

Investment Treaty News, September 7, 2007

Published by the International Institute for Sustainable Development

<http://www.investmenttreatynews.com>

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Arbitration Watch:

1. Hearings set in Canadian cattle ranchers' claim against US over mad cow ban,
By Luke Eric Peterson and Fernando Cabrera Diaz

A three-member arbitral tribunal is to hold hearings from October 9-11 in a NAFTA Chapter 11 arbitration which pits a group of Canadian cattle ranchers, producers and feedlot owners against the US Government.

The claimants are seeking upwards of a quarter of a Billion Dollars (US) in compensation, alleging that the US Government unfairly discriminated against them, to the benefit of their American counterparts, when it imposed an import ban on Canadian cattle and beef after Canadian officials identified a case of so-called Mad Cow Disease in Canada in 2003.

The dispute traces its roots to May of 2003 Canadian officials announced that an eight-year old Alberta dairy cow had tested positive for Bovine Spongiform Encephalopathy (BSE), commonly referred to as mad cow disease. Shortly after this announcement the US Government halted imports of Canadian cattle, beef, beef-based products and animal feed out of concerns that the disease could spread to US cattle and the US food supply.

Although humans are not directly affected by BSE, a variant of the fatal human brain illness Creutzfeldt-Jacob Disease (CJD) is believed to be caused by eating contaminated beef products from BSE-affected cattle.

A Canadian investigation, concluded in the late summer of 2003, found no other sick animals, and consequently the US eased import restrictions on beef in September of that year; however, the ban on live cattle remained in place. The live-cattle ban was itself partially lifted in January of 2005, but some restrictions remain in place banning the import of cattle over 30 months of age and pregnant heifers.

According to the claimants, the restrictions on live cattle imports were motivated by economic and political reasons more than health concerns. They argue that the ban has allowed US cattle ranchers to sell their live cattle to US processors at higher prices thanks to the unfair competitive advantage they enjoy over Canadian ranchers. The claimants say that the ban has crippled the Canadian cattle industry which relies heavily on exports to the US market.

The US Government refutes the claimants' allegations, and insists that the claimants cannot make out a case under Chapter 11 of NAFTA for the simple reason that they have made no cross-border investments in the United States. US lawyers have lodged a preliminary objection, seeking a ruling as to whether the arbitral tribunal has jurisdiction over a case where the claimants, by their own admission, have not made "investments" in US territory.

Meanwhile, the claimants contend that NAFTA Chapter 11 imposes no territorial limitation when it comes to the National Treatment obligations owed by NAFTA parties to "investors" located in any of the three nations comprising the NAFTA area (USA, Canada and Mexico). (See the next item in this newsletter for a more detailed analysis of the issues at stake in the arbitration).

The preliminary question will be heard by a tribunal consisting of the claimants' nominee, Mr. James Bacchus, Chair of the law firm Greenberg Traurig's global trade

practice and a former Chair of the World Trade Organization's Appellate Body; the US Government's nominee, Ms. Lucinda Low, a Partner at the law firm Steptoe Johnson; and tribunal chairman, Prof. Karl Heinz-Bockstiegel, a law professor at the University of Cologne.

In contrast to a number of other NAFTA Chapter 11 claims, the proceeding is not administered or hosted by the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID). As such, the hearing on the preliminary question will take place at the Army and Navy Club of Washington D.C.

In keeping with usual practice for disputes initiated against the United States pursuant to NAFTA Chapter 11, the hearing transcripts will be made available on the website of the US State Department following the conclusion of the hearings.

2. Analysis: Ranchers insist cross-border investment not needed under NAFTA Ch.11, By Fernando Cabrera Diaz

The NAFTA arbitration brought by a group of Canadian cattle farmers, ranchers and feedlot owners promises to be an interesting test-case insofar as the claim involves a group of Canadian individuals who, by their own admission, have not made investments in US territory, but, rather, in what they characterize as the Free Trade Area established under the NAFTA.

The claimants insist that they are owed "national treatment" by the US Government by virtue of the fact that the Canadian-based claimants compete with US cattle feeders operating out of the United States.

