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## NEWS: VERY HIGH STANDARD OF REVIEW FOR ICSID ANNULMENT APPLICATIONS CONFIRMED

By Elizabeth Whitsitt

An ad hoc committee, established pursuant to the ICSID Arbitration Rules, has rejected the annulment application of two US power companies: M.C.I. Power Group, L.C. (MCI) and New Turbine, Inc. (New Turbine). The companies' bid for annulment came after an ICSID tribunal dismissed part of the companies' case against Ecuador on jurisdictional grounds, and dismissed the remainder on the merits in the summer of 2007.

Problems for MCI and New Turbine began some thirteen years ago when MCI and New Turbine (through their subsidiary Seacoast, Inc.) entered into an agreement with Ecuadorian state-owned energy provider Instituto Ecuatoriano de Electrificación (INECEL) and Old Dominion Electric Cooperative (ODEC) for the sale of electricity. This agreement was signed on November 17, 1995, almost two years before the US-Ecuador BIT entered into force on May 11, 1997.

In April of 1996 various differences arose between the parties to the agreement, which resulted in Seacoast Inc. suspending its electricity operations and complaining that INECEL had not paid for prior power sales. A month later, INECEL unilaterally terminated the agreement. Challenging INECEL's termination of the agreement and requesting payment of approximately US \$25 million in damages for breach of contract, MCI's and New Turbine's subsidiary commenced suit in the Ecuadorian courts. The domestic proceedings ended in 2000, however,

when the Superior Court of Justice of Quito held that it lacked jurisdiction to hear the case.

*“the ad hoc committee noted that “[t]heir mission [was] confined to controlling the legality of awards according to the standards set out expressly and restrictively in Article 52 of the [ICSID] Convention.”*

On December 16, 2002, MCI and New Turbine commenced arbitral proceedings against Ecuador relying on the 1997 U.S.-Ecuador BIT, claiming that Ecuador had breached its obligations under that treaty. The ICSID tribunal hearing the case rejected arguments by MCI and New Turbine that Ecuador had violated the fair and equitable treatment and expropriation provisions of the US-Ecuador BIT. Additionally, the tribunal ruled that portions of the claim related to acts or omissions occurring before the US-Ecuador treaty entered into force, thus limiting the tribunal's jurisdiction over certain of the claims alleged by the US claimants.

Some four months later MCI and New Turbine sought partial annulment of the tribunal's award. Grounding their application on Articles 52(1)(b) and 52(1)(d) of the ICSID Convention, the US investors asserted that the tribunal had manifestly exceeded its

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## NEWS: GERMAN INVESTOR LAUNCHES ICSID CASE AGAINST COSTA RICA OVER ALLEGED EXPROPRIATION OF LAND NEAR ENDANGERED TURTLE HABITAT

By Fernando Cabrera Diaz

German investor Reinhard Unglaube, a resident of Costa Rica, has commenced arbitration against his host country over the latter's refusal to grant the appropriate permits to extend his eco-tourist hotel complex in Playa Grande, Costa Rica. Costa Rican authorities have refused to issue the permits citing the project's proximity to the Las Baulas de Guanacaste National Marine Park, home to the nesting site of the leatherback turtle, currently in critical danger of extinction.

ITN spoke to Mr. Unglaube from Costa Rica, who explained that beginning in the late 80s he and his wife sought to enlarge his hotel complex in Playa Grande by about 70%.

Playa Grande is one of three adjoining beaches which make up the main Pacific nesting site of the leatherback. By 1988 the Unglaubes had secured all of the required permits from the government of Costa Rica, including those from the Ministry of Energy and the Environment (MINAE), he said.

In 1992 Mr. Unglaube says he finalized a contract with the government, which declared the project 'nature friendly'. In order to avoid disturbing the leatherback turtles, "we made sure there were no lights on the beach, in fact we donated 10 hectares of our own property to the government to create a green zone between the property and the ocean, so from the beach you only see forest and not the property," says Mr. Unglaube.

Lights near beaches where female turtles nest, have been shown to confuse baby hatchlings and lead them away from the ocean after they emerge from their underground nests.

