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Arbitration Watch:
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1. Enron wins $106 Million (US) in financial crisis claim against Argentina,
By Luke Eric Peterson

An ICSID tribunal has held Argentina liable for violating protections owed to the US-based Enron Corporation under the terms of the US-Argentina bilateral investment treaty.

In a unanimous ruling dated May 22, 2007, Argentina was held to have breached treaty obligations to provide fair and equitable treatment and to observe (contractual and legal) obligations owed to Enron and Ponderosa Assets L.P. (an Enron-owned and controlled company).

As a result, the tribunal held that Enron was entitled to fair market value compensation for losses suffered as a result of emergency legal and regulatory measures taken by Argentina arising out of that country's earlier financial crisis.

The ruling is the third ICSID award on the merits against Argentina in relation to a financial crisis claim by a multinational investor. Argentina faces a large number of other

claims by foreign investors, the overwhelming proportion of which are being arbitrated at ICSID.

(Notably, the original arbitration claim filed by Enron at ICSID in 2001 was unrelated to the Argentine financial crisis, and pertained to a series of tax measures which Enron alleged to have been illegally imposed on its Argentine investments. Later, Enron added an “ancillary claim” related to losses alleged to have been sustained during the financial crisis. Subsequently, the taxes in dispute were struck down by an Argentine court. Enron, accordingly dropped that portion of its arbitration claim in 2005, while proceeding with the claims related to the financial crisis.)

The recent Award in the Enron case is the second of three ICSID rulings which have determined rule that Argentina was not entitled to a defence of “necessity” under international law in relation to its actions during the financial crisis– a defence which Argentina argued could have absolved it in whole, or at least in part, of liability for breach of investment treaty obligations owed to foreign investors.

In rejecting the necessity plea, the Enron tribunal diverged from the approach taken in an arbitration resolved last October, where a separate ICSID tribunal held that Argentina was entitled to a defence of necessity in the face of a claim by US-based gas company LG&E - at least during a 17 month period when the financial crisis was at its apex.

Despite the different rulings in the Enron and LG&E case, one individual, Prof. Albert Jan van den Berg, sat on both arbitral tribunals. Indeed, the Enron ruling is silent as to the earlier finding of a state of necessity in the LG&E v. Argentina case, with the Enron tribunal not attempting to distinguish its own reasoning from that adopted in the earlier LG&E case.

In diverging from the LG&E approach and holding that Argentina was not entitled to a plea of necessity, the Enron award hearkens back to the reasoning adopted in a 2005 award in another investment treaty claim against Argentina brought by the US-based CMS Gas Transmission Company. Indeed, the Enron and CMS tribunals contained a common arbitrator, Prof. Francisco Orrego Vicuna, who sat as Chairman in both cases.

Since becoming public late last week, the Enron award has stirred discussion amongst arbitration lawyers in on-line forums.

One observer, Stephan Schill, a recent Hauser Global Scholar at New York University Law School, expresses misgivings about the emerging trend whereby tribunals are not explaining why they are diverging from the reasoning of other tribunals in cases arising out of the same events. Schill tells ITN:

“In the absence of a central and permanent judicial institution that decides over investment disputes, the only way of arriving at convincing and accepted solutions in investment treaty arbitration will be by transparently providing the arguments for possible solutions and trying to convince the parties, as well as other observers, including

States, investors, academics and the general public, that the adopted solution is preferable."

ENRON ALLEGED ARGENTINE EXPROPRIATION OF GAS TRANSPORT BIZ

At the core of its arbitration claim, Enron had alleged that Argentina's series of emergency measures served to undo legal and contractual obligations – including the right to calculate tariffs in inflation-adjusted US Dollars.

Enron invested in Argentina in the 1990s, when the country privatized its natural gas transportation and distribution sector. The US firm took an indirect stake in the newly-created Transportadora de Gas del Sur (TGS).

