



**PAGE 1**

NEWS: Tribunal's decision in anticipated Yukos case released to public

**PAGE 2**

NEWS: ICSID finds that corruption has no place in annulment proceedings

**PAGE 3**

NEWS: Consortium building new Quito Airport takes Ecuador to ICSID, By Fernando Cabrera Diaz

**PAGE 4**

NEWS: Claimant seeks enforcement of environmental laws in notice of dispute alleging expropriation of Barbadian nature sanctuary

**PAGE 5**

NEWS: Perenco-nominated arbitrator disqualified for interview comments in ICSID dispute with Ecuador

**PAGE 6**

NEWS: ICSID tribunal affirms power to exclude counsel, but declines to do so

**PAGE 7**

NEWS: TWC Group settles with the Dominican Republic

**PAGE 9**

IN BRIEF: New arbitrator nominated in NAFTA dispute over thwarted Canadian garbage site

**Contact information:**

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



Institut international du développement durable

International Institute for Sustainable Development

## NEWS: TRIBUNAL'S DECISION IN ANTICIPATED YUKOS CASE RELEASED TO PUBLIC

By Elizabeth Whitsitt

Three highly anticipated decisions permitting three claimants – all former shareholders of Yukos Oil Corporation OJSC (Yukos) – to proceed to the merits phase of their multi-billion dollar expropriation claim against the Russian government have been released to the public.\* Similar in content, all three decisions were issued by the same tribunal, composed of L. Yves Fortier (Chairman), Dr. Charles Poncet, and Judge Stephen M. Schwebel, sitting at the Permanent Court of Arbitration in The Hague.

Cypriot companies, Hulley Enterprises Limited (Hulley) and Veteran Petroleum Limited (VPL) along with Yukos Universal Limited (YUL), a firm organized under the laws of the Isle of Man, commenced arbitral proceedings against the Russian Federation in February, 2005.

Problems between the parties arose two years earlier in the summer of 2003. According to the claimants, measures taken by Russia, including criminal prosecutions, tax reassessments, and its annulment of Yukos' merger with Sibneft, Russia's fifth largest oil company, left their investment in Yukos virtually worthless. Subsequently, the claimants brought expropriation claims against Russia under the Energy Charter Treaty (ECT).

While addressing various issues related to the tribunal's jurisdiction, central to the Yukos jurisdictional dispute was the extent to which the ECT applied to Russia. Russia signed the ECT in 1994 but its Parliament never ratified it. Under Article 45(1) a party, like

Russia, that has signed but not ratified the ECT is bound "...to apply [the] [t]reaty provisionally...to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."

*"the tribunal found that '...by signing the ECT, the Russian Federation [had] agreed that the treaty as a whole would be applied provisionally... unless the principle of provisional application itself was inconsistent with [Russia's] constitution, laws or regulations.'"*

Asserting that it was not bound by dispute settlement provisions in the ECT because they were inconsistent with its Constitution and laws, the Russian Federation argued that the tribunal had no jurisdiction to consider the merits of the claims raised in the arbitration.

In response, the claimants raised two principal counter-arguments. First, the claimants argued that Russia could not limit provisional application of the ECT because it had failed to make a formal declaration to that effect under either Article 45(2) or 45(1). In the alternative, Yukos' former shareholders contended, that the dispute settlement provisions of the ECT were not inconsistent with Russia's Constitution or laws.

*Continued on page 8*

## NEWS: ICSID FINDS THAT CORRUPTION HAS NO PLACE IN ANNULMENT PROCEEDINGS

By Elizabeth Whitsitt

American businessman, Jack J. Grynberg, has suffered another setback in his company's ongoing dispute with Grenada.

Commenced in 2005, the ICSID claim was one of a myriad of legal avenues pursued by Mr. Grynberg, the president and CEO of RSM Production Corporation (RSM), in an effort to gain an exploration license for oil and gas reserves thought to exist off the coast of Grenada.

Less than a year ago, an ICSID tribunal composed of Mr. V.V. Veeder (President), Professor Bernard Audit, and Dr David S. Berry dismissed RSM's substantive claims.\* Since that time RSM has sought to annul that award on grounds that the tribunal: (i) manifestly exceeded its powers, (ii) that there was a serious departure from a fundamental rule of procedure, and (iii) that the award failed to state the reasons on which it was based.

