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Arbitration Watch:  
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1. Swedish firm wins Energy Charter Treaty case against Republic of Latvia,  
By Luke Eric Peterson

The Swedish energy company, Nykomb Synergetics, has won an arbitral award against the Republic of Latvia under the Energy Charter Treaty.

According to two sources familiar with the case, the tribunal has ruled that Latvia violated the Energy Charter Treaty's provisions on non-discrimination by virtue of the failure of state-owned Latvenergo to pay double-tariffs to Windau (as had been promised in the initial investment agreements concluded between the parties).

The double tariffs - to be paid during the first 8 years of the project's life - were originally agreed upon in order to provide sufficient inducement for the investor to make the substantial investments needed to build a natural gas-fired co-generation plant in Latvia.

However, subsequent to the building of the plant, Latvenergo declined to pay the double tariffs. The investor alleged that a new government preferred to import cheaper electricity from abroad, than to pay a premium for the environmentally-friendly electricity generated at the Windau facility.

Following its conflict with Latvenergo, Nykomb filed an arbitration under the terms of the Energy Charter Treaty, a plurilateral trade and investment treaty governing the energy sector), and the case was brought to the Stockholm Arbitration Institute.

Sources tell INVEST-SD that the tribunal rejected allegations that Latvia's treatment of the Windau investment amounted to a creeping expropriation. One source indicated that the tribunal's award is notable for having "pierced the corporate veil" by finding that the actions of the state-owned Latvenergo firm could be attributed to the Latvian Republic.

In terms of the damages assessed in the case, it is understood that they fell considerably short of the amounts claimed by the investor.

INVEST-SD will continue to monitor this case - including any move by either party to challenge the award in Swedish courts - and is working to obtain a copy of the tribunal's (unpublished) award.

Sources:

INVEST-SD Interviews

2. Azurix water company registers second Argentine claim, as first claim clears jurisdictional hurdle,  
By Luke Eric Peterson

The Azurix Corp, a US-based water services company has mounted a second arbitration against the Argentine Republic under the terms of the US-Argentina bilateral investment treaty. This latest dispute was registered at the Washington-based International Center for Settlement of Investment Disputes (ICSID), and relates to a water and sewage concession in the Mendoza province of Argentina.

Counsel for the firm told INVEST-SD that the latest claim arises out of losses sustained as a result of the Argentine financial crisis.

It is understood that another partner with a stake in the Mendoza concession may bring its own investment treaty claim to ICSID.

Meanwhile, in new developments last week, an ICSID tribunal upheld jurisdiction in an earlier arbitration mounted by Azurix in 2001, in relation to its investment in a water and sewage concession in Buenos Aires province.

According to a 1999 press release issued by the Enron Corporation, its Azurix subsidiary (which was subsequently spun off by Enron) paid \$438.6 million for a 30 year concession to provide services to two regions of Buenos Aires Province.

Some press reports have suggested that the firm overbid wildly for the concession - with the next highest bid coming in at \$150 million. In any event, the concessionaire and the provincial authorities soon fell out over a number of matters including responsibility for infrastructural improvements and water quality issues.

In October of 2001 Azurix Buenos Aires terminated its concession contract with the government of Buenos Aires, and filed a claim for damages under the US-Argentina BIT, alleging that the regulatory actions of Argentina and its political subdivisions had violated various provisions of the treaty.

And last week, an ICSID tribunal agreed to examine Azurix Corp's claim for damages suffered as a result of Azurix Buenos Aires' treatment.

The tribunal's decision on jurisdiction is notable for having hewed to the rulings in other recent cases - including in the CMS v. Argentine Republic arbitration - that a prospective treaty claim would not be shortcircuited by virtue of the fact that the relevant investment contracts had specified local dispute settlement avenues.

Indeed, the Buenos Aires authorities had gone so far as to stipulate that the contract would be subject to a waiver of the concessionaire's rights to pursue a bilateral investment treaty claim in case of dispute. However, this legal maneuver did not serve to constrain the Azurix Corp - which was not a signatory to the contracts (which had been concluded by its Argentine-based subsidiaries) - and did not prevent it from mounting a treaty claim for damages to its shareholdings in Azurix Buenos Aires.