Enron alleged that it invested a total of 343.9 Million (USD) in TGS, and that the latter company invested a total of 925.5 Million (USD) in Argentina's gas transportation system. By contrast, Argentina insisted that the US company reaped enormous financial returns from its investments in Argentina, notwithstanding Enron's claim to have suffered 9 figure losses during the financial crisis period.

Enron maintained, however, that various steps taken by Argentina occasioned a default by TGS on its debts, and led to a massive decline in revenues due to the freeze imposed on tariff rates TGS charged to customers.

Ultimately, the tribunal would find that the claimants in the arbitration were entitled to calculate tariffs in US dollars, to adjust them periodically according to a US inflation index, and not to have such tariffs frozen in the absence of compensation.

In turn, the tribunal examined whether these rights were violated as a matter of Argentine law, and in light of international law (i.e. the US-Argentina bilateral investment treaty).

With respect to the former, the international tribunal reviewed Argentina's actions in light of domestic law, and held Argentina to have violated the property rights protections contained in the Argentine Constitution.

As far as the international treaty breaches alleged by Enron, the tribunal rejected Enron's claim to have suffered an indirect or direct expropriation. The tribunal noted that a direct expropriation could not take place without evidence of some transfer of "at least some essential component of property rights" to some other party. As for the "indirect" or "creeping" expropriation argument, the tribunal held that there had been no appreciable interference with the day-to-day operations of the company or control of the investment.

The investor harboured what might have seemed like an "ace in the hole" in the form of a 2005 ruling from the Overseas Private Investment Corporation (OPIC) to the effect that Enron's company, Ponderosa Assets, had suffered an expropriation at the hands of Argentina. On this basis, Ponderosa Assets was permitted to collect on a 50 Million

Dollar OPIC insurance policy.

However, the ICSID tribunal, with little by way of explanation noted that the 2005 OPIC finding of expropriation in relation to Enron's Argentine investments "responds to a different kind of procedure and context that cannot influence or be taken into account in this arbitration."

FAIR AND EQUITABLE TREATMENT BREACHED

For its part, Enron had more luck pleading other breaches of the US-Argentina investment treaty.

The claimants asserted that the fair and equitable treatment standard in the US-Argentina BIT entitled them to a level of treatment compatible with their expectations, as well as "the observance of arrangements on which the investor has relied to make the investment and the maintenance of a stable legal and business framework."

Argentina retorted that the treaty standard merely obliged Argentina to accord the minimum standard owed to aliens under customary international law. On this view, Argentina ought not make radical or arbitrary changes to the regulatory framework or engage in "endless normative changes to the determinant of the investor's business." In particular, Argentina insisted that the so-called "legitimate expectations" of investors were not vouchsafed by the treaty clause providing fair and equitable treatment.

However, the tribunal would disagree with Argentina's proposed interpretation, holding that the fair and equitable treatment standard went beyond the minimum provided under customary international law.

In particular, the tribunal held the treaty to oblige a stable regulatory framework for foreign investments. The tribunal hastened to add that this did not require a "freezing" of all legal or regulatory standards, but neither could the framework could not be dispensed with altogether where specific undertakings had been earlier made to a foreign investor.

Additionally, the tribunal held that fair and equitable treatment provides for the protection of investor's expectations, at least where those expectations were rooted in "conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest."

The tribunal added: "Given the scope of Argentina's privatization process, its international marketing, and the statutory enshrinement of the tariff regime, Enron had reasonable grounds to rely on such conditions (offered by Argentina)."

In light of these obligations, the tribunal held that Argentina, on the facts of the case, had failed to provide fair and equitable treatment to Enron.

UMBRELLA CLAUSE ALSO BREACHED

Apart from the fair and equitable treatment standard, the tribunal also held Argentina in breach of Article II (2) (c) of the US-Argentina treaty. That provision, which reads "(e)ach party shall observe any obligation it may have entered into with regard to investments", has occasioned some controversy as tribunals have adopted occasionally divergent interpretations from case to case.

