – the Honourable Davis R. Robinson (President) and Dr. Stanimir A. Alexandrov – dismissed the Ukraine's challenge to the tribunal's third member, Dr. Yoram Turbowicz.

Arbitral proceedings between Alpha Projektholding GmbH (Alpha) and the Ukraine began in 2007 after the Austrian company alleged violations of the Austria-Ukraine BIT in relation to its investment in a hotel-development project in Kiev in the mid-1990s.

Subsequent to the tribunal already having heard the merits of the case in the spring of 2009, the Ukraine filed a formal proposal for the disqualification of Dr. Turbowicz on January 25, 2010 by raising, among other things, concerns about the relationship between Dr. Turbowicz and the claimant's counsel. Specifically, the Ukraine's concerns arose after learning that both Dr. Turbowicz and the claimant's counsel, Dr. Leopold Specht, studied at Harvard University during the late 1980s and early 1990s and the fact that Dr. Turbowicz did not disclose this shared educational experience.

For his part, Dr. Turbowicz maintained that he was not required to disclose his shared educational experience with the claimant's counsel because that fact was not evidence of the type of relationship coming within the language of ICSID Arbitration Rule 6(2).

Under ICSID Arbitration Rule 6(2), upon accepting their appointments, arbitrators are required disclose "... (a) [their] past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause [their] reliability for independent judgment to be questioned by a party."

Ultimately rejecting all of the Ukraine's grounds for challenge, the bulk of the tribunal's decision is concerned with the scope of disclosure required under the ICSID Convention and its Arbitration Rules.

Applying those Rules, as informed by the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), to the facts of the case the two-person tribunal sided with their co-arbitrator and held that "...the IBA Guidelines, while

not determinative in any sense, affirmatively discourage the disclosure of the shared educational experience of Dr. Turbowicz and Dr. Specht."

Based on their analysis of those guidelines and affirming the holding in a prior ICSID case,\* the tribunal concluded that an arbitrator is only required to disclose a fact under Arbitration Rule 6(2) if the arbitrator "reasonably believes that such fact would reasonably cause his or her reliability for independent judgment to be questioned by a reasonable person."

Sources: \* See Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Second Decision on Disqualification, May 12, 2008, available here: <http://ita.law.uvic.ca/documents/Suez-VivendiChallenge2.pdf>

Previous ITN Reporting: "Failed hotel deal in Ukraine leads to ICSID arbitration," By Damon Vis-Dunbar, Investment Treaty News, 30 August 2007, available here: [http://www.iisd.org/pdf/2007/itn\\_aug30\\_2007.pdf](http://www.iisd.org/pdf/2007/itn_aug30_2007.pdf)

## PHILIP MORRIS INITIATES ARBITRATION ...

Continued from page 1

Framework Convention on Tobacco Control (WHO FCTC). One of the objectives of the FCTC is "to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties..."

Under the FCTC warnings on tobacco packages "should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas."

At the same time signatories of the FCTC agree to adopt measures that prevent

tobacco product packaging and labeling from promoting a product by any means "that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light", or "mild.""

Switzerland, which is also an FCTC signatory, recently implemented new cigarette labeling restrictions that require a minimum 56% of cigarette packages to be devoted to warnings. Swiss law now also bans the use of the terms "light" and "mild" from appearing on packages.

Sources: "Tabacalera demanda a Uruguay en el exterior," Fabián Tiscornia, El País, February 27, 2010.

"Coded to Obey Law, Lights Become Marlboro Gold," By Duff Wilson, The New York Times, February 18, 2010, available at: <http://www.nytimes.com/2010/02/19/business/19smoke.html>

WHO Framework Convention on Tobacco Control: [http://www.who.int/fctc/text\\_download/en/index.html](http://www.who.int/fctc/text_download/en/index.html)

Tobacco Labeling Resource Centre, Country Information for Switzerland: <http://www.tobaccolabels.ca/current/switzerl>

## NEWS: PAN AMERICAN ENERGY TAKES BOLIVIA TO ICSID OVER NATIONALIZATION OF CHACO PETROLEUM

By Fernando Cabrera Diaz

Anglo-Argentinean energy firm Pan American Energy (PAE) has initiated arbitration against Bolivia over the nationalization of its subsidiary Chaco Petroleum by the Morales government in 2009. The arbitration was registered by ICSID on April 12 2010, despite Bolivia having withdrawn from the ICSID Convention in 2007.