The US Government, in legal arguments filed in the arbitration proceeding, argues that the arbitral tribunal convened to hear the claim lacks jurisdiction over the dispute. On the US view, Canadian cattle feedlot operators cannot seek damages from the US Government for alleged breaches of NAFTA Article 1102 (National Treatment) unless they have made actual cross-border investments into the United States - something which the claimants have not done.

The claimants hope to convince an arbitral tribunal that the ban on live cattle violates the national treatment provision found in NAFTA's Article 1102(1), which requires signatories to offer investors of other NAFTA nations treatment that is no less favourable than that afforded to their own nationals.

DOES CH. 11 APPLY ONLY IN CASES OF CROSS-BORDER INVESTMENT?

The parties have agreed to submit a preliminary question to the Tribunal dealing solely with the question of whether the tribunal has jurisdiction to hear a NAFTA Chapter 11 claim against the US when all of the claimants' investments at issue are located in Canada and the claimants do not have - or plan to make - investments in the US.

The US's view is that NAFTA Chapter 11, like other obligations found in Bilateral Investment Treaties (BITs), only protects investors that have made cross-border investments.

To support its interpretation the US points to NAFTA Article 1101, which sets out the scope and coverage of Chapter 11: "1. This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party"

According to the US, Article 1101 must be read, as a whole, to limit Chapter 11's application "only to those measures relating to 'investments of investors of another Party in the territory of the Party' that has adopted or maintained those measures."

For the US, any other reading of Article 1101 would lead to absurd results - in that it would oblige the US to provide national treatment to the Canadian operators, even though the US was under no legal duty to provide national treatment to the Canadian "investments" of those operators.

Rather, the US argues that Article 1101 imposes territorial limitations on the rest of Chapter 11, meaning that, although Article 1102(1) on national treatment does not include explicit territorial limitations, they should be viewed as implicit.

The claimants, on the other hand, argue that interpreting the treaty using the natural and ordinary meaning of the text, in the context of the NAFTA, and in light of its object and purpose leads to a different result.

The claimants argue that neither Article 1101(1), pertaining to scope & definition, nor 1102(1), pertaining to national treatment, impose an explicit, territorial limitation on the obligation to provide "treatment no less favourable" to investors.

On the claimants' interpretation, Article 1101(1) operates in the fashion of typical bilateral investment treaties by extending certain protections to cross-border investments (subparagraph b); while at the same time protecting investors of another party from discrimination throughout the NAFTA free trade area.- regardless of the location of their investments (subparagraph a).

The claimants lay weight upon the objects and purposes of the broader NAFTA, whose Article 102 cites the promotion of "conditions of fair competition and a free trade area"; the elimination of barriers to trade in goods and services between the Parties; and the increase of investment throughout the free trade area.

Given their view that Article 1101(1)(a) does not impose territorial limitations for investors seeking Chapter 11 protection, and given that Article 1102(1) does not itself have such a limitation, the claimants argue that the national treatment obligation is owed to them by the US regardless of the fact that their investments are in Canada – so long as

they can establish that they are operating “in like circumstances” with their US counterparts.

The US counters by arguing that Article 1101(1)(a) does not make explicit reference to a territorial requirement as an unintended result of a so-called “legal scrub” process, during which the negotiating text was reviewed by lawyers in an effort to remove redundancies, conform terminology, and avoid contradictions.

To support this position, the US points out that in previous drafts of Article 1101 the term “investor” was clearly defined as those nationals of another Party that have made cross-border investments. US Government lawyers argue that it was not the intention of the Parties to make substantive changes during the legal scrub and therefore the previous version of the article is a good indication of its intended meaning.

The claimants contend that the treaty text is clear on its face; however, they add that changes made to the NAFTA text during the legal scrub phase led to the “significant” removal of any territorial limitation in Article 1101(1) at least with respect to investors.

In support of its own interpretation, the US Government has sought to draw support from the fact that other NAFTA signatories appear to agree that the intent of Chapter 11 is to protect only those investors which have made (or are seeking to make) cross-border investments.

US lawyers insist that Canada has previously expressed such a position in an earlier NAFTA arbitration, *S.D. Myers v. Canada*. Meanwhile, the Government of Mexico has gone so far as to file a legal brief with the tribunal in the case brought by the Canadian cattle ranchers against the US Government; in that brief, Mexico underscores its support for the US position on this question. Moreover, the US Government has also pointed to Mexican positions taken in a parallel NAFTA Chapter 11 claim brought by a number of US claimants (see discussion below).

