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Arbitration Watch:  
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1. Tribunal hands down jurisdictional ruling in Bechtel-Bolivia arbitration,  
By Luke Eric Peterson

A tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has found jurisdiction to examine the merits of a claim by Aguas del Tunari in its investment treaty arbitration against the Government of Bolivia.

According to the website of the ICSID facility, the decision was rendered on Oct. 21, 2005. The proceedings remain pending.

The decision comes after a notable wait, with hearings on jurisdiction having been held in February of 2004.

The Aguas del Tunari investment consortium, led by a subsidiary of US-based Bechtel Enterprises, alleges that Bolivia has violated investor protections contained in the Dutch-Bolivia bilateral investment treaty. The firm seeks unspecified damages for losses arising out of the alleged mistreatment of its investment in the water system of Cochabamba, Bolivia's third largest city.

Aguas del Tunari signed a concession contract to operate that water service in September of 1999. However, decisions to raise prices charged to households led to political outcry, and, eventually, to heated public demonstrations in early 2000. The Government imposed martial law to rein in demonstrations, company officials were forced to flee the country, and the contract was eventually cancelled by the government.

Responding to a request for comment from Investment Treaty News, a Media relations spokesperson for Bechtel, said: "The shareholders of Aguas del Tunari welcome the decision of the ICSID tribunal and hope it will contribute to the amicable resolution which they have sought since the beginning of this investment dispute."

## 2. Kyrgyzstan challenges Energy Charter award in Swedish courts, By Luke Eric Peterson

The Kyrgyz Republic has moved to overturn an arbitral award rendered earlier this year by a tribunal at the Stockholm Arbitration Institute.

The Stockholm tribunal had ruled in March that the Republic violated the terms of the Energy Charter Treaty, a plurilateral treaty governing trade and investment in the energy sector, thanks to its treatment of Gibraltar-based company Petrobart. Petrobart had complained that it had not been paid for several shipments of stable gas condensate under a contract concluded with KGM, a Kyrgyz state joint stock company.

Petrobart had failed in an earlier effort to sue Kyrgyzstan for payment under that country's Foreign Investment Law. An UNCITRAL arbitration launched pursuant to that Law ended in February of 2003 with the tribunal finding that it lacked jurisdiction to hear Petrobart's claim. The tribunal held that Petrobart had not made an "investment" as defined in the country's Foreign Investment Law.

Following this unfavorable ruling, the Gibraltar company turned to arbitration under the Energy Charter Treaty, while also seeking to challenge the decision of the UNCITRAL tribunal in the Swedish courts. That challenge is still pending.

Following the conclusion of the Energy Charter Treaty arbitration, Kyrgyzstan moved to challenge that award. As a consequence, the decisions in both arbitrations between

Petrobart and the Kyrgyz Republic are now under review in the Swedish court system.

### 3. US District Court rejects investor's request to vacate NAFTA Loewen award, By Luke Eric Peterson

The US District Court for the District of Columbia (DC) has rejected an application by a Canadian investor to vacate an arbitral award rendered in a NAFTA Chapter 11 arbitration.

In a decision issued on October 31, 2005, Judge Richard Roberts dismissed the application by Raymond L. Loewen, on the grounds that it was time-barred.

Under the terms of the US Federal Arbitration Act, a motion to vacate must be filed within three months of after the award is rendered.

Judge Roberts noted that Raymond Loewen's petition came some 18 months after the award was rendered by an ICSID tribunal in the case of The Loewen Group Inc. and Mr. Raymond Loewen versus the United States of America.

Mr. Loewen's decision to await the result of a US request for a so-called supplementary decision in the case, appears to have doomed his chances of having his challenge heard in US courts.

Following the ICSID tribunal's ruling in the case, the US Government applied to the tribunal for a supplementary decision, which would have clarified that the award had indeed dispensed not only with The Loewen Group Inc's NAFTA Chapter 11 claim, but also that of Mr. Loewen himself.

Ultimately, the tribunal would reject this US request, on the grounds that its award had clearly resolved both the corporation's claim and that of Mr. Loewen.

Only after this request had been dealt with, did Mr. Loewen turn to the US District Court in an effort to vacate the arbitral award. It was this decision to await the tribunal's finding on the supplementary decision which ran out the clock on the 3 month time window available under the US Federal Arbitration Act.

Arguments by Mr. Loewen that the ICSID tribunal's award had not been 'final', during the period when the tribunal considered the US request for a supplementary decision, were dismissed by Judge Roberts, who argued that the ICSID Additional Facility arbitration rules clearly state that an award is 'final and binding' on the parties.

In the court's view, any request for a supplementary decision would not detract from the finality of the award, but could only have the potential to supplement that final award. As such, the Federal Arbitration Act was held to bar Mr. Loewen from waiting out a decision from the ICSID tribunal on a supplementary decision past the three month vacature

window provided in the US Act.