In June 1995 partly due to mounting pressure from environmental groups to protect the leatherback turtle, the Costa

Rican Legislative Assembly, passed a law creating the Las Baulas marine park on a 75-meter strip beyond the maritime zone at Playa Grande, Ventanas, and Carbón beaches.

That same year the Government of Costa Rica created a new department under MINAE, the Technical Secretariat of the Environment of Costa Rica (SETENA). SETANA immediately imposed a new permit requirement on the Unglaubes in order for them to proceed with their project, says Mr. Unglaube.

*'Mr. Unglaube is alleging breaches of the expropriation, fair and equitable treatment, full protection and security, and most-favored nation clauses of the Costa Rica-Germany Bilateral Investment Treaty. Damages sought are yet to be determined.'*

That permit has been refused due to an interpretation by the Attorney General that the 1995 law creating the park intended to create a 75 meter strip measured inland from the maritime zone, according to Costa Rican newspaper the Beach Times. Landowners in the area argue that the 75 meters is to be measured offshore from the maritime zone, says the paper.

Furthermore, in 2003 and again in 2004 MINAE tried to expropriate sections of the Unglaubes' property along other beach property in the area in order to extend the Las Baulas marine park, but upon appeal, the country's Attorney General turned down both attempts, says Mr. Unglaube.

Mr. Unglaube is alleging breaches of the expropriation, fair and equitable treatment, full protection and security, and most-favored nation clauses of the Costa Rica-Germany Bilateral Investment Treaty. Damages sought are yet to be determined.

As reported previously by ITN, a year ago Mr. Unglaube's wife filed a similar arbitration against Costa Rica, which is also pending at ICSID. The two own 50% shares in the company Uni Rana which owns the hotel complex at Playa Grande. Mrs. Unglaube's arbitration alleges similar breaches of the Costa Rica-Germany Bilateral Investment Treaty, in relation to property she owns in the area including her 50% share in the hotel complex.

Last year, counsel for Mrs. Unglaube told ITN that she was not the only investor to have been affected by restrictions on property development in the area around the marine park. More than 50 other properties are alleged to have been affected; however it is unknown how many of these are foreign owned.

Mr. Unglaube's request for arbitration was filed October 28th, and registered by ICSID on November 3, 2009.

Sources:

"International Arbitration To Begin On Grande," by Zoraida Diaz, *The Beach Times*, July 04, 2008

ITN Reporting

"Blocked eco-tourism project in Costa Rica parkland leads to BIT arbitration," By Damon Vis-Dunbar and Luke Eric Peterson, *Investment Treaty News*, 21 February 2008, available here:

[http://www.iisd.org/pdf/2008/itn\\_feb21\\_2008.pdf](http://www.iisd.org/pdf/2008/itn_feb21_2008.pdf)

## NEWS: ARBITRATOR FORCED TO CHOOSE IN NAFTA DISPUTE OVER THWARTED CANADIAN GARBAGE SITE

By Elizabeth Whitsitt

Mr. J. Christopher Thomas Q.C. has resigned from his appointment as an arbitrator in a Chapter 11 NAFTA dispute initiated by US investor Vito G. Gallo against the Canadian government.

Canada's nominee to the tribunal resigned on October 21, 2009, one week after ICSID Deputy Secretary-General, Nassib G. Ziade, determined that Mr. Thomas would have to choose between continuing to provide legal advice to Mexico or serving as an arbitrator in the case.

Mr. Gallo's challenge was filed with Mr. Ziade in July of 2009 after learning that Mr. Thomas' professional situation had changed since the commencement of the arbitral proceedings. For fifteen years, Mr. Thomas was the managing partner of Thomas & Partners, a law firm specializing in international trade and arbitration matters. In this capacity he had served as a legal advisor to Mexico in various trade and investment matters (including NAFTA chapter 11 arbitrations). At the time of his arbitral appointment, however, Mr. Thomas was in the process of joining a larger Canadian law firm as an independent consultant so that he could focus on serving as an arbitrator. In this new role Mr. Thomas subsequently agreed to advise the Government of Mexico regarding "... specific legal matters as they arose..."