The claimants counter that the NAFTA has a formal mechanism by which the Parties can come together and issue binding interpretations of the treaty, which they have not done in this instance. Moreover, the claimants dispute the US Government’s contention that Canada supports the position of US and Mexico on this question.

For their part, US Government lawyers counter that nothing in NAFTA or international law requires that the Parties interpret the treaty solely through the formal Free Trade Commission process, and that “in fact, the NAFTA Parties can, and routinely do, interpret the treaty in many other ways, including through their pleadings and Article 1128 submissions...”

IMPACT OF RECENT NAFTA WATER RIGHTS DISPUTE DECISION

Ultimately, a recent ruling in a separate NAFTA Chapter 11 claim against Mexico could loom large in terms of the Canadian claimants’ case against the US Government.

As earlier reported in ITN, a group of US-based claimants had argued in the so-called Bayview v. Mexico arbitration** that they could make a NAFTA Chapter 11 claim against Mexico without necessarily having made investments located in Mexican territory.

In an award rendered on June 19, 2007, the arbitral tribunal in the Bayview case rejected that contention, stating that NAFTA Chapter 11 was “not intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States, in circumstances where those investments may be affected by measures taken by another NAFTA state party.”

Given the apparent similarities between the two cases, the Canadian cattle farmers have acknowledged the Bayview v. Mexico ruling in their own final filing in the cattle arbitration with the United States.

In their rejoinder, dated July 5, 2007, the Canadian claimants seek to differentiate their claim from that of the claimants in the Bayview v. Mexico case, by maintaining that the claimants in the Bayview case had focused their energies on arguing that they indeed had an investment in Mexico (i.e. water rights in that country).

According to the Canadian cattle farmers, the Bayview claimants made no attempt to show how Mexico’s alleged deprivation “related to them as investors under Article 1101(1)(a).

The claimants also argue that the Bayview case can be distinguished because the US-based claimants had made investments solely in Texas, while the Canadian-based investors in the cattle case argue that they “based their investment decisions on an overarching, transnational, regulatory framework applicable exclusively to their highly-integrated and continentally-focused industry.”

For its part, the US Government has already adverted to the (at-that-time still pending) Bayview case in its written arguments in the cattle arbitration. Doubtless, the US Government will seek to rely on the final ruling in that case at the upcoming hearings.

Sources:

* Editor’s Note: the parties refer to this case using different names. The claimants describe themselves as the Canadian Cattlemen for Fair Trade, whereas the US Government in legal filings has referred to the matter as Cattle Cases v. United State of America.

** See NAFTA Tribunal lacks jurisdiction to hear Texans’ water dispute with Mexico, by Fernando Cabrera Diaz, available on the web at:
http://www.iisd.org/pdf/2007/itn_july12_2007.pdf

Legal documents in the NAFTA arbitration are available here:

<http://www.state.gov/s/l/c14683.htm>

3. NGOs call for transparency as UNCITRAL governments meet in Vienna,
By Damon Vis-Dunbar

Governments will gather in Vienna from September 10-14 for a complete review of the United Nations Commission on International Trade Law's (UNCITRAL) rules of arbitration. As part of this meeting, delegates may also tackle the looming question of whether the rules should treat investor-state disputes differently than those involving solely private parties.

The meeting is part of an ongoing effort by governments to revise the UNCITRAL rules of arbitration; a process which kicked off last year and is set to wrap-up in 2008. Since their development in 1976, the rules have proved popular for a wide variety of different arbitration types. The revisions currently under discussion – which will be the first changes to the rules since their creation – are largely of a technical nature, and, as a result, have not garnered much attention outside of the international community of arbitration specialists.

Indeed, the UNCITRAL Commission - a committee of member governments which oversees the revision process - made clear from the beginning the rules should be modernized for the sake of efficiency, but that their “original structure and spirit” should be maintained.

However, two non-governmental organizations following the revision process believe that investor-state disputes should be treated differently than those between solely private parties.