At one extreme, the provision would arguably serve to elevate any breach of contract or domestic law to the level of a breach of the international treaty; among other things, claimants could sue under the treaty and avoid domestic remedies that might otherwise be provided for breach of contract or domestic law. At the other extreme, tribunals have taken a narrower view of this provision, holding that the "obligations" in question are restricted to those contained in investment agreements (for e.g. a natural resources concession contract or a power purchase agreement) between a state acting in its sovereign capacity and a foreign investor.

In the Enron case, the tribunal held that the treaty provision in question entitled Enron to claim that breaches of contract (including gas licenses) and of domestic legislation rose to the level of treaty breaches.

The tribunal rejected an argument by Argentina that it could not be held liable for breach of treaty because Enron was not itself a party to the license (and thus was owed no obligations under that license). Notably, in a different ICSID arbitration resolved in 2006, a tribunal had rejected a claim by a foreign investor for breach of the umbrella clause because that investor was not itself a party to the contracts that were alleged to have been breached. In that case, the contracts had been concluded not by the foreign investor and Argentina, but by different corporate entities with the province of Buenos Aires in Argentina.

OTHER ALLEGED BREACHES REJECTED

Otherwise, the tribunal in the Enron arbitration rejected all other claims for violation of the US-Argentina investment treaty. In particular, the full protection & security clause was not found to have been breached. The tribunal rejected the claimants' overly broad interpretation of this provision – which they argued should provide for some wider form of legal security – and held the standard to provide for a narrower form of physical protection of foreign investments, their managers and employees.

The tribunal devoted lengthy consideration to the damages claimed by Enron, and ultimately held that a fair market value quantification of the company's Argentine losses dating to 2001 came to 90.4 Million (USD), to which the tribunal added 15.9 Million (USD) for losses associated with earlier freezes in tariff adjustments imposed by Argentina in 2000 and 2001.

ENRON AWARD IS FIFTH TO GO AGAINST ARGENTINA AT LEAST IN PART

In five ICSID proceedings to date, Argentina has been found to have violated terms at least some provisions of the operative bilateral investment treaties.

In the earliest such case, involving the CMS Gas Transmission Company, Argentina has applied to ICSID for annulment of that 2005 ruling – a process which remains ongoing. In the more recently decided LG&E case, the proceeding remains ongoing and the two parties await an Award on damages from the tribunal.

In an arbitration claim unrelated to the Argentine financial crisis, the former Enron subsidiary Azurix Corp won an Award for $165 Million (US) from Argentina last year. Argentina has also moved to annul that ruling, in a process which is still under way.

In another arbitration claim unrelated to the Argentine financial crisis, the German-based Siemens Corporation secured an award for more than $200 Million against Argentina in relation to the cancellation of a national identification and immigration control system. ITN understands that Argentina has also moved to annul this Award.

At press time, there was no word as to whether Argentina would move to annul the recently-rendered Enron Award.

For awards rendered under the ICSID Arbitration Rules, annulment (an internal process supervised by an ICSID-appointed committee of three panelists) remains the only method for challenging a tribunal ruling.

Sources:

Enron Corporation, Ponderosa Assets L.P. v. Argentine Republic, Award of May 22, 2007, available on-line here.

A copy of the 2005 Overseas Private Investment Corporation (OPIC) finding on expropriation in the Ponderosa Assets L.P. v. Argentine Republic case is available on-line here.

2. Tribunal splits on nationality arguments in Egypt resort property seizure case,
By Luke Eric Peterson

A majority of a three-member ICSID tribunal has affirmed jurisdiction to hear a claim by two individuals who had filed an arbitration against Egypt under the terms of the Italy-Egypt bilateral investment treaty.