Mr. Thomas attempted to notify the parties of the changes to his professional status and his advisory role to the Mexican government. A mistyped email address, however, prevented the parties from receiving that communication until early June 2009. Shortly thereafter, counsel for Mr. Gallo requested that Mr. Thomas withdraw from his post as arbitrator.

In so doing, Mr. Gallo and his counsel stressed that they did "not allege the

existence of actual bias" on the part of Mr. Thomas. Instead they grounded their request on Articles 9 and 10 of the UNCITRAL arbitration rules and argued that Mr. Thomas could not act as an arbitrator in the dispute and at the same time act as advisor to another NAFTA state party. Doing so, in the claimant's opinion "...[gave] rise to justifiable doubts as to [Mr. Thomas'] impartiality and independence."

*"[b]y serving on a tribunal in a NAFTA arbitration involving a NAFTA State Party, while simultaneously acting as an advisor to another NAFTA State Party which has a legal right to participate in the proceedings, [Mr. Thomas] inevitably risked creating justifiable doubts as to his impartiality and independence."*

In response Canada attempted to test the timeliness of the claimant's challenge. Canada argued that Mr. Gallo was outside the 15 day time limit to challenge Mr. Thomas' appointment. In addressing this issue, the parties made numerous arguments about when the Mr. Gallo became aware or should have become aware that Mr. Thomas was continuing to act as a counsel for Mexico. Eventually siding with Mr. Gallo, Mr. Zaide remained unconvinced by Canada's evidence on this point and determined that "[t]he proper matter to be considered [in the case was] whom Mr. Thomas ha[d] counseled, and on what topics."

Mr. Zaide clarified that the applicable standard under Articles 9 and 10 of the UNCITRAL arbitration rules in addressing that question is an objective one, clarifying that "... one may as a general matter be simultaneously an arbitrator in one case and a counsel in another." Moreover, he was clear that Mr. Gallo could not sustain his challenge on the basis of Mr. Thomas' expressed intention to retire as counsel and subsequent change of heart. In his view, the potential for conflict in this case lay in NAFTA Article 1128, which provides NAFTA state parties the right to make submissions in Chapter 11 disputes (as non-disputing parties) on questions of interpretation of NAFTA.

Considering Mexico a "potential participant" in the case, Mr. Zaide rejected evidence provided by Mr. Thomas which indicated that he had only provided a "de minimis" amount of legal advice to Mexico in his new role as an independent consultant.

Mr. Zaide was careful, however, to recognize that "Mr. Thomas' personal integrity [was] unquestioned" and commended him for disclosing his advisory services to Mexico in a forthright manner.

Nonetheless, Mr. Zaide concluded that "[b]y serving on a tribunal in a NAFTA arbitration involving a NAFTA State Party, while simultaneously acting as an advisor to another NAFTA State Party which has a legal right to participate in the proceedings, [Mr. Thomas] inevitably risked creating justifiable doubts as to his impartiality and independence." Accordingly, Mr. Zaide asked Mr. Thomas to choose whether he would continue to advise Mexico, or continue to serve as an arbitrator in the dispute between Mr. Gallo and Canada.

## ARBITRATOR FORCED TO CHOOSE...

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### Sources:

Decision on the Challenge to Mr. J. Christopher Thomas, QC in *Vito G. Gallo v. Canada*, UNCITRAL (NAFTA) is available here:

[http://ita.law.uvic.ca/documents/Gallo-Canada-Thomas\\_Challenge-Decision.pdf](http://ita.law.uvic.ca/documents/Gallo-Canada-Thomas_Challenge-Decision.pdf)

Resignation Letter of Mr. J. Christopher Thomas, QC is available here:

[http://www.naftaclaims.com/disputes\\_canada\\_gallo.htm](http://www.naftaclaims.com/disputes_canada_gallo.htm)

### Previous ITN Reporting:

“US investor notifies Canada of potential arbitration over thwarted waste site,” By Luke Eric Peterson, Investment Treaty News, 15 November 2006, available here:

[http://www.iisd.org/pdf/2006/itn\\_nov15\\_2006.pdf](http://www.iisd.org/pdf/2006/itn_nov15_2006.pdf)

“US investor files formal arbitration against Canada over thwarted garbage disposal site,” Luke Eric Peterson, Investment Treaty News, 27 May 2007, available here:

[http://www.iisd.org/pdf/2007/itn\\_may27\\_2007.pdf](http://www.iisd.org/pdf/2007/itn_may27_2007.pdf)

“Tribunal appointed to hear NAFTA claim over thwarted garbage site in Canada,”

By Luke Eric Peterson, Investment Treaty News, 21 February 2008, available here:

[http://www.iisd.org/pdf/2008/itn\\_feb21\\_2008.pdf](http://www.iisd.org/pdf/2008/itn_feb21_2008.pdf)

## NEWS: CONTINENTAL CASUALTY AND ARGENTINA WILL CONTINUE TO BATTLE OVER FINANCIAL INVESTMENTS

*By Elizabeth Whitsitt*

On October 23, 2009 an ad hoc committee, composed of Gavan Griffith Q.C., Judge Bloa A. Ajibola and Mr. Christer Söderlund, ruled that it will hear the annulment applications of the Argentine Republic and Continental Casualty Company. According to the ad hoc committee those proceedings will take place without requiring Argentina to post financial security into an escrow or trust account.

One of many disputes arising as a result of Argentina’s response to an economic depression that took hold of the country in 2001-2002, this case concerned Continental Casualty’s investment in an Argentine insurance company, CNA ART (CNA). CNA saw its low-risk assets, such as cash accounts, treasury bills and government bonds, plummet in value as Argentina converted financial instruments originally valued in US dollars into pesos and asset transfers out of Argentina were restricted.

On September 5, 2008 an ICSID tribunal awarded Continental Casualty US \$2.8 million, only a small portion of the US \$46 million that the firm had claimed against Argentina.

*“the ad hoc committee confirmed that “...where a rectification decision is given...the period of time provided for under Article 52(2) of the ICSID Convention runs from the date of the rectification decision, rather than from the date of the original award.”*

Earlier this year, Continental Casualty moved to annul that award arguing that the tribunal had “manifestly exceeded its powers” and that the award “failed to state the reasons upon which it [was] based.” Six months later, on June 5, 2009 Argentina made its own bid for partial annulment of the tribunal’s award.

At a preliminary procedural consultation meeting between the parties this summer, Continental Casualty objected to Argentina’s

annulment application. Specifically, the Illinois-based firm argued that Argentina’s annulment application was filed more than 120 days after the tribunal’s award was rendered. Meanwhile, Argentina asserted that the time limit for submitting an annulment application had been extended by virtue of the tribunal’s decision on February 23, 2009 rectifying its original award in the case.

After finding that Argentina’s annulment bid was filed within the time limits stipulated by Articles 49(2) and 51(2) of the ICSID Convention, the ad hoc committee rejected arguments by Continental Casualty that favoured the establishment of separate time limits for different categories of annulment applications (i.e. those applications relating to an original award versus those relating to matters affected by a rectification decision). Relying on the clear language of Article 49(2), the ad hoc committee confirmed that “...where a rectification decision is given...the period of time provided for under Article 52(2) of the ICSID Convention runs from the date of the rectification decision, rather than from the date of the original award.”

## CONTINENTAL CASUALTY AND ARGENTINA WILL CONTINUE...

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In a separate decision, the ad hoc committee determined that enforcement of the tribunal's US \$2.8 million award would be deferred until the conclusion of the annulment proceedings. The ad hoc committee's ruling is notable for the fact that it does not oblige Argentina to post security. In making its decision, the ad hoc committee accepted Continental Casualty's concern that Argentina might not comply with its obligations to pay the award (pending the outcome of the annulment proceedings). However, the ad hoc committee distinguished this dispute from other annulment proceedings which have insisted that Argentina is wrong to require award creditors to commence enforcement procedures in Argentine courts before collecting payment.\* Specifically, the committee viewed the relatively small amount of the award and the cross applications for annulment in this case as determinative of the issue and concluded that "... practical considerations may allow a continued stay of the enforcement of the Award pending the conclusion of the annulment proceedings without imposing any condition of security."