The International Institute for Sustainable Development (IISD)* and the Center for International Environmental Law (CIEL) have argued that the public interest-dimension inherent in many disputes between foreign investors and host governments requires that there be greater transparency in the arbitration process for such disputes.

While the governments of Canada and the United States have introduced changes into their own international investment agreements (IIAs) with other countries, mandating the types of transparency advocated by IISD and CIEL, the overwhelming number of IIAs offer recourse to the UNCITRAL rules as a form of dispute resolution without imposing any additional transparency requirements.

The UNCITRAL rules are believed to be the second most popular rules of arbitration for settling investor-state disputes, after the arbitration rules of the World Bank's

International Centre for the Settlement on Investment Disputes (ICSID). However, precise figures on UNCITRAL-based arbitrations are not available due to the current lack of transparency around such proceedings. (Investment Treaty News, as part of its mandate endeavours to investigate and report on such arbitrations which may be taking place with little or no publicity).

An updated paper released this month by the IISD and CIEL lays out arguments as to why investor-state disputes require specially-tailored rules, and how those revisions could be drafted in a neat fashion by UNCITRAL member-governments without affecting the rules application to other types of arbitrations (e.g. purely commercial cases between two private parties).

The proposed revisions would mandate that awards, decisions and other arbitral documents be released to the public; a docket of cases be maintained on the Web; hearings be opened to the public; and that interested parties be expressly allowed to make submissions (i.e. so-called amicus curiae briefs) to a tribunal.

In terms of defining what constitutes an “investor-state” arbitration, the two NGOs suggest that the UNCITRAL Rules could adopt the approach of the International Centre for Settlement of Investment Disputes (ICSID), whose Convention offers a “workable” and time-tested definition of investor-State arbitrations.

At the last meeting of the UNCITRAL Working Group, in New York in February of 2007, the Group decided that they would conduct a first reading of the draft revised UNCITRAL rules, before considering whether or not to address the issue of investor-state arbitrations. That first reading remains to be completed going into the 10-14 September meeting.

Sources:

The IISD-CIEL paper, “Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations”, is available on-line at:
http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration_september.pdf

* Editor's Note: IISD undertakes policy research and analysis and advances policy recommendations in the area of international investment law. Investment Treaty News (ITN) is a reporting service of the IISD with an editorially independent mandate to provide neutral reporting on developments in the area of foreign investment law and policy.

4. US railway investor’s claim against Guatemala tests CAFTA transparency provisions,
By Fernando Cabrera Diaz and Luke Eric Peterson

A US-based company, Railroad Development Corporation (RDC), has seen its arbitration claim against the Republic of Guatemala registered by the International Centre for Settlement of Investment Disputes.

The arbitration claim is the first known to have been launched pursuant to a US Free Trade Agreement with Central America and the Dominican Republic (CAFTA-DR) – an agreement whose extensive transparency provisions should ensure that the arbitration proceedings take place in the public eye.

RDC is seeking at least \$15 million US for compensation and \$50 million USD for lost profits in relation to alleged breaches of several CAFTA-DR protections.

In 1997, RDC, through its Guatemalan subsidiary Compania Desarrolladora Ferroviaria, S.A. (FVG), won a public bid and signed a contract with the Guatemalan state-owned railway system, Ferrocarriles de Guatemala (FEGUA). RDC took on the responsibility of re-opening and operating a system which had fallen into neglect in recent years. However, the company insists that it has been hobbled by contractual violations and the government's failure to remove squatters from railway land.

According to RDC, after negotiations failed to resolve these issues, the company sought local arbitration in June 2005. RDC alleges that FEGUA responded by initiating proceedings which led to the voiding of the company's contracts on the grounds that they were injurious to the Guatemalan state and executed in violation of government rules and procedures. The company says that its lease was later cancelled in August of 2006.

RDC has selected former US Deputy Treasury Secretary Stuart Eizenstat as its nominee to the tribunal. Mr. Eizenstat is a Partner at the law firm of Covington & Burling, a firm which represented Railroad Development Corporation and Rail World Estonia LLC in an earlier ICSID arbitration with Estonia. Covington & Burling has also acted for LG&E in an ICSID arbitration with Argentina; and for the Kingdom of Jordan in an ICSID claim by JacobsGibb Ltd.