Sources:

INVEST-SD Interviews

"Azurix Corp. to be awarded water and wastewater concessions for two regions of Buenos Aires Province", Enron Corporation, Press Release, May 19, 1999, available on-line at: [www.enron.com/corp/pressroom/releases/1999/azx/agosbarelease.html](http://www.enron.com/corp/pressroom/releases/1999/azx/agosbarelease.html)

"How Enron's great water adventure ended in tears", The Guardian, Nov. 5, 2002, Available at: [www.guardian.co.uk/enron/story/0,11337,830207,00.html](http://www.guardian.co.uk/enron/story/0,11337,830207,00.html)

Azurix Corp. v. Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/01/12, Dec. 8, 2003, available online at: <http://www.asil.org/ilib/azurix.pdf>

### 3. ICSID Tribunal declines to halt investor arbitration in deference to State-to-State arbitration, By Luke Eric Peterson

An ICSID tribunal hearing a claim by a Chilean firm against the Peruvian government has rejected a move by Peru to suspend the proceedings on the grounds that a separate state-to-state arbitration has now arisen in relation to the same controversy.

Earlier this year, the Chilean firm, Lucchetti, registered a claim for damages with ICSID, arising out of the closure of the firm's pasta factory located in an area which local Peruvian authorities have designated as an environmental preserve.

A representative of the investor notes that a number of other factories - including several chemical factories - are located in, or adjacent to the preserve, and insists that Lucchetti has been the victim of discrimination because of its Chilean nationality.

Meanwhile, the Peruvian government has questioned whether the dispute falls under the terms of the Chile-Peru bilateral investment treaty - as disagreements between Lucchetti's factory and the local authorities predated the entry into force of the Chile-Peru bilateral investment treaty. However, diplomatic efforts by Peruvian authorities to convince Chile that this was the case, proved unsuccessful. One source indicated to INVEST-SD that this is what led Peru to launch a claim under the state-to-state arbitration clause of the BIT.

According to this source, Peru insists that its disagreement with Chile over the retroactive applicability of the treaty provides sufficient pretext to launch a state-to-state arbitration under the treaty, and to have a tribunal rule on this particular question.

And having put in motion a state-to-state arbitration under the UNCITRAL rules of arbitration, Peru attempted in September of this year to convince the ICSID tribunal hearing the Lucchetti claim that it should suspend the earlier-registered investor-state arbitration in deference to that state-to-state proceeding.

However, in an order issued on September 15, the ICSID tribunal rejected this request and instead ordered that arguments on jurisdiction be heard - with each party to submit arguments over the next months and for a hearing on jurisdiction to be held in September of 2004.

Sources:

INVEST-SD Interviews

#### 4. Lawyers argue that Canadians excluded from Iraq contracts could sue under NAFTA

In an op-ed column published in the Toronto Globe and Mail newspaper, lawyers Todd Weiler and Charles Gastle argue that Canadian firms cut out of the bidding for Iraqi reconstruction contracts may be able to mount legal action under the investor-state provisions of the North American Free Trade Agreement (NAFTA).

The full column can be read on-line at:

[www.globeandmail.com/servlet/ArticleNews/TPStory/LAC/20031216/COGASTLE16](http://www.globeandmail.com/servlet/ArticleNews/TPStory/LAC/20031216/COGASTLE16)

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Negotiation Watch  
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#### 5. Countries differ over proposals to kick investment out of the WTO Doha Round, By Luke Eric Peterson

Following a critical meeting of the World Trade Organization's General Council (the body comprised of the member states' permanent ambassadors to the WTO) earlier this week, the fate of investment at the WTO remains a subject of contention.

Members states appear to have agreed that the 4 so-called Singapore Issues\* can be "unbundled" and dealt with on their respective merits - but there is no consensus as to how to handle each unbundled issue.

Many developing countries have declared their opposition to any form of negotiation on all but the least controversial of the 4 Singapore Issues: trade facilitation. This message was conveyed in a submission to the General Council meeting, where a group of developing countries led by China, India and Malaysia noted that the continuing divergence of views meant that there could be no "explicit consensus" to launch negotiations on investment, competition and transparency in government procurement.

