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Editor's Note:

1. Argentina liable for breaches of US-Argentina BIT in dispute with US water firm

As this edition of the newsletter was going to publication, word broke in the Argentine press that Argentina had lost an international arbitration with a US water-services company.

According to reports, Azurix Corp, a spin-off of the Enron Corporation, won a \$165 Million (US) award against Argentina, following a dispute over a concession to provide water and sewage services to two regions of Buenos Aires Province.

Azurix had filed suit against Argentina in 2001 at the International Centre for Settlement of Investment Disputes, and the claim predated the succession of arbitrations directed at Argentina after that country's financial crisis.

ITN has put in requests to Azurix Corp and Argentina, seeking a copy of the arbitral award, which has yet to be released to the public. We intend to report on the arbitration in a subsequent edition of this newsletter.

Arbitration Watch:

2. Spanish fund to open new front in arbitration against Russia over Yukos,
By Luke Eric Peterson

A US law firm has announced the filing of a notice of dispute against the Russian Federation on behalf of a Spanish fund which claims losses arising out of Russia's treatment of the Yukos energy firm.

The Spanish fund is poised to launch an arbitration against the Russian Federation after the 3 month waiting period prescribed under the Russia-Spain bilateral investment treaty.

Already, the majority shareholders, Group Menatep, have mounted a series of arbitration claims under the Energy Charter Treaty against Russia. These claims allege damages amounting to some 30 Billion (US). However, lawyer Tom Johnston, of the law firm Covington & Burling predicts that his claim on behalf of a Spanish institutional investor in Yukos could be one of many additional claims to be launched by minority shareholders against Russia.

Johnston estimates that foreign minority shareholders may have lost anywhere between \$20 and 40 Billion (USD) as a result of the Russian Government's legal and taxation actions against the Yukos Corporation. He adds that many foreign shareholders may be covered by bilateral investment treaties between their home governments and Russia.

Although enforcement of arbitral awards has been a persistent concern on the part of investors dealing with Russia, Johnston takes heart from a ruling by a Dutch court, which last week froze assets which Johnston's clients say were illegally taken from Yukos. The Dutch court ordered that \$9 Million (US) of assets owned by Russian firm Rosneft be frozen until the claim by Mr. Johnston's Spanish client has been resolved.

In an interview with ITN, Johnston hailed this “precedent”, observing that it will enable his client to collect on any arbitral award should they prevail in arbitration with Russia.

Meanwhile, the much larger arbitration between Group Menatep and the Russian Federation soldiers on. That UNCITRAL arbitration claim is being heard before a tribunal consisting of Daniel Price, Stephen Schwebel, and L. Yves Fortier, under the supervision of the Permanent Court of Arbitration in the Hague. A source familiar with that claim says that hearings on jurisdiction and admissibility have been set for July 2007.

3. UNCITRAL to review arbitral rules, greater transparency not on the agenda, By Fiona Marshall

The United Nations Commission on International Trade Law (UNCITRAL) has launched plans to revise its signature arbitration rules, however a move towards greater transparency does not appear forthcoming.

The UNCITRAL Arbitration Rules are perhaps the most commonly-used set of arbitral rules for resolving disputes between commercial parties.

Thanks to their incorporation into hundreds of bilateral investment treaties, the Rules have also been used to resolve dozens of investment treaty disputes between foreign investors and their host states.

However, when it comes to their use in investment treaty arbitration there are no precise figures, because the Rules do not require such arbitrations to be a matter of public record; nor is the Vienna-based UNCITRAL Secretariat notified of their use. Although some investors or governments disclose information about UNCITRAL-based arbitrations, it remains unclear what percentage do so.

As such, the best estimate as to the use of the UNCITRAL Rules in investment treaty disputes comes from a November 2005 survey commissioned by the UN Conference on Trade and Development, a separate (and unrelated) UN agency which monitors trade and investment developments.

UNCTAD found evidence of 219 treaty-based investment arbitrations (dating as far back as 1987); of these disputes some 60% took place at the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID). Significantly, 30% of the known cases were being arbitrated under the UNCITRAL Rules.

These figures understate the true number of UNCITRAL investor-State arbitrations, however, as an unknown number of cases are conducted without publicity.

The UNCITRAL secretariat has been floating possible revisions of its arbitration rules since the late 1990s. However, the decision to commence revision in earnest was made by

the Commission at its 39th Session, i.e. the annual meeting of UNCITRAL-member governments, which began in New York in late June of this year.

The announcement from UNCITRAL comes three months after the ICSID adopted limited amendments to its own arbitration rules (see “ICSID Member-Governments OK watered-down changes to arbitration process”, ITN, March 29 2006, available at: http://www.iisd.org/pdf/2006/itn_mar29_2006.pdf).