Meanwhile, Guatemala appointed Cambridge University Professor James Crawford as its nominee to the tribunal. Prof. Crawford has served as arbitrator in a number of investment treaty cases, including *SGS v. Philippines* and *Mondev v. USA*, as well as counsel in *Eureko v. Poland* on behalf of the Government of Poland. He also serves currently on the annulment committee in the ongoing ICSID dispute between CMS Gas Transmission and Argentina.

CASE WILL TEST CAFTA-DR'S TRANSPARENCY PROVISIONS

In comparison to most international investment treaties, the CAFTA-DR contains extensive transparency provisions applicable to its investor-state dispute settlement mechanism.

Most arbitration documents are to be made public, Notices of Intent to arbitrate; Notices of arbitration; hearing transcripts; and orders, awards, and decisions of the presiding tribunal. Meanwhile, any legal pleadings or briefs submitted by the disputing parties, or by non-disputing parties - such as other signatories to the agreement or interested non-governmental organizations - must also be made public. Oral hearings are also to be open to the public.

At this early stage of the RDC v. Guatemala arbitration only the claimant's Notice of Intent and subsequent Notice of Arbitration have been filed in the case. Julio César Corado, of the Guatemalan Ministry of Economy, tells ITN that Guatemala will comply with the CAFTA-DR's transparency obligations, and plans to post relevant documents on its website.

At press time, RDC's Notice of Intent had been made available on the Ministry's website (see link below); Mr. Corado noted that the Notice of Arbitration, which Guatemala received more recently, would be posted in the near future.

Sources:

ITN interviews.

The notice of intent in the RDC v. Guatemala arbitration is available in Spanish and English from the Guatemalan Ministry of Economy website at:
<http://dace.mineco.gob.gt/dacepdf/doc1exp16dace07.pdf>

Future documents will be made available here (document search engine is in Spanish):
http://dace.mineco.gob.gt/Casos_portal/tratado2.php?ver=1

5. Kaliningrad regional government sues Lithuania under Russian BIT, By Damon Vis-Dunbar

Investment Treaty News has learned that the regional government of Kaliningrad is suing Lithuania under the Lithuania-Russia bilateral investment treaty after one of its buildings was seized through a Lithuanian court order.

A request for arbitration was filed by the Government of the Kaliningrad Region with the Paris-based International Chamber of Commerce's court of arbitration (ICC) in October 2006, according to a statement provided to ITN by the Lithuanian Ministry of Foreign Affairs.

"The dispute arose because of the actions of the institutions of the Republic of Lithuania related to [a] building ... which belongs to the Government of the Kaliningrad Region," said the Lithuanian government in a statement. "The Claimant alleges that the

Respondent by its actions breached the Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on the Promotion and Mutual Protection of Investments....”

The Government of the Kaliningrad Region declined to comment on the dispute when contacted by ITN. The Government of Lithuania is providing minimal information about the arbitration, citing a confidentiality agreement.

However, the events leading up to the arbitration have been documented in the Russian and Lithuanian press.

According to news reports, in 1997 the Kaliningrad Regional Development Fund took out a \$10 million loan from Dresdner Bank to help fund a poultry farm. Kaliningrad allegedly defaulted on that loan. A company called Duke Investment Limited later bought the rights to that debt, and took the government of Kaliningrad to the London Court of International Arbitration to enforce payment. The court ordered Kaliningrad to pay over \$20 million in damages.

With those damages unpaid, a Lithuanian court of appeals approved the seizure and sale of a building in Vilnius, Lithuania, owned by the government of Kaliningrad in 2005. Kaliningrad’s attempts to appeal that decision have failed. The arbitration at the ICC relates to the seizure of Kaliningrad’s building, says the Lithuanian government.