Before addressing the substantive grounds for annulment, the US firm asked the annulment committee, composed of Dr. Gavan Griffith QC (President), Dato' Cecil W. M. Abraham, and Professor Campbell McLachlan QC, to investigate suspicions of corruption in the contract underlying the dispute. Specifically, RSM applied to the annulment committee for a finding that a key witness in the arbitral hearing (a cabinet minister in Grenada's government) was bribed to ensure that the oil and gas exploration contract won by RSM would not be successfully performed.

Corruption allegations surfaced earlier during the merits hearing in the arbitral proceeding. However, counsel for RSM did not request that the tribunal make a finding of fact

relating to those assertions. Instead, RSM asked the tribunal to consider evidence of the alleged corruption when considering the testimony of Grenada's cabinet minister.

*"the committee concluded that 'it [did] not have the power to exercise an independent jurisdiction' to assess the corruption allegations raised by RSM"*

For its part, the tribunal did not accept any of the criticisms of Grenada's key witness. Indeed the tribunal determined that whether or not Grenada's witness acted corruptly was immaterial to its substantive findings.

Subsequently, RSM revitalized its corruption allegations while attempting to have the tribunal's substantive findings annulled. Citing new evidence to support its bribery claims, RSM asserted that the annulment committee possessed inherent jurisdiction to evaluate its request.

In its decision dated December 7, 2009, but only recently made available to the public, the annulment committee flatly rejected RSM's request. Finding that RSM's request fell outside of its jurisdiction, the committee noted that annulment committees have a narrowly defined jurisdictional mandate exhaustively outlined in Article 52 of the ICSID Convention. As a result, the committee concluded that "it [did] not have the power to exercise an independent jurisdiction" to assess

the corruption allegations raised by RSM.

The committee also observed that the ICSID Convention and its Arbitration Rules provided powers to the original tribunal to deal with the proceedings in the post-award phase, including the discovery of new evidence. In the annulment committee's view, those avenues would have been more appropriate for addressing RSM's request.

The committee will now move on to hear RSM's substantive arguments on annulment. In that vein, RSM filed reply arguments in its annulment application on January 15, 2010.

\* Award in RSM Production Corporation v. Grenada is available here:

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

Sources:

Decision on RSM Production Corporation's Application for a Preliminary Rule of 29 October 2009 is available here:

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

ITN Reporting:

"ICSID tribunal dismisses RSM Production Corporation's claim against Grenada," By Damon Vis-Dunbar, Investment Treaty News, 26 March 2009, available here:

<http://www.investmenttreatynews.org/cms/news/archive/2009/03/26/icsid-tribunal-dismisses-rsm-production-corporation-s-claim-against-grenada.aspx>

## NEWS: CONSORTIUM BUILDING NEW QUITO AIRPORT TAKES ECUADOR TO ICSID

By Fernando Cabrera Diaz

Corporacion Quiport S.A., the company building the new Quito international airport, has initiated arbitration proceedings at ICSID against the Republic of Ecuador in connection with its concession to maintain and operate the existing Quito airport and to construct and operate the New Quito International Airport (NQIA) being built outside Ecuador's capital.

Two weeks after the arbitration was registered by ICSID on December 30, 2009 it was suspended by agreement of the parties. Citing sources at the Attorney General's Office, Quito daily El Comercio reported that on January 13, 2010 the parties suspended the arbitration so that they could continue talks related to the airport concession contract.

The central issue in the negotiations arose from a July 2009 decision by the transitional Ecuadorian Constitutional Court which found that the financing plan for the construction of the NQIA found in the original 2002 concession contract was partially unconstitutional under the new Ecuadorian Constitution of 2008.

Under the concession contract Quiport was supposed to pay loans to international lenders, recoup its investment and make a profit through the fees it was given the authority to charge to airport users both at the old Quito Airport, which it also manages, and at the NQIA during the life of the concession.

Yet the Constitutional Court ruled that the fees charged to airport users were actually taxes which could not be handled by a private company under the new Constitution law. The decision of the court is understood not to be appealable.

Following the decision, the sides were forced to enter renegotiations of the

concession contract. The Municipality of Quito, which was set to receive US \$1.5 million per year as a concession fee, has taken the opportunity to seek a larger share of the profits from the new airport. The international lenders include OPIC, Ex-Im, IDB and EDC.