Whereas ICSID was established specifically to deal with investor-State disputes, UNCITRAL’s Arbitration Rules deal with commercial arbitration across the board. This means that arbitrations between a government and a private party are conducted under the same rules as those between two private parties, notwithstanding that the former have the potential for wider public policy implications.

At UNCITRAL’s 39th Session, member-governments suggested that UNCITRAL’s Working Group on Conciliation and Arbitration should undertake to carefully define the list of topics that might be addressed in a future revision process.

In particular, the governments determined that a 2006 document* provided a useful starting point, insofar as it offers a series of suggested amendments to the UNCITRAL Arbitral Rules that were put forward by practitioners at a conference held in Vienna on 6-7 April 2006.

One proposal mooted in that document was to further strengthen the confidentiality of arbitral proceedings. In particular it was suggested that current provisions regarding confidentiality of hearings and awards should be extended so as to cover the proceedings themselves, as well as materials used in the proceedings (including legal pleadings).

Another proposal would have the Commission consider whether an express provision on third-party intervention should be included in the rules, however the proposal gave no indication as to whether such a provision would permit or prevent intervention by interested third-parties (for e.g. non-governmental organizations, business groups, etc.).

Other potential changes include the addition of provisions which would govern multi-party arbitrations; consolidation of similar cases before arbitral tribunals; procedures for proceeding with a truncated arbitral tribunal if one arbitrator acts in bad faith to obstruct progress on a case; and what constitutes “reasonable” arbitrators’ fees. It was also suggested that the Commission consider whether the question of the liability of arbitrators needs further examination and whether the existing provision on interim measures should be brought into line with UNCITRAL’s Model Law on Commercial Arbitration.

Using these various proposals as a basis for discussion, UNCITRAL’s Working Group on Conciliation and Arbitration will begin work on revision of the UNCITRAL Arbitration Rules at its next meeting on 11-15 September 2006 in Vienna. The Working Group’s

discussions will be further informed by a so-called “issues paper” to be prepared by the UNCITRAL secretariat.

According to ITN sources, the UNCITRAL secretariat’s paper will not propose a change to the Arbitration Rules’ current emphasis on protecting the confidentiality of arbitral hearings and the privacy and autonomy of the parties involved.

Interested international organisations (including accredited non-governmental organizations) and States that are not UNCITRAL members are permitted to attend the meetings of the Working Group as observers.

Observers may participate in the discussions to the same extent as UNCITRAL members, including submitting written statements. Relevant documents should be available on UNCITRAL’s website prior to the Working Group’s meeting.

ITN will endeavour to report on the contents of the forthcoming UNCITRAL “issues paper” once it is released to the public.

* “Settlement of Commercial Disputes: Possible future work in the field of settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules” A/CN.9/610/Add.1

Sources:

ITN interviews

UNCITRAL website <http://www.uncitral.org>

“Settlement of Commercial Disputes: Possible future work in the field of settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules” A/CN.9/610/Add.1, available [here](#)

“Possible future work in the area of international commercial arbitration” A/CN.9/460, available [here](#)

UNCTAD website <http://www.unctad.org>

“Latest Developments in Investor-State Dispute Settlement”, IIA MONITOR No. 4 (2005)(UNCTAD/WEB/ITE/IIT/2005/2), available [here](#)

ICSID website <http://www.worldbank.org/icsid/>

4. Argentina persists with challenges to arbitrators in BIT cases,
By Luke Eric Peterson

An investigation by Investment Treaty News (ITN) find that the Argentine Republic continues to raise objections to certain arbitrators presiding over the numerous bilateral investment treaty disputes faced by that country.

Argentina is party to a remarkable 35 of the 104 arbitrations currently pending at the World Bank's International Centre for Settlement of Investment Disputes (ICSID); in addition, the country faces 3 investment treaty arbitrations being pursued under the ad-hoc UNCITRAL rules of procedure.

Most, but not all, of these cases arise out of that country's financial crisis, where foreign investors allege that contractual and treaty undertakings were violated by virtue of various actions taken by Argentina during that period.

As has been reported earlier in this newsletter, lawyers acting for Argentina had earlier sought to challenge one arbitrator, Mr. Andres Rigo Sureda, who sits as a member of the tribunal in 3 pending arbitration claims against Argentina.

In January of this year, the last of these challenges was rejected by the International Chamber of Commerce, which had been called upon to rule on the challenge to Mr. Sureda in the UNCITRAL arbitration between the UK utilities firm National Grid and Argentina.