However, one tribunal member, in a partial dissenting opinion signaled that he could not support a finding of jurisdiction in the case of one of the two individuals. In that dissent,

Prof. Francisco Orrego Vicuna warned that the majority's ruling was at odds with the purpose of the ICSID Convention insofar as it seemed to allow one of the two claimants to shed his Egyptian nationality, in order to bring a claim against his own country.

The claim was filed at ICSID in 2005, by Mr.Waguih Elie George Siag and his mother Ms. Clorinda Vecchi. The pair alleges that Egypt confiscated a property which had been purchased by the pair's Egyptian company and which had been slated for development into a resort property.

Because the ICSID Convention bars persons from mounting an arbitration against their own state, the tribunal's Decision on Jurisdiction (a copy of which has been seen by ITN) devotes extensive attention to Egyptian law in an effort to determine whether Mr. Siag and Ms. Vecchi had ceased to be Egyptian nationals by the time that they elected for ICSID arbitration.

The tribunal was confronted with documentary evidence which suggested that the claimants maintained Egyptian nationality, however the tribunal – citing other ICSID cases and international law – maintained that such evidence was not determinative of nationality. Rather, it was for the international tribunal to interpret Egypt's national law in order to determine whether the claimants had ceased to be Egyptian nationals.

Ultimately, a majority of the tribunal adopted a ruling which determined that both individuals, by dint of Egyptian law, would have ceased to become Egyptian nationals prior to their turning to arbitration against Egypt.

ARBITRATOR WARNS ON POTENTIAL ABUSE OF ICSID ARBITRATION

In his partial dissenting opinion, Prof. Orrego Vicuna noted that the drafting history of the ICSID Convention evidenced the desire of states not to be sued by their own nationals. The dissenting arbitrator expressed a concern about potential "abuse" of the ICSID Convention by individuals seeking to shed an inconvenient nationality in order to bring a claim against their erstwhile home state.

For his part, Prof. Orrego Vicuna noted that the purpose of the Convention might be better served if arbitrators were to ascertain the nationality of a claimant not merely at the time that they give their own consent to arbitration - and at the subsequent registration date of the arbitration claim - but also at (the often much earlier) date when the state targeted for arbitration had offered its own consent (for e.g. by concluding an investment treaty offering arbitration of disputes) or when the relevant investment had been made.

In sum, Prof. Orrego Vicuna held that such an approach would provide less scope for individuals to use their own system of "flags of convenience" in order to shed an inconvenient nationality after having made investments and encountering problems – but before filing an international arbitration claim at ICSID.

Notably, all three arbitrators held that Ms. Vecchi had lost her Egyptian nationality on the

date when she reacquired Italian nationality in September of 1993. Thus, notwithstanding her frequent use of Egyptian passports in the subsequent years, the majority ruled that she had ceased to hold Egyptian nationality – and was accordingly eligible to mount an arbitration claim against Egypt at ICSID at a later date.

Meanwhile, two of the three arbitrators held that Mr. Siag had lost his Egyptian nationality in 1991, by virtue of his failure to take formal steps to retain that nationality after he had notified Egyptian officials of his having a claim to other nationality.

Prof. Orrego Vicuna, in his dissent, expressed discomfort with the majority's finding as it related to Mr. Siag.

"The investor was Egyptian at the time the investment was made, benefited from Egyptian legislation granting exclusive rights to Egyptian citizens and was at all times considered to be Egyptian, not just by the Egyptian Government but this was also his own understanding and that of his family. The argument relied upon by the Claimant to the effect that he had not realized that he had lost his Egyptian nationality, is a rather bad one."

Notwithstanding this disagreement with the majority, Prof. Orrego Vicuna expressed his agreement with the other parts of the majority's ruling, including a finding that the ICSID system imposed no requirement that the capital used to fund "investments" must ultimately originate outside of the host country.