A PAE spokesperson contacted by ITN indicated that the company is seeking “just and adequate compensation for the expropriation of its investment in Chaco Petroleum Company.” The company is also demanding compensation for losses suffered in 2003 and 2005 due to “certain measures adopted by Bolivia that violated the legitimate expectations of PAE with respect to the regulation and treatment of its investment in the hydrocarbons sector.”

The Bolivian government has responded by sending a formal letter to ICSID dated April 27, 2010 in which it protests that body’s registration of PAE’s request for arbitration, the government announced in its state newspaper Cambio. Danny López, Director General of Jurisdictional and Arbitral Defense, told the paper that Bolivia does not recognize any arbitration before ICSID as it has not been part of that body since 2007.

In a press conference held on 29 April 2010, Bolivian Vice President Alvaro García said that Bolivia was still negotiating with PAE, adding that “we have to pay for their shares [in Chaco Petroleum], we have an appraisal, we are deducting debts, liabilities and we are going to make a proposal, but we will also defend ourselves in any tribunal,” reports the Associated Press.

Chaco Petroleum was taken over in January of 2009 as part of a policy launched by President Evo Morales

to nationalize Bolivia’s hydrocarbons sector. That same month a referendum was held in which Bolivian’s adopted a new constitution that gives the government more control over the country’s vast natural resources, cementing Bolivia’s policy of nationalizing ‘strategic resources.’

*“A PAE spokesperson contacted by ITN indicated that the company is seeking ‘just and adequate compensation for the expropriation of its investment in Chaco Petroleum Company.’”*

The new Bolivian constitution also denies the jurisdiction of international tribunals to hear disputes over investments in the hydrocarbons sector. In this respect it follows Bolivia’s May 2007 announcement that it was withdrawing from the ICSID Convention after accusing that body of being biased towards multi-national corporations.

While the ICSID rules provide that Bolivia’s withdrawal from ICSID took effect six months later, there has been much debate in the arbitration community over the exact impacts of the withdrawal. As ITN has previously reported, there are arguments that as long as Bolivia is a signatory to bilateral investment treaties that offer investors ICSID arbitration, those investors can continue to resort to ICSID.

In that vein the PAE spokesperson contacted by ITN explained that the Bolivia-United States bilateral investment treaty gives the company the right to arbitrate its disputes with

Bolivia at ICSID and that the treaty is still in force and applicable.

Ecuador became the second country to denounce the ICSID Convention in July of 2009 and although there are cases pending that might shed light on the effects of withdrawal from ICSID, no tribunal ruling on the matter has yet been published.

Notably, PAE is also part of a consortium - along with British Gas and Repsol - drilling for gas in the Caipipendi block located in southern Bolivia. A PAE spokesperson speaking to HidrocarburosBolivia.com said that the arbitration would not affect the company’s other investments in the country. But Vice President García has accused PAE of sabotage for delaying its investments in the gas fields.

PAE is owned by British Petroleum of the U.K. and Bidas Corporation of Argentina.

Sources:

“Bolivia protesta ante el Ciadi por solicitud arbitral de PAE,” Cambio, 28 April 2010:

<http://www.cambio.bo/noticia.php?fecha=2010-04-28&idn=18209>

“Bolivia: vicepresidente acusa de sabotaje a petrolera,” AP Spanish Worldstream,

29 April 2010.

“ICSID registers arbitration claim in face of Bolivian objections,” By Damon Vis-Dunbar, Fernando Cabrera Diaz and Luke Eric Peterson, Investment Treaty News, 15 November 2007: [http://www.iisd.org/pdf/2007/itn\\_nov15\\_2007.pdf](http://www.iisd.org/pdf/2007/itn_nov15_2007.pdf)

## NEWS: AMERICAN GAS SERVICES FIRM EXTERRAN FILES FOR ARBITRATION AGAINST VENEZUELA OVER NATIONALIZED ASSETS

*By Fernando Cabrera Diaz*

Houston-based Exterran Holdings has taken Venezuela to ICSID over the nationalization of its gas services support business in the country. The arbitration, registered by ICSID on April 12, 2010, is the second in as many months initiated by firms in the hydrocarbons services sector, an area that is the target of a new wave of Venezuelan nationalizations.