*“The tribunal, however, ultimately based its decision on a finding that the claimants did not meet the third requirement, that the ‘new’ fact would have a decisive effect on the underlying award.”*

Mayor Augusto Barrera, who was not in office when the concession contract was signed, has said the concession fee does not serve the city's interests and is instead seeking new terms under which the city would receive a percentage of the airport's profits. Quiport is opposed to changing the contractual model, though it has been open to a new economic arrangement which may now be necessary in order to abide by the Constitutional Court's ruling.

ITN contacted Steve Nackan, President of Aecon Concessions, one of the investors in the project, and Jonathan Hamilton of White & Case LLP which represents the claimants and was told the company had no comment due to the ongoing negotiations. ITN also contacted officials at the Ecuadorian Attorney General's who also had no comment.

Philippe Baril, president of Quiport, told El Comercio that the international lenders funding the project had imposed a negotiation deadline of January 29, 2010. According to Mr. Baril the project is proceeding but at

a diminished pace due to a lack of funds being made available by the project's lenders.

Corporacion Quiport S.A. is a 100 percent privately owned capital firm originally formed by Canadian companies AECON and Airport Development Corporation (ADC), which later added U.S.-based HAS Development Corporation (HAS-DC) and Brazilian Andrade Gutierrez Concessões (AGC). There

Though the current dispute at ICSID was filed under an investment contract, some investors in Quiport are protected by Bilateral Investment Treaties. The American and Canadian BITs with Ecuador contain arbitration clauses which allow for investor-state arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), not just ICSID.

This is significant because Ecuador denounced the ICSID Convention on July 6, 2009 and in accordance with Article 71 of the ICSID Convention, the denunciation took effect on January 7, 2010, six months after ICSID's receipt of Ecuador's notice. (Read about the possible effects of Ecuador's withdrawal from ICSID: <http://www.investmenttreatynews.org/cms/news/archive/2009/08/28/ecuador-prepares-for-life-after-icsid-while-debate-continues-over-effect-of-its-exit-from-the-centre.aspx>)

Quiport won the concession for the NQIA and the management of the existing Quito airport through the Canadian Commercial Corporation (a Canadian Government Crown Corporation), which made a proposal to the city in 2001 setting out the structure of the project.

## CONSORTIUM BUILDING NEW QUITO AIRPORT...

Continued from page 3

The City of Quito accepted the proposal and signed the concession and construction contracts with CCC in 2002 for the design, financing, construction, and operation of the new Quito International Airport, as well as the administration and operation of the current Mariscal Sucre International Airport.

Since then, according to public reports, the company claims it has invested US\$ 74 million of its equity investment as well as US\$ 376 million in international financing for the US\$650 million project.

Sources:

“La renegociación cumple 5 meses,” December 19, 2010 (El Comercio)

“Canadian Commercial Corporation visits the new Quito International

Airport (NQIA) site,” CCC Press Release, December 9, 2009, available from the CCC website at: [http://www.ccc.ca/eng/id\\_Quito\\_latestNews.cfm](http://www.ccc.ca/eng/id_Quito_latestNews.cfm)

Quiport website: <http://www.quiport.com/www/frontEnd/main.php>

The Ecuador-United States Bilateral Investment Treaty available from the United Nations Conference on Trade and Development (UNCTAD) website here: [http://www.unctad.org/sections/dite/ia/docs/bits/us\\_ecuador.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/us_ecuador.pdf)

The Canada-Ecuador Bilateral Investment Treaty available from the United Nations Conference on Trade and Development (UNCTAD) website here: <http://www.unctad.org/sections/dite/ia/docs/bits/>

[canada\\_ecuador.pdf](#)

Related ITN Reporting:

“ALBA moves forward with plan to create regional investment arbitration alternative to ICSID at 7th Summit,” By Fernando Cabrera Diaz, Investment Treaty News, 3 November 2009, is available here:

<http://www.investmenttreatynews.org/cms/news/archive/2009/11/01/alba-moves-forward-with-plan-to-create-regional-investment-arbitration-alternative-to-icsid-at-7th-summit.aspx>

“Ecuador continues exit from ICSID,” By Fernando Cabrera-Diaz, Investment Treaty News, 8 June 2009, is available here:

## NEWS: CLAIMANT SEEKS ENFORCEMENT OF ENVIRONMENTAL LAWS IN NOTICE OF DISPUTE ALLEGING EXPROPRIATION OF BARBADIAN NATURE SANCTUARY

By Elizabeth Whitsitt

A notice of dispute forwarded to Barbados some five months ago by Mr. Peter Allard, Canadian owner of the Graeme Hall Nature Sanctuary, contends that the Government of Barbados has violated its international obligations by refusing to enforce its environmental laws.