Citing the ruling in the earlier Tokios Tokeles v. Ukraine case, the tribunal held that the ICSID system imposed no "origin of capital" requirement – nor for that matter did the Italy-Egypt bilateral investment treaty which was at issue in the Siag and Vecchi arbitration.

TRIBUNAL NODS AT CONTESTED MAJORITY FINDING IN EARLIER CASE

The Tokios Tokeles decision cited by the tribunal in the Siag & Vecchi case was itself a contested one. In 2004, the Chairman of that tribunal, Prof. Prosper Weil issuing a vigorous dissent from the majority ruling in that case, and resigned his seat on the tribunal.

Prof. Weil warned that the majority's finding that the origin of capital was irrelevant for jurisdictional purposes was "flying in the face of the object and purpose of the ICSID Convention and system". He added that the "integrity" of the ICSID system might be jeopardized by tribunal rulings which sanctioned international arbitration of investment disputes where the investments had been financed by domestic capital dressed up as foreign capital thanks to creative corporate structuring.

"The ICSID mechanism and remedy are not meant for, and are not to be construed as, allowing – and even less encouraging – nationals of a State Party to the ICSID Convention to use a foreign corporation, whether preexistent or created for that purpose,

as a means of evading the jurisdiction of domestic courts and the application of their national law."

By contrast, in the recent Siag & Vecchi v. Egypt case, the claimants had warned that the imposition of an "origin of capital" requirement for ICSID arbitration – such as that advocated by Prof. Weil in the earlier Tokios Tokeles case - "would have a chilling effect and discourage foreign investment."

The tribunal did not clarify as to whether the claimants argued that this alleged chilling effect would affect only those domestic-originating investments which take on the trappings of "foreign" investment through nationality-planning – or whether the argument was that an "origin of capital" rule (i.e. excluding those investments that were ultimately of domestic origin) might somehow deter capital investments whose origin was definitively foreign.

SIAG & VECCHI CASE TO MOVE FORWARD TO MERITS PHASE

The Siag & Vecchi arbitration against Egypt now proceeds to a hearing on the merits.

Mr. Siag and Ms. Vecchi allege that the Egyptian Government confiscated their parcel of land on the Gulf of Aqaba, and resisted subsequent rulings by Egyptian courts which offered relief for the claimants. The claimants seek compensation for all damages suffered, costs, and an award of compound interest.

The parties will exchange written briefs on a schedule to be agreed with the tribunal. After this, hearings on the merits will be set to hear oral arguments.

Egypt is represented in the proceedings by The Egyptian State Lawsuits Authority and the law firm of Baker & Mackenzie. The claimants are represented by the law firm King & Spalding.

Sources:

Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, Decision on Jurisdiction, April 11, 2007, soon to be published in the ITN Documents Centre.

Earlier ITN reporting on Tokios Tokeles v. Ukraine case: "ICSID tribunal splits sharply over question of corporate nationality", By Luke Eric Peterson, June 11, 2004, INVEST-SD News Bulletin, available on-line here.

3. Canadian softwood lumber firm files for NAFTA Chapter 11 arbitration against US, By Damon Vis-Dunbar

A Canadian softwood lumber firm has filed a notice of arbitration under the North American Free Trade Agreement (NAFTA) alleging breaches of five provisions in the agreement's investment chapter.

The Canadian company, Domtar - which had been critical of last summer's settlement between the Governments of Canada and the United States of the protracted softwood lumber dispute - is seeking some 200 Million US in damages.

Domtar's complaint hinges on antidumping (AD) and countervailing duties (CVD) imposed on Canadian exports of softwood lumber to the United States. Those duties were levied on Canadian firms in response to the determination by the US government that Canada was "dumping" subsidized softwood lumber onto the American market.

Furthermore, thanks to the so-called Byrd Amendment, those duties were distributed to American lumber companies, supposedly to offset the competitive advantage provided to Canadian firms by their government.