Recently, Argentina turned to a Buenos Aires administrative court in an effort to have that ICC decision invalidated, on the grounds that it gave no reasons for the decision to reject Argentina's challenge to Mr. Rigo.

Meanwhile, Argentina has moved to exclude another arbitrator, Mr. Fernando de Trazegnies Granda, in an ongoing ICSID arbitration brought by three investors with interests in electricity distribution, EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.

According to several sources familiar with this matter, Argentina objected to the fact that Mr. Trazegnies, a former Foreign Minister of Peru, had provided an expert opinion to a US investor, Duke Energy, which is currently pursuing a separate ICSID arbitration with the Government of Peru.

Argentine Government lawyers were unable to obtain a copy of this confidential legal opinion, which was understood to have pertained to the jurisdictional phase of the Duke v. Peru arbitration.

Accordingly, Argentina expressed concerns about having Mr. Trazegnies preside over jurisdictional questions in Argentina's own arbitration with the three aforementioned investors, EDF, SAUR and Leon Parcicipaciones.

While Mr. Trazegnies is understood to have rejected Argentina's doubts about his impartiality, in a move taken this week, he tendered his resignation from the tribunal in question. (Mr. Trazegnies still remains a member of the tribunal in another case brought by Electricidad Argentina and EDF International against Argentina; however that arbitration has been suspended since November of 2005 while the parties explore a negotiated settlement).

5. Conciliation of international investment disputes remains under-utilized, By Damon Vis-Dunbar

When Togo Electricité, a subsidiary of the French firm Elyo, clashed with the Government of Togo over a contract to deliver electricity in that country, the parties opted for one of the lesser-used services of the Washington-based International Centre for Settlement of Investment Disputes (ICSID): conciliation.

Togo Electricité favoured conciliation because it wanted to remain in Togo, in spite of the dispute, counsel for Togo Electricité told ITN. The company had cancelled a contract with the Togolese government when a rate hike by a power supplier in Benin made its investment unviable, spurring the government to seize some of the company's assets, alleges Togo Electricité.

Yet while the French investor opted for conciliation, those proceedings broke down last year. The dispute has now landed in arbitration, ending the most recent conciliation case to be brought to the ICSID.

Despite this outcome, there are examples of successful conciliation of investor-state disputes at ICSID. TG World, a Canadian energy company, initiated ICSID conciliation proceedings in 2004 in an effort to settle a dispute with the Republic of Niger, after the government of Niger terminated a contract that had allowed the company to explore for oil. Niger alleged that TG World had failed to invest adequately in the project, and transferred the exploration rights to a Chinese company.

A year into the conciliation proceedings, TG World and Niger reached a new agreement, permitting the company to continue its operations in the country.

Conciliation has been singled out as particularly appealing for oil and gas disputes, where foreign investors often have significant long-term stakes in a country.

“Although not traditionally considered to be as contentious as litigation in national courts, arbitral proceedings may still not always be suitable for the types of projects and relations encountered in the oil and gas sector,” writes Ucheora Onwuamaegbu, Senior Counsel at ICSID, in a recent article on oil and gas disputes.

But whatever its potential merits, the fact remains that conciliation is a little-used avenue of dispute resolution at ICSID. Of the 104 cases currently on the docket at ICSID, all are

subject to arbitration, none to conciliation. In fact, only five conciliation cases have been brought to the Centre, in its 40-plus years of existence.

One academic expert suggests that enforceability of conciliation outcomes could be a concern for foreign investors.

“The reason that conciliation is so unpopular, in my opinion, is that once they have reached an agreement, then (the investor) is really at square one, because I have to trust the state to enforce the settlement agreement,” said Eric van Ginkel, an arbitrator and mediator who teaches at the Pepperdine University School of Law.

The Washington Convention – which ICSID members sign onto - assures that arbitral awards handed down by ICSID tribunals are binding and final: a guarantee that does not exist if the parties reach a settlement in conciliation proceedings.

However, Jack Coe, a Professor of Law at Pepperdine University, has suggested recently that arbitration and conciliation might be resorted to in simultaneous fashion. Building on this idea, his Pepperdine University colleague Mr. Ginkel says there is nothing under ICSID rules to stop parties from first initiating arbitration proceedings, to be followed immediately by conciliation proceedings, so that the two progress concurrently. That would allow any agreement which arises out of the conciliation process to be enshrined in the form of a binding award issued by the arbitration tribunal, thus ensuring its enforceability, said Mr. Ginkel.

In the eyes of proponents, conciliation offers a number of benefits, such as easing case load management for states handling multiple arbitrations. “For a sovereign facing multiple claims at various stages, the ability to designate certain of them as holding special promise for settlement ... may add flexibility to its operations,” writes Mr. Coe.