More broadly, the group warned that WTO commitments on the Singapore Issues would curtail domestic policy space and "entail high costs, which many developing countries cannot afford at their present level of development."

It is understood that 45 developing countries affixed their names to this document (not 13 as has been reported in the Washington-based trade newsletter Inside US Trade).

However, not all WTO members share the view that negotiations on 3 of the 4 Singapore Issues should be jettisoned.

With respect to investment and competition, the European Union has continued to call for negotiations to be launched on a plurilateral basis, with the participation of willing WTO member-states.

In his closing remarks to the General Council session, Chairperson Carlos Pérez del Castillo noted that further consultation and discussion needs to take place between members as to the appropriate disposition of certain of the Singapore Issues.

INVEST-SD will continue to monitor developments at the WTO.

\* transparency in government procurement, competition, investment and trade facilitation

Sources:

"Singapore Issues: The Way Forward", Joint Communication from Bangladesh (on behalf of 33 Least-Developed Countries), Botswana, China, Cuba, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Philippines, Tanzania, Uganda, Venezuela, Zambia and Zimbabwe, submitted to World Trade Organization General Council, dated Dec. 12, 2003. Document available on-line by searching for document # WT/GC/W/52 at: [www.wto.org/english/docs\\_e/docs\\_e.htm](http://www.wto.org/english/docs_e/docs_e.htm)

"Closing Remarks by the chairman of the General Council", Dec. 16, 2003, available at: [http://www.wto.org/english/news\\_e/news03\\_e/stat\\_gc\\_chair\\_16dec03\\_e.htm](http://www.wto.org/english/news_e/news03_e/stat_gc_chair_16dec03_e.htm)

"Developing countries cool to all Singapore issues but trade facilitation", Inside US Trade, Dec. 19, 2003, by subscription only.

6. US announces conclusion of Central American talks, but Costa Rica calls a time-out,  
By Luke Eric Peterson

The US Government has announced the conclusion of negotiations on a Central American Free Trade Agreement, but a key member has broke off discussions following the tabling of an 11th hour negotiating proposal by the United States.

Meanwhile, a powerful Democratic Senator has criticized the Bush Administration's announcement as "premature", given that a number of issues - and now the involvement of a key party - remain outstanding.

Max Baucus, Democratic Senator for Montana and the ranking member of the influential Senate Finance Committee has pointed to unfinished work on a public submissions process which would permit citizens to file complaints against a party's environmental performance.

This is not the only structural feature of the agreement which has yet to be finalized. According to Inside US Trade, a lead US negotiator has indicated that language on an appellate mechanism for investor-state disputes remains to be negotiated between the parties.

If this week's announcement of the conclusion of talks on the so-called CAFTA can be described as "premature", the early announcement could be related to set-backs in other US negotiations, with Morocco and Australia, which will see discussions drag into early 2004.

In addition, the announcement that a deal has been struck with El Salvador, Honduras, Nicaragua, and Guatemala could be a negotiating tactic designed to bring Costa Rica onside. When the US tabled a last-minute proposal during the final week of negotiations which would have opened up Costa Rica's state-owned insurance sector to liberalization, the Costa Rican delegation withdrew from negotiations in order to consult with government officials in the national capital.

The US responded by announcing that a deal on a free trade agreement had been reached with the remaining 4 Central American parties. The deal will cover investment, and would likely supplant existing bilateral investment treaties with Honduras (in force), and El Salvador and Nicaragua (not in force).

INVEST-SD has made several telephone and email inquiries to the Office of the US Trade Representative in an effort to obtain information about the state of US investment treaty policy and practice. No reply has been forthcoming as yet.

Sources:

"Major CAFTA Issues Unresolved as U.S., Others Announce Conclusion", Inside US Trade, Dec. 19, 2003

"A Pact on Central America Trade Zone, Minus One", By Elizabeth Becker, The New York Times, Dec.18, 2003

"Costa Rica Balks at Approving Central American Trade Pact", By Elizabeth Becker, The New York Times, Dec.17, 2003

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