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Arbitration Watch:

1. Tribunal holds Argentina liable for BIT breaches, but accepts necessity plea in part,
By Luke Eric Peterson

An arbitral tribunal has issued a long-awaited ruling in a claim lodged against Argentina by 3 US-based investors under the US-Argentina bilateral investment treaty (BIT).

In a ruling dated October 3, 2006, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has held that Argentina violated certain provisions of the BIT, in relation to its treatment of investments by LG&E Energy Corp, LG&E Capital Corp, and LG&E International Inc.

At the same time the tribunal found that Argentina is exempted from liability for a 17 month period of time, owing to the crisis-stricken country having been in “a state of necessity” from December 1 2001 until April 26, 2003 (the date when current President Nestor Kirchner was elected to office).

Accordingly, the Argentine Government was exempted from a duty to pay compensation for damages incurred during the 17 month period, when Argentina was held to have been in a state of necessity. At the same time, the tribunal held that Argentina is liable for damages related to violations occurring outside of that 17 month span. Those damages are to be quantified during a subsequent phase of the proceeding.

In the early 1990s, LG&E bought into Argentina’s newly privatized natural gas market, by purchasing stakes in three gas distribution companies, Centro, Cuyana, and GasBan. LG&E turned to arbitration in late 2001, following alleged breaches by Argentina of treaty and contractual commitments, including an obligation to adjust tariffs charged to Argentine consumers in line with a US inflation index and to express those tariffs in the Argentine equivalent of US Dollars.

Hearings on Argentina’s liability were held in January of 2005, since which time the parties have been awaiting a decision from the tribunal.

In the ruling issued this week, the ICSID tribunal rejected LG&E’s claims that it had suffered expropriation and arbitrary measures contrary to the US-Argentina BIT. However, the tribunal held Argentina in breach of treaty provisions on fair & equitable

treatment, treatment in accordance with international law, and the obligation to refrain from discriminatory measures impairing investments.

Additionally, the tribunal held that Argentina's abrogation of certain contractual undertakings gave rise to international liability under the so-called umbrella clause of the US-Argentina treaty.

The LG&E ruling marks the second instance where an arbitral tribunal has found Argentina in partial violation of its investment treaty commitments in relation to its treatment of foreign investors during and after its financial crisis.*

In another ICSID arbitration decided last year, in the case of CMS Gas Transmission Company v. Argentina, a tribunal rejected Argentina's defence of a "state of necessity". An Argentine Government official who spoke with ITN expressed the view that there is a "great contradiction" in the handling of the "necessity" defence in the CMS and LG&E cases, despite the two cases having being "based on the same facts and the same treaty."

(Argentina is currently seeking to have the CMS award annulled in a separate procedure at the Washington-based ICSID).

Meanwhile, a member of LG&E's legal team contacted by ITN declined to compare and contrast this week's ruling with other ICSID decisions. Instead, this person expressed satisfaction with the decision in the LG&E matter:

"We are very pleased with the finding of liability. We are analyzing the state of necessity issues, and we look forward to completing, as expeditiously as possible, the next phase of the proceeding to calculate the damages to which the tribunal found we are entitled."

(* In a third arbitration brought by the US-based Azurix Corp., the Government of Argentina was held liable this summer for breaches of the US-Argentina BIT. However, the Azurix case pertained to an investment dispute which largely pre-dated the Argentine financial crisis. (For more information on the Azurix matter, see Investment Treaty News, July 26, 2006, available on-line at:

http://www.iisd.org/pdf/2006/itn_july26_2006.pdf)

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