According to Domtar's Notice of Arbitration, US actions breached the standards of national treatment and most-favoured nation treatment in NAFTA's Chapter 11 between 2002 and 2006, given that the US duties and re-distribution of that money under the Byrd Amendment put the Canadian company at a competitive disadvantage against American and other foreign firms.

Moreover, Domtar has alleged that the US failed to meet its obligation to treat Canadian investors with the international law standards of fair and equitable treatment and full protection and security. This comes in response to duties on Canadian softwood lumber imposed after certain NAFTA and WTO panels, as well as US courts, ruled that they were unlawful.

Finally, the Notice of Arbitration argues that the US breached obligations related to the free transfer of capital, by first collecting AD and CVD deposits, and then not promptly returning those funds when certain tribunals and courts ruled that such collections were illegal.

Domtar is seeking to arbitrate the dispute under the United Nations Commission on International Trade Law (UNCITRAL) rules of arbitration.

EARLIER SOFTWOOD NAFTA CH.11 CLAIMS AGAINST USA NEARING END

This is not the first time that Canadian softwood lumber firms have turned to NAFTA's investment chapter in response to US duties on Canadian exports. Three firms - Canfor Corp., Terminal Forest Products Ltd, and Tembec Inc – had also launched suits under NAFTA's investment chapter in the period from 2002 to 2004. The Terminal and Canfor arbitrations are in the process of being settled following last summer's deal between Canada and the United States, which brought the US AD and AVDs to an end.

However, the case involving Tembec remains ongoing. Following a request by the United States in 2005, the Tembec, Terminal and Canfor cases were consolidated under the purview of a single arbitration tribunal - a move challenged by Tembec at the United States District Court for the District of Columbia.

In the wake of the Canada-US softwood lumber agreement concluded last year, Tembec's challenge to the consolidation order was dropped, but soon after Tembec tried to reopen the case. Tembec argued that it was misled by the United States into signing a deal that allowed the United States to seek legal costs from Tembec.

In April, a District Court Judge denied Tembec's attempt to revive the case, after finding that the United States had not knowingly misled Tembec. The United States is now attempting to recoup legal costs from Tembec, and hearings on this matter were conducted in the NAFTA Chapter 11 arbitration several months ago. Tembec and the United States are currently awaiting a decision from the tribunal.

It is understood that the United States is not seeking legal costs from either Canfor or Terminal.

Sources:

Domtar's Notice of Arbitration is available from the US Department of State's website here.

"Tribunal allows NAFTA investment arbitration in softwood case to proceed in part", By Luke Eric Peterson, Investment Treaty News, June 15, 2006, available on-line here.

"Tembec Trying to overturn softwood consolidation case in US courts", By Damon Vis-Dunbar, Investment Treaty News, June 15, 2006, available on-line here.

4. US investor files formal arbitration against Canada over thwarted garbage disposal site, By Luke Eric Peterson

US investor Vito G. Gallo has filed a notice of arbitration with the Canadian Government, thus setting in motion a formal arbitration process under Chapter 11 of the North American Free Trade Agreement.

As was reported in an earlier edition of ITN, Mr. Gallo's Canadian company owns a former open-pit iron ore mine in northern Ontario that was intended to serve as a landfill for non-hazardous household and commercial waste from the City of Toronto.

The Adams mine site is home to a manmade lake, and the waste disposal proposal called for the deposit of waste in that lake, and the periodic withdrawal of contaminated water for treatment.

Following a change in government at the provincial level, Mr. Gallo alleges that he was prevented from renewing an expired water removal permit which had been granted by the predecessor Government.

Following this, Mr. Gallo alleges that the newly-elected Government of Ontario passed legislation which introduced a blanket prohibition on waste disposal at the Adams Mine site.

Mr. Gallo alleges that this move to put him out of business and occasioned various breaches of investment protections contained in NAFTA Chapter 11, and seeks more than $355 Million (US) in compensation for his alleged losses.