The Loewen dispute has been on-running for more than a decade. The Canadian firm, and its then majority shareholder Mr. Loewen, turned to NAFTA arbitration in 1998 following an unfavorable ruling at the hands of a Mississippi jury. Following a lengthy trial in a commercial dispute between the Loewen firm and a local competitor in the funeral home business, the jury handed down a \$500 Million (US) verdict against the Canadian firm. Further, the Court imposed an onerous requirement to post a \$625 Million (US) bond in order to appeal that ruling.

After agreeing to a costly settlement of the case, the Canadian firm sought to recoup its losses by mounting a claim against the United States Government for failure to protect its investment in Mississippi. Loewen brought a claim alleging various breaches of the NAFTA, including denial of justice.

In 2003, the tribunal issued its award, holding that it no longer had jurisdiction to resolve the claim because the Canadian firm had filed for bankruptcy and that its assets were now held by a US company. As such, there was no longer any diversity of nationalities – a prerequisite for an international investor-state arbitration under the NAFTA.

At press time, it was unclear if Mr. Loewen plans to press his claim further, by seeking to appeal the recent decision of the US District Court for the District of Columbia.

#### 4. Motorola agrees to drop BIT claim against Turkey, By Luke Eric Peterson

The US-based Motorola Corporation has announced a settlement with the Turkish Government which will bring to an end the company's ICSID arbitration alleging violations of the US-Turkey bilateral investment treaty.

As earlier reported in this newsletter, the firm had filed a claim for \$2 Billion (US) in damages arising out of the Turkish Government's take-over the telecommunications firm Telsim.

Prior to Telsim's take-over by the Turkish Government, the Motorola Credit Corporation (MCC) had made loans totaling \$2 Billion (US) to Telsim. MCC subsequently fell out with Telsim's controlling shareholders, the Uzan family, alleging massive fraud on the part of the Turkish family. There followed a raft of international litigation between the two parties, including an effort by MCC to enforce a favourable US Court judgment for more than \$4 Billion (US) against the Uzan family.

While this litigation played out, the Turkish Government moved to take over the troubled Telsim firm, and would pass legislation ordering the firm's sale, and placing Turkey's own financial claims against the telecoms firm ahead of those of Motorola. Motorola

responded by alleging that Turkey's actions violated investor protections contained the US-Turkey BIT.

However, according to the terms of a settlement agreement reached by Turkey and Motorola, and announced on October 28, the US firm will drop this BIT claim against Turkey. A press release issued by the company reads in part:

“Under the agreement, Motorola has settled its claims for a cash payment of \$500 million which the company received today plus the right to receive 20% of the proceeds from the sale of Telsim assets over \$2.5 billion. Motorola has further agreed to dismiss its litigation against Telsim as well as Motorola's pending demand for arbitration against the Government of Turkey at the International Center for the Settlement of Investment Disputes (ICSID) in Washington, D.C. In addition, Motorola has agreed not to pursue collection efforts against certain corporate defendants under TMSF control, subject to certain conditions.

The agreement permits Motorola to continue its efforts, except in Turkey and certain other agreed upon countries, to enforce its previous judgment rendered on behalf of Motorola against the Uzan family for perpetrating a massive fraud against Motorola through their control of Telsim.”

#### 5. Omani investor files BIT arbitration at ICSID against Yemen, By Luke Eric Peterson

An Omani construction firm has brought a claim to the International Centre for Settlement of Investment Disputes (ICSID) against Yemen, alleging numerous violations of the Oman-Yemen bilateral investment treaty.

Desert Line Projects Inc. (DLP) seeks some \$100 Million (US) in compensation for the alleged expropriation and violation of its rights under eight construction contracts entered into with Yemeni authorities. The firm was contracted to build 1000 kilometres of road in various parts of Yemen, which represented some 20% of the country's asphalt roads at the time of the investment.

The Omani firm's claim was registered by the ICSID facility on September 30, 2005. An arbitral tribunal is now in the midst of being selected.

Yemen's investment protection treaty with Oman entered into force in 2000; In autumn of 2004, Yemen ratified the ICSID Convention.

#### 6. Poland retains law firm to challenge Eureko award in Belgian courts, By Luke Eric Peterson

According to a report in the Polish media, Poland has retained the law firm Salans to represent it in a challenge to a partial award rendered by an ad-hoc arbitral tribunal in mid-August.

As reported in this newsletter, the arbitral tribunal found Poland liable for violations of the Netherlands-Poland bilateral investment treaty, in relation to its treatment of the Dutch-based insurer Eureko. The tribunal did not rule on damages, but reserved that question for a subsequent stage of the arbitration.

The arbitration which is sited, for legal purposes, in Brussels, is subject to supervision by the Belgian courts.