Exterran, which formed from a merger of Hanover Compressor Company and Universal Compression Holdings, principally operates compression pumps used to extract and transport natural gas. The company is seeking U.S. \$500 million in compensation for its nationalized assets in Venezuela.

ITN spoke to Exterran spokesperson Susan Nelson, who would only confirm that the arbitration had been filed under the Spain-Venezuela bilateral investment treaty. There was no word on what connection the American firm had to Spain. Venezuela has no bilateral investment treaty with the U.S.

Universal Compression Holdings operated gas compressors and electrical generators in Venezuela. It also owned minority shares in PIGAP II and El Furial - two companies that operated natural gas compression plants - and SIMCO, which owned and operated water injection plants.

According to an Exterran press release, in February 2009 the Venezuelan National Guard occupied SIMCO facilities and handed them over to Venezuelan state-owned oil company Petróleos de Venezuela S.A. (PDVSA). In May of 2009 PIGAP II and El Furial were also taken over after each had sent a notice of default to their sole customer PDVSA

the previous month due to its lack of payments for their services.

*“ITN spoke to Exterran spokesperson Susan Nelson, who would only confirm that the arbitration had been filed under the Spain-Venezuela bilateral investment treaty.”*

In June 2009 Petrosucre, a subsidiary of PDVSA, took over Exterran’s gas compressors and electrical generators in Venezuela, terminating most of the company’s investment in the country.

These takeovers are part of a new wave of Venezuelan nationalizations that target companies that provide services for oil and gas extraction in order to cut costs for PDVSA. PDVSA claims that Exterran was charging excessive fees that were causing losses for Venezuela, according to AP reports.

Last month ITN reported that New Orleans-based Tidewater Inc launched another arbitration against Venezuela for the expropriation of its operations including vessels that provided transportation services for petroleum companies including PDVSA.

As reported previously by ITN, under President Hugo Chavez Venezuela has sought to nationalize most of the extractive sectors. The government’s policy has been to convert private petroleum and mining projects into joint ventures with private companies under which the Venezuelan state, usually represented by PDVSA, retains majority ownership.

Venezuela was successful in renegotiating these joint venture contracts with most oil companies operating in its territory, but hold outs such as Exxon Mobil and ConocoPhillips launched ICSID arbitrations against Venezuela that are still pending. In the mining sector, Canadian firm Gold Reserve Inc. also filed a claim against Venezuela at ICSID that remains pending.

Venezuela has previously threatened to withdraw from ICSID, most notably at a meeting of the Bolivarian Alternative for the Americas (ALBA), but has yet to follow in the footsteps of fellow ALBA members Ecuador and Bolivia, both of which have withdrawn from the Convention.

Sources:

“Event Brief of Q4 2009 Exterran Holdings, Inc. Earnings Conference Call – Final,”

CQ FD Disclosure, 25 February 2010

“Canadian mining company Gold Reserve commences ICSID arbitration against Venezuela,” By Fernando Cabrera Diaz, Investment Treaty News, 6 December 2009

“Exterran may seek money from Venezuela for assets,” Reuters News, 16 June 2009,

“Exterran Holdings Expects to Record Non-Cash Impairment Charge in First Quarter 2009 Related to Non-Operated Investments in Venezuela,” Business Wire, 1 May 2009

“Gobierno venezolano toma operación de Exterran, de EEUU,” AP Spanish Worldstream, 10 June 2009

## NEWS: MICHIGAN OWNER AND OPERATOR OF BUSY TRADE ROUTE PREPARES TO FILE A SECOND NAFTA CLAIM AGAINST CANADA

*By Elizabeth Whitsitt*

A Notice of Intent forwarded to Canada earlier this year by US owner and operator of the Ambassador Bridge contends that the Canadian government has violated its obligations under NAFTA Chapter 11.