\* See "Argentina ordered to reconsider its position on payment of ICSID

awards," By Damon Vis-Dunbar, Investment Treaty News, 14 October 2008, available here:

<http://www.investmenttreatynews.org/cms/news/archive/2008/10/14/argentina-ordered-to-reconsider-its-position-on-payment-of-icsid-awards.aspx>

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Decision on the Claimant's Preliminary Objection to Argentina's application for annulment in Continental Casualty Company v. Argentine is available here:

<http://ita.law.uvic.ca/documents/ContCasObjectiontoAppforAnnul.pdf>

Decision on Argentina's application for a stay of enforcement of the award in Continental Casualty Company v. Argentina is available here:

<http://ita.law.uvic.ca/documents/ContCasStayEnforcement.pdf>

Previous ITN Reporting

"Continental Casualty Company v. the Argentine Republic: Argentina emerges largely victorious in dispute related to country's financial crisis," By Damon Vis-Dunbar, Investment Treaty News, 10 September 2008, available here:

<http://www.investmenttreatynews.org/cms/news/archive/2008/09/10/award-continental-casualty-company-v-the-argentine-republic-argentina-emerges-largely-victorious-in-dispute-related-to-country-s-financial-crisis.aspx>

"Continental Casualty Company moves to annul award favourable to Argentina," By Damon Vis-Dunbar, Investment Treaty News, 16 January 2008, available here:

<http://www.investmenttreatynews.org/cms/news/archive/2009/01/16/continental-casualty-company-moves-to-annul-award-favourable-to-argentina.aspx>

## NEWS: CANADIAN MINING COMPANY GOLD RESERVE COMMENCES ICSID ARBITRATION AGAINST VENEZUELA

*By Fernando Cabrera Diaz*

Canadian mining company Gold Reserve has commenced arbitration against Venezuela at the International Centre for Settlement of Investment Disputes (ICSID) over the alleged expropriation of its Brisas gold and copper mine in the Bolivar State of Venezuela. Less than a week after the company filed for arbitration on October 21, 2009 the Government of Venezuela assumed control of the Brisas property.

According to company press releases, on October 26 Venezuelan personnel arrived at the Brisas property with an order to take control of the alluvial concession, which composes unconsolidated or weathered material near the surface. On November 9, the company received notice from Venezuelan officials that its hardrock concession, lying below the alluvial concession, was being cancelled by an Administrative Act dated October 21, 2009.

In a press release dated October 21, the company states that it filed for arbitration because Venezuela had wrongfully expropriated its Brisas project through unreasonable delays by the Venezuelan Ministry of Environment in completing the permitting process, the Ministry's rescission of a March 2007 permit for the commencement phase of the Brisas Project, and the announcement by President Chávez in January 2009 that the Government was taking over the project.

## NEWS: AN END TO EUROPEAN MINING CLAIMS IN SOUTH AFRICA?

*By Elizabeth Whitsitt*

On November 2, 2009 claimants in the high-profile arbitration involving mining interests owned by Piero Foresti, Laura de Carli and others against the Republic of South Africa requested the discontinuance of ICSID arbitral proceedings that have been ongoing since the beginning of 2007.

The request comes approximately one month after the tribunal in this case accepted two petitions for participation by a coalition of non-governmental organizations and the International Commission of Jurists (ICJ). As previously reported, the parties' redacted documents were expected to be forwarded to the non-disputing parties in mid-November so that the coalition and the ICJ could file their written submissions with ICSID by December 21, 2009.

In an interview with ITN, counsel for both parties confirmed that, for now, distribution of those documents to the non-disputing parties has been delayed in light of this latest procedural wrangling.

A recent announcement on the ICSID website indicates that South Africa has objected to the claimants' request for discontinuance and filed an application for a default award.\* The Tribunal has

given the claimants until mid-January to respond to South Africa's submission. While details of the claimants' request for discontinuance and South Africa's application have not been made public, one could expect that an interesting issue for the tribunal to consider will be related to the question of costs in light of these recent events.

\* Case Details in Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1) are available at:

<http://icsid.worldbank.org/ICSID/FrontServlet>

For further background on this dispute, see the ITN's previous reporting:

"An ICSID Tribunal Introduces Innovative Steps Into Non-Disputing Party Procedure," By Elizabeth Whitsitt, Investment Treaty Newsletter, 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>

"In Brief: Suspension extended in Piero Foresti, Laura de Carli and others v.