Located on the south coast of Barbados, Graeme Hall Sanctuary consists of 34.25 acres of natural wetlands and is situated within a 240 acre green space that is the last significant mangrove forest and migratory bird habitat in the Caribbean state.

Mr. Allard acquired the land for the Sanctuary in the mid-1990s and subsequently developed it into an

*“In an interview with ITN Mr. Allard’s lawyer, Mr. Robert Wisner of McMillan LLP, indicated that while Barbados has yet to respond to his client’s notice of dispute, he is hopeful that an amicable settlement between the parties can be reached.”*

eco-tourism facility. In the notice of dispute, Mr. Allard claims to have taken numerous steps to contribute to the sustainability of the Sanctuary

only to have such efforts thwarted by the acts and omissions of Barbados.

Mr. Allard asserts that Barbados’ acts and omissions have severely damaged that natural ecosystem relied upon to attract tourists to the Sanctuary. Consequently, Mr. Allard contends that Barbados failed to provide his investment full protection and security and fair and equitable treatment in accordance with the Canada-Barbados BIT.

With respect to Barbados’ omissions to protect the Sanctuary, Mr. Allard argues that Barbados has, among other things, failed to: (i) prevent the repeated discharge of raw sewage into the Sanctuary wetlands, (ii) investigate or prosecute sources of runoff of

Continued on page 9



## NEWS: PERENCO-NOMINATED ARBITRATOR DISQUALIFIED FOR INTERVIEW COMMENTS IN ICSID DISPUTE WITH ECUADOR

*By Fernando Cabrera Diaz*

Permanent Court of Arbitration (PCA) Secretary-General Cristiaan M.J. Kroner has accepted the challenge by Ecuador to remove the Honourable Charles N. Brower as arbitrator in its dispute with oil company Perenco Ecuador Limited. In his December 9, 2009 ruling Mr. Kroner concludes that “comments made by Judge Brower in an August 2009 interview gave rise to reasonable doubts as to Judge Brower’s impartiality or independence in the dispute.”

The challenge to Judge Brower arose out of comments he made in a published article entitled “A World-Class Arbitrator Speaks!” in the August 2009 issue of *The Metropolitan Corporate Counsel*. Judge Brower was interviewed about a wide range of topic for the article, but the controversial comments came when he was asked what he thought were the most pressing issues in international arbitration.

The Judge responded by saying: “There is an issue of acceptance and the willingness to continue participating in it, as exemplified by what Bolivia has done and what Ecuador is doing. Ecuador currently is expressly declining to comply with the orders of two ICSID tribunals with very stiff interim provisional measures, but they just say they have to enforce their national law and the orders don’t make any difference. But when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya, start bringing hot oil litigation and chasing cargos, doing detective work looking for people who will invoke cross-default clauses in loan agreements, etc., the politics may change. After a certain point, no one will invest without having something to rely on.”

Judge Brower was referring in part to Ecuador’s refusal to abide by a temporary restraint order and subsequent provisional measures issued by the tribunal in the Perenco case, which recommended that Ecuador refrain from trying to collect alleged debts from the company while the debts were being disputed in the arbitration.

Ecuador seized Perenco’s oil assets on March 3, 2009 in an attempt to forcibly collect debts the company had allegedly accumulated from its refusal to pay taxes under a windfall tax law (Law 42) enacted amid rising oil prices in 2006. The country has maintained that the tribunal’s provisional measures are not binding as a matter of international law.

In refusing to pay the Law 42 tax, Perenco has argued that Law 42 is in violation of its contract with Ecuador and the France-Ecuador bilateral investment treaty.

After becoming aware of Judge Brower’s comments in August of 2009 Ecuador filed for the judge’s disqualification on September 19, 2009.