Sources:

ITN interviews

“Property of Kaliningrad Region in Vilnius May be Sold for Debts”, Russian Finance Report, November 11, 2005

“Kaliningrad Region Hasn’t a Representative Office in Lithuania”, Kommersant, February 4, 2005

Upcoming Events:

6. Participants sought for Oct 1-2 developing country negotiators forum in Singapore,

A developing country investment negotiators forum is being convened by the International Institute for Sustainable Development (Canada) and the Centre on Asia and Globalization, Lee Kwan Yew Centre for Public Policy, National University of Singapore. The event is designed to allow negotiators from developing countries to come together to discuss common issues and concerns in investment negotiation. The meeting is to be “low key” and “non-political” working session and networking opportunity for

negotiators. A steering committee of developing country negotiators has guided the design of the Forum, which the organizers aim to establish as an annual event.

Speakers at the event include Justice Florentino Feliciano (Philippines, formerly WTO Appellate Body), Professor M. Sornarajah (National University of Singapore), H.E. Makhdoom Khan (former Attorney General, Pakistan), Mr. Stanimir Alexandrov (Sidley Austin LLP) and Debapriya Battacharya (Executive Director, Centre for Policy Dialogue, Bangladesh).

Topics to be addressed include the meaning and nature of commitments on fair and equitable treatment; indirect expropriation, regulation and “police powers” exceptions; the role of choice of forum and umbrella clauses in arbitration; strategic defences in arbitration; and elements of investment liberalization.

Generous support from the Governments of the Netherlands and Denmark allow for full financial support for a limited number of participants.

For further information please contact Mr. Aaron Cosbey directly at telephone number +1 (250) 362-2275, or by e-mail at acosbey@iisd.ca.

Briefly Noted:

7. Tribunal constituted in Merrill & Ring v. Canada NAFTA Chapter 11 claim,
By Luke Eric Peterson

A tribunal has been constituted to hear an arbitration claim brought by the US forestry company, Merrill & Ring, against the Government of Canada.

As previously reported in ITN, Merrill & Ring grows, harvests, and sells timber from some 8,000 acres of land it owns in the Canadian province of British Columbia. The US firm alleges that Canada has committed various breaches of Chapter 11 of the North American Free Trade Agreement, including in relation to an export control regime which is alleged to operate so as to prevent Merrill & Ring from obtaining international market prices for its logs. (For more information on the claim, see earlier ITN reporting*)

For its part, Canada has nominated as its party-appointed arbitrator, J. William Rowley, Chair of the Canadian law firm McMillan Binch Mendelsohn. Mr. Rowley has served in various investment treaty cases, including in the second claim filed by Vivendi Universal against Argentina, and in the Methanex v. United States arbitration.

Meanwhile, the claimant has nominated as its party-appointed arbitrator, Kenneth Dam, a Professor Emeritus at the University of Chicago, and from 2001 to 2003 Deputy Treasury

Secretary in the administration of George W. Bush.

Sitting as Chair of the tribunal is Francisco Orrego Vicuna, A professor of international law at the University of Chile, and a frequent adjudicator of investment treaty disputes, including service as president of the tribunal in *Enron v. Argentina*, *CMS v. Argentina*, *PSEG v. Turkey* and *Maffezini v. Spain*.

* See “US lumber firm Merrill & Ring notifies Canada of NAFTA suit over log exports”, By Fernando Cabrera Diaz, *Investment Treaty News*, November 2, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_nov2_2006.pdf

8. Repsol threatens Algeria with BIT suit, as contractual proceeding gets under way,
By Luke Eric Peterson

The Spanish energy firm Repsol has publicly stated that it will seek international arbitration against Algeria in a dispute over a major natural gas project in that country.

Recently, Algeria’s state-owned energy company Sonatrach announced that it was canceling the participation of Repsol and Gas Natural, another Spanish energy firm, in the multi-billion dollar Gassi Touil project. The parties had been wrangling for some months over alleged delays and cost-overruns on the project.

A source familiar with the dispute confirms that the company may claim under the Spain-Algeria BIT, but that a so-called triggering letter – which would initiate the mandatory waiting period under the treaty - has yet to be served on Algeria.

Meanwhile, ITN can report that a commercial arbitration has already been initiated by Sonatrach against Repsol and Gas Natural. That claim is to be heard in Geneva under the UNCITRAL rules of arbitration; a tribunal is in the process of being constituted.

The disputes come at a time when Algeria has sought greater national involvement in energy projects. *Forbes Magazine* reports that the country recently passed a law mandating that Sonatrach have a minimum 50% participation in any new energy projects in Algeria.

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