Some 30 per cent of ICSID cases already end in an agreed settlement, and conciliation running in parallel with arbitration may increase that percentage, says Mr. Coe.

While some see more room for conciliation of investment disputes, few bilateral investment protection treaties make express reference to this mode of dispute settlement.

Provisions encouraging the use of conciliation are “a good idea,” says Mr. Ginkel, but he maintains that countries do not have to amend the language in their investment agreements in order to allow conciliation to run in parallel with arbitration.

Under current ICSID rules, once an arbitral tribunal has been constituted, it could order the appointment of a conciliation commission. “Everything you need exists now,” says Mr. Ginkel.

For its part, ICSID says it encourages investors and states to consider conciliation. ICSID also provides model clauses that it recommends to states and investors, which require that parties resort first to conciliation, followed by arbitration only if conciliation fails.

In the past, ICSID has proposed steps that would strengthen its non-arbitration services, noting in a 2004 paper on possible improvements to the ICSID rules that it “has begun to examine the possibility of helping to sponsor the establishment of a mediation service for investor-to-State disputes.” However, an ICSID official says the Centre is not working on such a service at the moment.

Sources:

ITN interviews

“Toward Mandatory ICSID Conciliation? Reflections on Professor Coe’s Article on Investor-State Conciliation”, By Eric van Ginkel, Mealey’s International Arbitration Report, April 2006

“Resolution of Oil and Gas Disputes at ICSID”, By Ucheora Onwuamaegbu, News From ICSID, Summer 2004, available [here](#)

Negotiation Watch:

6. European Commission makes another play for power to negotiate investment pacts,
By Damon Vis-Dunbar and Luke Eric Peterson

The European Commission (EC) is proposing new changes to European law that would broaden the European Union’s authority to negotiate international investment agreements with non-EU countries, according to unpublicized proposals seen by Investment Treaty News (ITN).

The EC, the executive-arm of the 25-member European Union, has long sought the legal competence to negotiate foreign investment agreements. Provisions contained in the proposed Convention on the Future of Europe (AKA the EU Constitutional Treaty) would have given the EC competence over foreign direct investment. But the proposed Convention was rejected in national referenda in France and the Netherlands in mid-2005, thus ending the near-term prospects for adoption of that agreement by EU member-states.

Presently, the EU does enjoy competence over certain aspects of external economic relations, including in relation to trade, intellectual property rights and capital movements. However, foreign investment does not fall squarely under the EC’s international remit; rather the EC shares the competence with the 25 EU member-states, with the EC typically focused on international agreements on establishment (i.e. establishing a commercial presence in another country’s territory) and the member-states negotiating agreements on investment protection (for e.g. bilateral investment treaties).

However, a recent “issues paper” prepared by the EC’s Directorate-General for Trade calls on members to “rapidly upgrade the EC investment approach.”

“In comparison to NAFTA countries’ agreements, EU agreements and achievements in the area of investment lag behind because of their narrow content,” notes the paper, which was tabled before the so-called Article 133 Committee - the committee of EU member-states that deals with trade policy. “As a result, European investors are discriminated vis-à-vis their foreign competitors and the EU is losing market share.”

In particular, the EC suggests it should have the authority to insert a most-favoured-nation (MFN) provision into EU agreements with trading partners, allowing EU investors to profit from agreements concluded by those partners with third parties. For example, a hypothetical EU Agreement with Canada should include an MFN clause which ensures that EU investors in Canada were obtaining treatment at least as favourable as that offered by Canada in other of its investment agreements.

The EC proposal on MFN would apply only to the establishment of a foreign investment, and would not extend to disciplines on expropriation or dispute settlement, according to the proposal.

However, the proposal is couched as a “minimum platform,” which could lead to broader initiatives to enhance the investment agreements negotiated by the EU; the EC is asking that members consider other types of investment protection provisions that might be adopted into EU law.

Following internal discussion amongst the EU member-states, the EC says it intends to produce a draft proposal of a text on establishment, but a spokesperson for the EC said that there is no fixed time-line attached to this process.

The EC proposal will meet resistance from some EU member-states, according to a national-level official working on foreign investment policy matters for a West European country.

“This process and procedures turns out not to be an easy one, because the Commission has different ideas than the member-states have,” said this person who declined to be named. “This process is by no means at an end.”