By previous agreement of the parties, arbitrator challenges in the dispute are resolved by the Secretary-General of the PCA, applying the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines).

Under the IBA Guidelines the relevant question in resolving the challenge to Judge Brower is whether the interview comments constitute circumstances that, “from a reasonable third person’s point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator’s impartiality or independence,” said Secretary-General Kroner in his decision.

According to Mr. Kroner, Judge Brower’s remarks could lead an informed third person to reasonably infer that Judge Brower was drawing an analogy between Ecuador and Libya in the famous nationalizations of oil companies in the 1970s. As a result, Mr. Kroner went on to conclude that although Judge Brower may not have actually prejudged the issue of expropriation, from a reasonable third person’s point of view his comments could give rise to an appearance that he had prejudged the issue.

Based on these reasons, Secretary-General Kroner sustained Ecuador’s challenge and disqualified Judge Brower from the arbitration.

ITN spoke top Perenco spokesperson Rodrigo Marquez, who said that the company had no comment on the disqualification of Judge Brower. Mr. Marquez did confirm that Judge Brower had been replaced by a new Perenco-nominated arbitrator Neil Kaplan.

ITN also contacted a senior official of the Ecuadorian government who called the agreement between the parties to use the PCA and in particular the IBA Guidelines to resolve issues regarding impartiality of arbitrators an important development in the field.

“This precedent is fundamental to the system of settlement of investment disputes. The fact that the parties, on their own initiative, established higher standards of excellence and fairness for the arbitrators than those standards established under the ICSID Convention sends a good message to the arbitrators who have the sensitive and delicate task of judging sovereign states...,” added Mr. Galindo.

The arbitration is now set continue at ICSID with a full panel, added Mr. Marquez.

Sources: PCA Decision on Ecuador’s Request to Disqualify Judge Brower available at Investment treaty arbitration: <http://ita.law.uvic.ca/documents/PerencovEcuador-Challenge.pdf>

Previous ITN Reporting: “Ecuador defies provisional measures in dispute with French oil company,” By Damon Vis-Dunbar, *Investment Treaty News*, 8 June 2009, is available here:

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

## NEWS: ICSID TRIBUNAL AFFIRMS POWER TO EXCLUDE COUNSEL, BUT DECLINES TO DO SO

By Elizabeth Whitsitt

An ICSID tribunal, composed Sir Franklin Berman, Mr. Donald Donovan and Mr. Marc Lalonde, has determined that Mr. Barton Legum, a partner with Salans & Associés, can continue to represent Dutch firm Rompetrol N.V. in its arbitration against Romania. Mr. Legum formally took over as counsel for Rompetrol in the summer of 2009 after his colleague, Ms. François-Poncet, announced her departure from private practice.

In August 2009, Romania sought “to remove Mr. Legum from the case and to forbid him from participating in it in any way” after learning that Mr. Legum would be taking over legal representation of Rompetrol’s case. Of concern to Romania was the fact that Mr. Legum and Mr. Donald Donovan, a member of the tribunal, had both worked at Debevoise and Plimpton LLP from 2004-2008.

In a rare maneuver, Romania elected to challenge Mr. Legum’s position, rather than to challenge the tribunal itself or any of its members. Neither the ICSID Convention nor the ICSID Arbitration Rules explicitly provide for challenges to the appointment of counsel in arbitral proceedings. As a result, Romania grounded its challenge on the inherent general powers of ICSID tribunals to “police the integrity of [their] proceedings.”

As support for its position, Romania relied upon the 2008 decision of an ICSID tribunal in *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*. In its ruling the Hrvatska tribunal excluded the participation of counsel in arbitral proceedings after the

Republic of Slovenia announced its appointment of Mr. David Mildon QC as co-counsel shortly before hearings in the arbitration were to begin. In that case, concerns about the existence of a conflict of interest were raised when Hrvatska

*“the Rompetrol tribunal considered that ‘...the Hrvatska [d]ecision might better be seen as an ad hoc sanction for the failure to make proper disclosure in good time than as a holding of more general scope.’”*

learned that Mr. Mildon QC and a member of the tribunal, Mr. David Williams QC, were members of the Essex Court Chambers in London.