Mr. Gallo has nominated as his party-appointed arbitrator, Mr. Jean-Gabriel Castel, a Professor Emeritus of Law at York University in Toronto.

The ensuing arbitration against Canada will take place according to the UNCITRAL rules of arbitration. In common with all investor-state arbitrations initiated pursuant to the North American Free Trade Agreement, the state-parties in those suits endeavour to publish relevant documents on the World Wide Web.

A copy of the Notice of Arbitration served by Mr. Gallo on March 30th is available here.

5. French firm launches BIT arbitration against Paraguay over outstanding debt,
By Fernando Cabrera Diaz

French company Bureau Veritas BVAC, has filed for arbitration against Paraguay at the International Centre for Settlement of Investment Disputes (ICSID), for that country's alleged failure to pay outstanding debts related to a contract for customs inspection services. Bureau Veritas is seeking $33 million US in compensation for the unpaid amounts plus interest.

The dispute centers around a contract between Paraguay and Bureau Veritas, in which the company was to provide pre-shipment inspection support to the Paraguayan Customs Agency. According to the Paraguayan investor, both sides agreed to terminate the contract in the late 1990s, at which point Bureau Veritas claims Paraguay owed it $7 million US for services that had been rendered before the contract was terminated.

A change of government in Paraguay in 1999 made it difficult for Bureau Veritas to collect the outstanding debt. The new government of Luis Ángel González Macchi launched several reviews of the original contract and the debt. Those reviews taken by the Public Audit Office and other government agencies determined that the contract was valid and the moneys were owed, says Bureau Veritas.

In any event, before a decision on whether to pay was ever made by the González Macchi government, that government was replaced in 2003.

The current government of Nicanor Duarte Frutos has refused to pay the outstanding debt, according to the claimant, leading to the current arbitration. Bureau Veritas says it has never received an official reason for Paraguay's refusal to pay.

Investment Treaty News tried to contact Paraguay for comment, but was told that the head of Paraguay's Customs Agency, which is handling the dispute, was traveling and the agency would not comment until her return.

The arbitration was filed under the Netherlands-Paraguay Bilateral Investment Treaty, as the original contract was structured through a Dutch branch of Veritas giving the company the option to take advantage of the protections of the Netherlands-Paraguay BIT.

The company is alleging the violation of several BIT protections including those on indirect expropriation, and fair and equitable treatment.

According to a source close to the arbitration, Swiss-based Société Générale de Surveillance(SGS) is in a comparable situation to Bureau Veritas, being owed outstanding amounts for a similar contract. This source tells Investment Treaty News, that as far as he knows, SGS has yet to file for arbitration against Paraguay.

6. Investors pursue arbitration over Dominican Republic electricity investments,
By Fernando Cabrera Diaz and Luke Eric Peterson

French bank Société Générale and its subsidiary American investment company TCW Group Inc. are pursuing claims against the Dominican Republic (DR) over investments in that country's electricity distribution network.

The foreign firms are seeking $680 million US for what they call the DR's failure to enforce electricity rate increases and to control rampant electricity theft.

The two companies are taking advantage of their respective nationalities to pursue potential lawsuits under different international agreements.

For its part, Société Générale has initiated arbitration under a 2003 Dominican Republic-France Bilateral Investment Treaty. That claim will proceed under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules. The formal request for arbitration was filed in March of this year, according to a source familiar with the case.

Meanwhile, US-based TCW has notified the Dominican Republic of a second claim under a free trade agreement between the United States and the Dominican Republic. A so-called Notice of Intent has been filed by TCW, meaning that the US firm must heed a

mandatory 90 day waiting period before being able to file for actual arbitration.

Both suits center on TCW's power distribution operation in the Dominican Republic, and that country's handling of the privatization of the sector. The DR privatized its electricity network in 1999 creating several companies as joint ventures between itself and private investors. In 2004 TCW bought a 50% share in one of these joint ventures, Edeeste, from American energy company AES.