Facilitating a significant amount of trade between the US and Canada, the Ambassador Bridge is an international toll bridge that connects the cities of Windsor, Ontario and Detroit, Michigan.

Michigan firm, Detroit International Bridge Company (DIBC) is the successor to the American Transit Company which acquired rights “to construct, maintain and operate a bridge...across the Detroit River...” in 1921. In addition, DIBC owns shares in the Canadian Transit Company (CTC), a company created by Canada’s federal parliament that owns that section of the Ambassador Bridge located on Canadian soil.

In its Notice of Intent, DIBC claims that legislation passed by Canada in 2007 deprives it of certain rights established by the Boundary Waters Treaty Act of 1909 and the Ambassador Bridge Treaty. According to DIBC, the latter treaty, made pursuant to Boundary Waters Treaty, was created by reciprocal legislation passed in the US and Canada and vested it with rights to construct, own and operate the Ambassador Bridge.

In DIBC’s view Canada’s recently enacted International Bridges and Tunnels Act (ITBA) interferes with those rights by giving the Canadian government authority over the construction, operation, and ownership of international bridges.

DIBC’s claim against the Canadian government comes in the wake of competing attempts by DIBC owner Manuel Moroun and the Canadian

government to build new bridges in close proximity to the 81 year old Detroit River crossing.

According to reports, the Canadian government along with the Michigan Department of Transportation, US Federal Highway Administration and Ontario’s provincial transportation agency are leading the charge to construct a new state-funded bridge that would connect southwest Detroit with Windsor. While proponents of the new Detroit River International Crossing reportedly argue that the bridge is needed to create jobs, improve traffic flow and help guard against terrorist attacks by creating redundancy capacity, the proposal has been challenged by DIBC owner Mr. Moroun, among others.

For its part, Mr. Moroun’s company is reportedly committed to “twinning” the current Detroit River crossing; a project that would involve construction of a second span adjacent to the Ambassador Bridge.

With the prospect of increased competition for tolls and other revenue-generating business associated with these proposals, an onslaught of litigation between DIBC and the Canadian and US governments has recently ensued.

According to its Notice of Intent filed earlier this year, Canada has sought a declaration from an Ontario Superior Court regarding the application of Canada’s ITBA to DIBC and its Canadian counterpart, CTC.

Should the ITBA be interpreted and applied to the Ambassador Bridge, DIBC alleges that Canada will have violated its obligations to investors under NAFTA Articles 1102 (national treatment), 1105 (minimum standard of treatment) and 1110 (expropriation).

A press release issued by the company on April 30, 2010 confirms that since filing its Notice of Intent in January 2010, DIBC filed a claim of arbitration in accordance with NAFTA Article 1120 on March 23, 2010 and is seeking some US\$ 3.5 billion.

The April 30th press release also reveals that DIBC “...is preparing to file a [second] claim under [NAFTA] against the Canadian government.” This second claim is reportedly related to Canada’s offer to provide some \$550 million to the state of Michigan for a proposed new border crossing.

As noted by DIBC’s corporate counsel in the company’s press release, “[b]y offering to increase its financial participation in the [proposed] project and give Michigan \$550 million, Canada is intentionally undermining a U.S. citizen’s right to own and operate a business in Canada.”

Sources:

“DIBC to file \$550 million NAFTA claim against Canada,” Ambassador Bridge/Detroit International Bridge Company Press Release (April 30, 2010).

“Bridge battle brought to boil,” By Tom Greenwood, The Detroit News (April 17, 2010).

“Ambassador Bridge owner Matty Moroun files suit against U.S. and Canadian government,” By Dave Battagello, The Windsor Star (March 25, 2010).

A copy of the Notice of Intent under Section B of Chapter 11 of NAFTA between Detroit International Bridge Company v. Government of Canada is available here: [http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/detroit-bridge\\_archive.aspx?lang=en](http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/detroit-bridge_archive.aspx?lang=en)