Republic of South Africa", By Damon Vis-Dunbar, Investment Treaty Newsletter, 8 June 2009, available here:

<http://www.investmenttreatynews.org/cms/news/archive/2009/06/05/in-brief-suspension-extended-in-piero-foresti-laura-de-carli-and-others-v-republic-of-south-africa.aspx>

"European miners and South Africa suspend proceedings", By Damon Vis-Dunbar, Investment Treaty Newsletter, 2 April 2009, available here:

<http://www.investmenttreatynews.org/cms/news/archive/2009/04/02/european-miners-and-south-africa-suspend-proceedings-as-settlement-talks-continue.aspx>

"South African court judgment bolsters expropriation charge over Black Economic Empowerment legislation in the mining sector", By Damon Vis-Dunbar, Investment Treaty Newsletter, 23 March 2009, available here:

<http://www.investmenttreatynews.org/cms/news/archive/2009/03/23/south-african-court-judgment-bolsters-expropriation-charge-over-black-economic-empowerment-legislation.aspx>

## IN BRIEF: RUMORS OF A DISPUTE BETWEEN UKRAINIAN AND VIENNESE FIRMS OVER NATURAL GAS SURFACE

*By Elizabeth Whitsitt*

Murmurings that Centragas Beteiligungs Holding AG has accused the Ukraine of violating "an agreement on the Energy Charter" surfaced in mid-November.\*

According to press reports, the Viennese firm, which holds a 50% interest in Swiss gas distribution company RosUkrEnergo (RUE), alleges that the Ukrainian oil and gas company, Naftohaz Ukrainy, expropriated 11

billion cubic meters of gas belonging to RUE during the first quarter of 2009. Those sources also indicate that Centragas Holding AG has requested an amicable settlement of the dispute in accordance with Article 26 of the Energy Charter Treaty. If the dispute cannot be settled within three months from the date on which Centragas Holding AG's request was made, the parties may find themselves enmeshed in litigation or arbitration.

\* "Centragas Beteiligungs accuses Naftogaz of violating Energy Charter," Ukrainian Journal, 17 November 2009, available at:

<http://www.ukrainianjournal.com/index.php?w=article&id=9457>

"Firtash's company, as co-founder of RosUkrEnergo, Accuses Ukraine..." Interfax News Agency, November 17, 2009.

## RECENTLY PUBLISHED:

*International Investments Protection: Comparative Law Analysis of Bilateral and Multilateral Interstate Conventions, Doctrinal Texts and Arbitral Jurisprudence Concerning Foreign Investments*, By Jan Schokkaert and Yvon Heckscher, Bruylant, 2009

A new book on international investment law published by Bruylant with the support of the Antwerp

University Institute of Development Policy and Management aims to “suggest means, to Contracting States and international investors alike, to improve current media of protection of investments made on foreign soil.” More specifically, the objective of the book is “...to facilitate the drafting of Treaty and State Contract texts better adapted to rapidly evolving international arbitration.” The book

is published by Jan Schokkaert, a lawyer with significant experience in the Belgian Ministry of Foreign Affairs and Yvon Oscar Heckscher, a lawyer specializing in US immigration and naturalization laws, and in European Union sustainable development laws and practices. The Book can be ordered from the Bruylant website at: <http://www.bruylant.be/st/en/fiche.php?id=12876>.

## ICSID TRIBUNAL CONFIRMS THAT ALLEGATIONS OF CORRUPTION...

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powers and failed to state the reasons upon which its decision was based. Specifically the US investors took issue with the tribunal’s application of the non-retroactivity principle to the US-Ecuador BIT.

In considering those arguments, the ad hoc committee, composed of Judge Dominique Hascher, Judge Hans Danelius and Judge Peter Tomka, was clear that “...the role of an ad hoc committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness.” Consequently, the ad hoc committee noted that “[t]heir mission [was] confined to controlling the legality of awards according to the standards set out expressly and restrictively in Article 52 of the [ICSID] Convention.”