TCW and Société Générale allege that the Dominican Republic has failed to live up to agreements it made during the privatization process, including the need to make investments in the electricity network, enforcing rate increases, and preventing rampant electricity theft in the country. These failures, the company argues, have led to massive loses for Edeeste.

A Dominican Republic official tells ITN that TCW's claim has raised issues concerning the privatization of the electricity sector which pre-date TCW's own investments (made in 2004).

7. Bolivia expounds on reasons for withdrawing from ICSID arbitration system,
By Fernando Cabrera Diaz

Amidst criticism from domestic and foreign business interests, the Government of Bolivia has come out in defence of its recent move to withdraw from the International Centre for Settlement of Investment Disputes (ICSID). In defending the move, Bolivian officials point to several reasons, including what they view as ICSID's alleged bias towards corporations, the lack of a substantive appeals mechanism for arbitration rulings, and the confidentiality of arbitration hearings charged with resolving matters of public interest.

As reported in the previous edition of Investment Treaty News, Bolivia sent notice to the World Bank on May 1st of its plans to withdraw from the ISCID system. (See previous ITN reporting*)

Since then, the Bolivian business community has criticized the government for its move.

Among the fears expressed by the business community is that this move will be seen as a sign of legal and judicial uncertainty, which could slow the flow of foreign investment to Bolivia. There is also fear that the move may prejudice Bolivia's ability to obtain future financing from the World Bank.

The president of the Bolivian Confederation of Private Businessmen, Roberto Mustafá Schnorr, has publicly signaled concern with Bolivia's move to withdraw from ICISD.

Mr. Schnorr is quoted in local newspapers as saying that the move would be a

disincentive for investment in Bolivia, with potentially deleterious impacts on local employment. He went on to warn that a signal was being sent by Bolivia that it intended to violate certain international treaties and contracts.

In response to these and other criticisms the Bolivian Ministry of Foreign Affairs has issued several press releases and posted articles on its website which elaborate on Bolivia's reasons for withdrawing from the World Bank's investment arbitration facility.

According to the Ministry, the ICSID has been established to favor the interests of investors over States.

Bolivia accuses ICSID tribunals of misapplying investment treaty obligations, and expanding protections such as that of fair and equitable treatment in favor of multinational corporations.

The Ministry also takes issue with the alleged lack of impartiality of certain arbitrators serving on ICSID tribunals. As the ministry puts it, "some of these arbitrators, or their law firms, act at the same time as lawyers for other investors in similar disputes" – thus raising doubts as to their capacity to interpret investment treaty provisions in an impartial manner.

Bolivian officials also criticize the confidentiality of ICSID hearings in light of the fact that such proceedings often deal with matters of public importance. Ordinarily, ICSID hearings are not open to the public or the media, unless both parties to the arbitration give their consent.

According to recently published statements, Bolivian government officials also express unease with the inability to appeal ICSID tribunal decisions on the merits, so as to ensure consistent outcomes from one case to the next.

One lawyer who represents foreign investors in Bolivia, who spoke to ITN on an anonymous basis given the sensitivity surrounding his professional work, says that most investors feel that ICSID accords more favour to Governments than to investors. This source suggests that, even when ICSID tribunals find in favor of investors, oftentimes the resulting arbitral awards are greatly reduced from the amounts claimed by the investors.

For its part, Bolivia addresses fears that withdrawing from ICSID will affect foreign investment, by citing the example of Brazil, which is not a member of ICSID, yet remains the largest recipient of foreign investment in South America. In recent public statements, Bolivian officials note that Brazil has no bilateral investment treaties; the country has never ratified any of the handful of bilateral investment treaties it negotiated during the 1990s.

Sources:

*"Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions", By Damon Vis-Dunbar, Luke Eric Peterson, and Fernando Cabrera Diaz, Investment Treaty News, May 8, 2007.

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