In its decision of January 14, 2009, the Rompetrol tribunal ultimately rejected Romania’s position. In so doing, the tribunal observed that “[a] power on the part of a judicial tribunal of any kind to exercise a control over the representation of the parties in proceedings before it is by definition a weighty instrument...” Moreover, the tribunal concluded that the power to exclude counsel should only be used when there is an “overriding and undeniable need to safeguard the essential integrity of the entire arbitral process.”

Considering the facts of the case (i.e. that the association between Mr. Legum and Mr. Donovan had ceased), the tribunal determined that it should not interfere with Rompetrol’s choice of legal counsel

because the integrity of the arbitral process was not an issue.

Apparently concerned about reconciling its decision with the Hrvatska ruling, the Rompetrol tribunal was careful to point out that its analysis should not be seen as second-guessing the assessment of the Hrvatska tribunal. Rather, the Rompetrol tribunal suggested that the Hrvatska tribunal’s decision was materially influenced by Slovenia’s late announcement regarding the appointment of a new lawyer in the arbitration. As a result, the Rompetrol tribunal considered that “...the Hrvatska [d]ecision might better be seen as an ad hoc sanction for the failure to make proper disclosure in good time than as a holding of more general scope.”

Undoubtedly, the Rompetrol tribunal’s re-casting of the Hrvatska decision may well provoke further comment about the power to exclude counsel in arbitral proceedings.

Sources:

Decision of the Tribunal on the Participation of a Counsel in Rompetrol Group N.V. v. Romania is available here: <http://ita.law.uvic.ca/documents/RompetrolParticipation.pdf>

Related ITN Reporting:

“Arbitrators clash on question of interpretation in *Hrvatska Elektroprivreda d.d. v. The Republic of Slovenia*,” By Elizabeth Whitsitt, Investment Treaty News, 15 July 2009, available here:

<http://www.investmenttreatynews.org/cms/news/archive/2009/07/14/arbitrators->

## NEWS: TWC GROUP SETTLES WITH THE DOMINICAN REPUBLIC

By Elizabeth Whitsitt

TWC Group, Inc. and its affiliate Dominican Energy Holdings L.P. have reached a settlement with the Dominican Republic, ending a dispute that began in 2007.

TWC had been seeking some US\$ 680 million for alleged violations of the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR).

In a joint letter issued on 30 June 2009 to a tribunal constituted under the UNCITRAL Arbitration Rules, the parties announced that they had reached an agreement, and requested discontinuance of the arbitration proceedings. In its consent award made available to the public only recently, the tribunal accepted the parties' request for discontinuance. Additionally the tribunal ordered that costs of the arbitration – which have been fixed

at some EUR\$ 212 thousand – be born equally between the parties.

The TWC Group did not respond to requests made by ITN for further information about the settlement.

As previously reported by ITN, in 2007 TCW's French parent company, Société Générale, launched parallel arbitral proceedings against the Caribbean nation under a different treaty, the 2003 Dominican Republic-France bilateral investment treaty (DR-France BIT). In October 2008, an arbitral tribunal issued a decision on jurisdiction in which it allowed the arbitration to proceed to the merits phase of the dispute.

Sources:

Consent Award in TWC Group, Inc. v. Dominican Energy Holdings L.P. is available here: <http://ita.law.uvic.ca/>

documents/TD-DRConsentAward\_002.PDF

Procedural Order No. 4 in TWC Group, Inc. v. Dominican Energy Holdings L.P. is available here: [http://ita.law.uvic.ca/documents/TD-DRPO4\\_002.pdf](http://ita.law.uvic.ca/documents/TD-DRPO4_002.pdf)

Related ITN Reporting:

"Société Générale passes jurisdictional hurdle in dispute with Dominican Republic; controversy erupts over press release," By Fernando Cabrera Diaz, Investment Treaty News (28 October 2008), available here:

<http://www.investmenttreatynews.org/cms/news/archive/2008/10/28/soci-233-t-233-g-233-n-233-rاله-passes-jurisdictional-hurdle-in-dispute-with-dominican-republic-controversy-erupts-over-press-release.aspx>

## TRIBUNAL'S DECISION IN ANTICIPATED YUKOS CASE...

Continued from page 1

In its decision, the results of which have been widely publicized, the tribunal ultimately sided with the claimants. But it was not a complete victory for the shareholders of what was once considered Russia's largest oil company.