Sources:

“EU Constitution votes a set-back for European Commission on investment issue”, By Luke Eric Peterson, INVEST-SD, June 10, 2005, available [here](#)

“New European Constitution would bring FDI under European competence”, By Luke Eric Peterson and Jan Ceysens, INVEST-SD, October 20, 2003, available [here](#)

“Comparing EU free trade agreements: investment” By Stefan Szepesi, European Centre for Development Policy Management, 2004

7. Canada schedules consultation on FIPAs, identifies priority countries,
By Luke Eric Peterson

The Government of Canada is to host a consultation with external organizations on August 2nd to discuss its plans for new foreign investment protection agreements.

According to information provided by the Department of Foreign Affairs and International Trade, Canada has the capacity to initiate negotiations with 4 or 5 additional countries in the mid-term. One purpose of the consultation meeting is to highlight the list of countries with which negotiations could be launched, and to gather feedback on the government’s FIPA program.

Currently, the government is negotiating investment agreements with Peru, China and India. Furthermore, ongoing trade negotiations with a number of parties could yield similar reciprocal commitments on investment; these countries include: Honduras, Guatemala, Nicaragua, El Salvador, Singapore, Korea, Japan, and the Andean and CARICOM regions.

In terms of future negotiations, the Department has identified three categories of countries which are of interest. The first of these - Indonesia, South Africa, Russia, and Cuba – are of interest, however Canada cites unspecified “political impediments” to negotiations.

The second group includes a number of countries with whom Canada seeks negotiations, but is unclear as to reciprocal interest on the part of these countries: Malaysia, Tanzania, Kazakhstan, Sri Lanka, Libya, Serbia & Montenegro, Kyrgyz Republic, Qatar, and Israel.

Finally, the Department has issued a list of countries with whom reciprocal negotiations appear possible: Dominican Republic, Hong Kong, Algeria, Kuwait, Pakistan, Uzbekistan, Vietnam, Mongolia, Jordan, Paraguay, Morocco, and the United Arab Emirates. According to information supplied by the Department, Canada may engage in exploratory discussions with 4 to 5 of these countries.

As far as ongoing investment treaty negotiations are concerned, the Department says that talks with Peru are near completion, with negotiators still working on the list of reservations to the agreement. However, it remains unclear if negotiators can meet an end of July deadline which had been set in an effort to nail down reservations before a change in Government in Peru.

As for negotiations with China, the Department reports that progress has been “good” since the talks were re-launched in 2004, however several important issues remain outstanding, including questions about the scope of the agreement; divergences as to

protection standards (minimum standards of treatment, transfers); disagreement as to the ease with which investors can resort to investor-state arbitration; and differing views as to transparency. The Department says that “political guidance” may be needed to unlock negotiations.

Finally, the next round of negotiations with India is slated for August in Ottawa. The Department reports that the agreement could be concluded by year’s end, although there are outstanding differences, including in relation to the transparency of the investor-state arbitration process. (Under the terms of Canada’s new Foreign Investment Protection Agreement negotiating template, all investor-state arbitrations are to be a matter of public record and open to public scrutiny). Historically, most other governments, including India, have not mandated transparency in the investor-state process.

The August 2nd consultation with stakeholders is being organized by the Department of Foreign Affairs and International Trade. To date, the Department has not issued a public announcement of the event, however targeted invitations have been sent to certain groups or persons. Inquiries about the event can be directed to Erin Elliott at (613) 944-8974 or at erin.elliott@international.gc.ca

(*Disclosure: The Editor of Investment Treaty News serves on an external advisory committee to the Department of Foreign Affairs and International Trade providing feedback on environmental assessments of trade and investment agreements)

Briefly Noted:

8. Norwegian fish company sues Czech Republic under BIT,

A Norwegian company, Czechoslonor, has filed an arbitration against the Czech Republic under the Norway-Czech Republic bilateral investment treaty.

According to a report by the news service, Eastbusiness.org, the Norwegian firm entered into a pact with a Czech firm, to supply fish and seafood to the Czech Republic.

After Czechoslonor’s local partner fell into bankruptcy in September of 2005, the Norwegian firm says that it has had to wait out protracted bankruptcy proceedings, which have led to mounting financial losses for the firm. The company reportedly alleges that Czech institutions have breached the terms of the Czech-Norwegian BIT due to their “dilatatory” conduct since the bankruptcy of Czechoslonor’s partner.

Eastbusiness.org reports that the company claims some 8.5 Million (EUR) in losses, and that the Czech Finance Ministry has advertised for a law firm to defend the Czech state against the international claim.

Sources:

“The Czech Republic Faces Arbitration with Norwegian Company”, Eastbusiness.org, June 5, 2006

“Norwegian claims CZK240 Million”, Nordic News, newsletter of the Nordic Chamber of Commerce in the Czech Republic, 2/2006

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