Under Belgian arbitration law, applicants have a period of 3 months from the time an award is rendered in which to mount an effort to set aside that arbitral award in Belgian courts. This time frame would afford Poland until mid-November to lodge such a challenge with the Belgian courts.

#### 7. German construction firm alleges Thailand in breach of BIT, By Luke Eric Peterson

According to a report in the Thai media, German construction firm Walter-Bau has served Thailand with a request for arbitration, alleging violations of the Germany-Thailand investment protection treaty and of a construction concession agreement.

The German firm is a 10% shareholder in the Don Muang Tollway.

A request for comment from the company was unanswered at press time. Earlier this year, the German firm went into bankruptcy. Since that time, various legal actions have been taken by the company's administrator to collect on unpaid debts. Business Week magazine reports that the company's arbitration against Thailand is for some \$100 Million US in unpaid construction bills.

ITN continues to investigate this dispute.

#### Sources:

"Bankrupt Walter-Bau impounds Lebanese jet", Business Week, Oct.17, 2005, available on-line at:

<http://www.businessweek.com/ap/financialnews/D8D9UJG80.htm>

"German Tollway investor seeks arbitration", The Nation (Thailand), Oct.4, 2005

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Negotiation Watch:  
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8. Andean countries divided on posture toward investment in US trade talks,  
By Damon Vis-Dunbar

As negotiations on a US free trade agreement (FTA) with Peru, Ecuador and Colombia enter the eleventh hour, the positions of the three Andean countries appear to diverge with respect to rules on foreign investment.

Colombia admits a number of key elements in the proposed investment chapter still need to be agreed to, while informed sources from Peru say that apart from “a couple minor details”, they have no outstanding issues to resolve.

Meanwhile, Ecuador already has a bilateral investment treaty (BIT) with the US, but the Ecuadorian Government is hesitant to see it superseded by new investment disciplines in an FTA.

Earlier this year, Colombia published a detailed list of its negotiating positions beside the “assumed” positions of the US, revealing areas where disagreement existed. A number of these remain unresolved, including rules for the settlement of disputes.

Colombia said it was pushing for “predetermined rules and institutional forums to settle investor-state disputes,” while the US was said to promote “broad options ... for dispute resolution, including ad-hoc forums” – a seeming reference to UNCITRAL arbitration which may occur outside the supervision of an arbitration facility.

Meanwhile, a Peruvian official says that investment “was one of the easiest chapters for Peru,” and that outstanding issues “were pretty much finished (during) the last round.” A few “minor” details will be ironed out before the next set of formal negotiations, said this source.

“Investment areas are not a big issue (for Peru)” confirmed Mario Tello, a professor of Economics at the University of Florida who has been advising the Peruvian negotiating team during these FTA talks.

“Peru has very open (foreign investment) laws already,” said Dr. Tello.

Ecuador, which signed a BIT with the US in 1997, appears farthest from agreeing to rules in a new FTA.

The offer proposed by the US is similar to that agreed with Morocco in a separate recent FTA negotiation, according to an Ecuadorian source. Morocco had a pre-existing BIT

with the US when it entered in to FTA talks in 2003, but the country ultimately agreed to a new investment chapter of the FTA which superseded the old BIT.

“Ecuador is not comfortable with this proposal,” said the Ecuadorian source.

One provision in particular, which would extend the definition of an investment to those with the intention to invest, but who did not actually do so, was of particular concern to Ecuador, said this source.

Ecuador has suggested waiting until 2007, ten years after the ratification of the BIT, at which point either of the two parties could terminate the agreement with one years notice. In other words, Ecuador is willing to kill the existing treaty, but they are not eager to renegotiate a new one.

This defensive posture is not surprising, perhaps, given the number of ongoing disputes which have arisen out of the current US BIT, several in relation to Value-Added Tax rebates in the hydrocarbons sector.

After losing one such arbitration in 2004, to US-based Occidental Petroleum, the Ecuadorian Government made noises about tearing up the US BIT.

Ecuador’s posture towards US investors has led US business groups to question the wisdom of further trade concessions for the country. Last year, a representative of the US Chamber of Commerce told a sub-committee of the House Committee on International Relations that Ecuador should settle the “great majority” of investment disputes before the US agrees to a FTA.

In a recent country-report, the US Commerce Department has warned US investors that “the Government of Ecuador does not always honor its obligations with respect to the (Bilateral Investment) Treaty.”

At this point in negotiations of the US-Andean FTA, it still remains unclear whether negotiators will conclude a single agreement encompassing all four countries, or separate hub and spoke bilateral agreements with the US as the hub – which would free the US to put certain of the countries on a fast-track, and others on a slower track.

For their part, the Andean Governments have stated that they would like to sign the proposed FTA on November 22, leaving time to have it ratified before all three countries conduct presidential and congressional elections next year. The goal, therefore, is to make the next round of negotiations, slated for November 14, to be the last.

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