Focusing on the plain and ordinary meaning of ECT Article 45, the tribunal rejected the claimants' first argument that would have made a state's limitation of the ECT's provisional application dependent on a formal opt-out declaration. Specifically, the tribunal held that "[n]othing in the language of Article 45 suggests that the limitation clause in Article 45(1) is dependent on the mandatory making of a declaration under Article 45(2)." Similarly, the tribunal observed that Article 45(1) did not expressly require any form

of opt-out declaration or notification in order for a signatory party to limit the ECT's provisional application.

Subsequently, the tribunal focused its analysis on whether the dispute settlement provisions of the ECT were inconsistent with Russia's Constitution or laws. As a preliminary matter, the tribunal clarified when a signatory state could opt-out of the ECT's provisional application under Article 45(1). On this point, the parties' positions differed dramatically.

According to Russia, it could be provisionally bound by each provision of the ECT, but only to the extent performance of the obligation created by that provision was not inconsistent with its Constitution, laws or regulations. Based on

this "piecemeal" approach, Russia contended that it was not bound by dispute settlement provisions in the ECT.

The claimants, on the other hand, asserted that Article 45(1) operates on an "all-or-nothing basis." In particular, the claimants argued that each signatory agrees to be bound by the ECT if the principle of provisional application is consistent with its domestic law. If, on the other hand, a signatory's domestic law does not allow it to be bound by way of provisional application, it may decline to assume any international obligations under the ECT. Citing Russia's long-standing practice of provisionally applying international treaties, the claimants challenged Russia's contention that the dispute settlement provisions of the ECT were

Continued on page 8

## TRIBUNAL'S DECISION IN ANTICIPATED YUKOS CASE...

Continued from page 1

inconsistent with its Constitution or laws.

For its part, the tribunal eventually sided with the claimants. Specifically, the tribunal found that "...by signing the ECT, the Russian Federation [had] agreed that the treaty as a whole would be applied provisionally... unless *the principle of provisional application itself was inconsistent 'with [Russia's] constitution, laws or regulations.'*"

There was no significant debate between the parties on the issue of whether the principle of provisional application was inconsistent with Russia's Constitution, law or regulations. The Tribunal therefore had no difficulty in concluding that the principle of provisional application was perfectly consistent with Russia's Constitution, laws and regulations. Accordingly, the Tribunal found that the whole of the ECT applied provisionally in the Russian Federation until October 18, 2009 when Russia's formal announcement terminating its provisional application of the ECT came into effect.

Under Article 45(3) of the ECT, for energy investments made prior to October 18, 2009, Russia remains bound to the treaty for 20 more years, allowing investors to arbitrate

disputes with Russia concerning those investments.

The tribunal will now proceed to hear the merits of former Yukos shareholders' claims.

In a related development, the European Court of Human Rights has postponed hearing the merits of another claim launched against Russia by Yukos. Initially scheduled for January 14, 2010 the hearing has been adjourned until March 4, 2010 due to the unavailability of both Russia's ad hoc judge, Andrei Bushev, and its representative government agent, Georgy Matyushkin.\*\*

\* Interim Award on Jurisdiction in *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* is available here: <http://ita.law.uvic.ca/documents/HELvRussianFederation-InterimAward-30Nov2009.pdf>

Interim Award on Jurisdiction in *Yukos Universal Limited (Isle of Man) v. The Russian Federation* is available here: <http://ita.law.uvic.ca/documents/YULvRussianFederation-InterimAward-30Nov2009.pdf>

Interim Award on Jurisdiction in *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* is available here: <http://ita.law.uvic.ca/documents/VPLvRussianFederation-InterimAward-30Nov2009.pdf>

[InterimAward-30Nov2009.pdf](#)

\*\* See <http://www.khodorkovskycenter.com/news-resources/stories/hearing-yukos-v-russia-case-postponed>

Previous ITN Reporting on Yukos Dispute:

"The merits of former Yukos shareholders' expropriation claim will be heard," By Elizabeth Whitsitt, Investment Treaty News, 13 January 2010, available here:

<http://www.investmenttreatynews.org/cms/news/archive/2010/01/12/in-brief-the-merits-of-former-yukos-shareholders-expropriation-claim-will-be-heard.aspx>