The ad hoc committee then went on to reject all of MCI’s and New Turbine’s arguments for annulment. In so doing, the ad hoc committee reiterated that the standard of review applicable in annulment proceedings is very high. Examples of the ad hoc committee’s reasoning in this regard can be seen throughout its decision.

Pursuant to Article 52(1)(b) MCI and New Turbine alleged that “... the [t]ribunal’s interpretation of the principle of non-retroactivity of treaties was egregiously wrong and so grave as to be tantamount to an abrogation of the BIT.” In particular, they complained that the tribunal

was wrong to characterize INECEL’s non-payment for power services as an act or omission that only occurred prior to the BIT entering into force. In their view, those non-payments were acts or omissions that continued up to (and beyond) the date on which the US-Ecuador BIT entered into force. Thus, MCI and New Turbine argued that the tribunal could exercise jurisdiction over claims related to those non-payments.

In rejecting those arguments, the ad hoc committee noted that “[f]ailure to apply the proper law is not an independent ground for annulment under Article 52 . . . Ad hoc committee decisions however recognize that a tribunal’s failure to apply the applicable law may constitute a manifest excess of powers pursuant to Article 52(1)(b).” Thus, while the ad hoc committee agreed that reasonable minds could disagree regarding the interpretation of the non-retroactivity of the BIT, the tribunal’s decision did not amount to “manifest excess of powers” because, in the ad hoc committee’s opinion, “[a]n egregious violation of the law would assume that there is a departure from a legal principle or legal norm which is clear and cannot give rise to divergent interpretations.”

MCI and New Turbine also challenged the tribunal’s analysis under Article 52(1)(e) of the ICSID Convention. Specifically, the US investors

complained that the tribunal “failed to state reasons for the Award by forgetting to address the question whether Ecuador breached the BIT by continuously refusing to pay... outstanding accounts receivable owed to them whether on a continuous basis or only after the entry into force of the Treaty.” This, MCI and New Turbine argued, was “an issue of sufficient importance affecting the outcome of the Award.”

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. Given such a rigid standard of review, the ad hoc committee went on to reject the US investors’ bid for annulment. In so doing, this ad hoc committee’s decision falls in line with prior decisions by reconfirming that annulment applications under Article 52 of the ICSID Convention are not appeals and a very high standard of review will be applied.\*

\* See Previous ITN Reporting on standard of review in annulment proceedings:

“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:

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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:

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<http://ita.law.uvic.ca/documents/MCI-Annulment.pdf>

## CANADIAN MINING COMPANY GOLD RESERVE...

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According to the company, these and other actions have violated its right to fair and equitable treatment, and its right against unlawful expropriation as protected by the 1996 Canada-Venezuela Bilateral Investment Treaty. The company says it has invested US\$ 300 million in Venezuela but estimates the projected profitability of those investments at US\$ 5 billion.

ITN contacted Gold Reserve president Doug Belanger, who stated that the amount of compensation the company was seeking was to be determined during the process of arbitration.

In May of this year, the Venezuelan Minister of Basic Industry and Mining (Mibam) refused the company’s request to extend the Brisas project, and at the same time declared extinct part of the company’s mining concession, according to reports from Business News Americas (BNA).

BNA spoke to a Mibam official who said at the time that “these sectors are going to be part of the new joint ventures contemplated under government policy.”

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 retains majority ownership.

*“ITN contacted Gold Reserve president Doug Belanger, who stated that the amount of compensation the company was seeking was to be determined during the process of arbitration.”*

As reported previously by ITN, Venezuela was successful in renegotiating these joint venture contracts with most oil companies operating in its territory. Exxon Mobil and ConocoPhillips were the only holdouts and both launched ICSID arbitrations against Venezuela that are still pending.

When asked if Gold Reserve had been contacted by Venezuela to form such a joint venture for the Brisas project, Mr. Belanger answered that Gold Reserve “does not comment publicly to confirm or deny corporate issues.”

Gold Reserve sent the Government of Venezuela a notice of arbitration in April 2009, beginning the 6-month negotiation period required under the

Canada-Venezuela Bilateral Investment Treaty before arbitration could be initiated.

ITN contacted Glen Ireland, partner at international law firm White & Case, who represents Gold Reserve, but Mr. Ireland declined to comment on the case.

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