"Spanish fund to open new front in arbitration against Russia over Yukos," By Luke Eric Peterson, Investment Treaty News, 19 July 2006, available here:

[http://www.iisd.org/pdf/2006/itn\\_july19\\_2006.pdf](http://www.iisd.org/pdf/2006/itn_july19_2006.pdf)

"More Spanish portfolio investors line up to sue Russia over Yukos," By Luke Eric Peterson, Investment Treaty News, 13 October 2006, available here:

[http://www.iisd.org/pdf/2006/itn\\_oct13\\_2006.pdf](http://www.iisd.org/pdf/2006/itn_oct13_2006.pdf)

## CLAIMANT SEEKS ENFORCEMENT...

Continued from page 4

grease, oil, pesticides, and herbicides from neighboring areas, and (iii) investigate or prosecute poachers that have threatened the wildlife within the Sanctuary.

Additionally, Mr. Allard has made reference to actions taken by the Parliament of Barbados in 2008, which resulted in the adoption of a new National Physical Development

Plan. Barbados' new Development Plan revokes its previously protective land use policies and instead calls for the commercial and residential development of the majority of the 240-acre green space surrounding the Sanctuary. In Mr. Allard's view those changes, which will inevitably cause further environmental damage to the Sanctuary, have led to the indirect expropriation of his investment.

In an interview with ITN Mr. Allard's lawyer, Mr. Robert Wisner of McMillan LLP, indicated that while Barbados has yet to respond to his client's notice of dispute, he is hopeful that an amicable settlement between the parties can be reached.

A press release issued by the Sanctuary indicates that it has been over a year since there

Continued on page 9



## IN BRIEF: NEW ARBITRATOR NOMINATED IN NAFTA DISPUTE OVER THWARTED CANADIAN GARBAGE SITE

Canada has nominated Mr. Laurent Levy to act as arbitrator in its Chapter 11 NAFTA dispute against US investor Vito G. Gallo.

Canada's original nominee, Mr. J. Christopher Thomas Q.C., resigned from his appointment as an arbitrator in October, 2009 after ICSID Deputy Secretary-General, Nassib G. Ziade, determined that Mr. Thomas could not continue to provide legal advice to Mexico and serving as an arbitrator in the case.

Mr. Levy is a lawyer and arbitrator with Levy Kaufmann-Kohler, a Swiss firm specializing in international commercial, investment and sports arbitration.

For previous ITN reporting on the dispute between Vito Gallo and Canada, including the challenge to Mr. Thomas' appointment as arbitrator in the case see:

"Arbitrator forced to choose in NAFTA dispute over thwarted Canadian garbage site," By Elizabeth Whitsitt, Investment Treaty News, 6 December 2009, available here:

<http://www.investmenttreatynews.org/cms/news/archive/2009/12/04/arbitrator-forced-to-choose-in-nafta-dispute-over-thwarted-canadian-garbage-site.aspx>

"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)

Sources:

"Replacement arbitrator selected by Canada in NAFTA garbage site dispute," By Luke Eric Peterson, Investment Arbitration Reporter Vol. 3, No. 1, 17 January 2010.

### CLAIMANT SEEKS ENFORCEMENT...

*Continued from page 8*

has been any face-to-face contact between Sanctuary and Barbadian government officials.

According to the Canada-Barbados BIT, Barbados has until early March, 2010 to respond to Mr. Allard's notice of dispute. After that Mr. Allard may initiate arbitral proceedings under the ICSID Additional Facility Rules or in accordance with the UNCITRAL

Arbitration Rules. Mr. Wisner confirmed to ITN that his client is willing to proceed to arbitration if necessary but indicated that a decision has yet to be made regarding the forum for potential arbitral proceedings.

Sources:

A copy of Mr. Allard's Notice of Dispute can be found here:

<http://www.graemehall.com/legal/papers/BIT-Complaint.pdf>

A copy of the Sanctuary's press release can be found here:

<http://graemehall.com/press/releases/promised-meeting-fails/index.htm>

#### Disclaimer:

The views expressed in Investment Treaty News are factual and analytical in nature; Apart from clearly identified IISD Perspectives or Viewpoints, ITN articles do not necessarily reflect the views of the International Institute for Sustainable Development, its partners, or its funders. Nor does the service purport to offer legal advice of any kind.