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Arbitration Watch:
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1. Tribunal rules on NGO's bid to intervene in second Argentine water dispute,
By Luke Eric Peterson

An ICSID tribunal has issued an Order in response to a request by an Argentine non-governmental organization and three individual experts for permission to intervene in an ongoing investment treaty arbitration related to a disputed water services concession in Argentina's Santa Fe province. The groups seek to raise arguments before the tribunal related to sustainable development, human rights and development.

The tribunal's March 17th 2006 Order ruling on that request is the second to be issued by an ICSID tribunal, following on the heels of a 2005 Order which paved the way for non-

parties to apply for amicus curiae (friend of the court) status in another ongoing arbitration involving a water services concession in Argentina's Buenos Aires province.

In both the Santa Fe and the Buenos Aires disputes, the presiding tribunal has consisted of the same three persons: Prof. Jeswald Salacuse, Prof. Gabrielle Kaufman-Kohler, and Judge Pedro Nikken. Moreover, in its recent Order in the Santa Fe case, the tribunal notes that the petition by non-parties raises legal issues which "are virtually identical" to those raised by the petitioners in relation to the Buenos Aires arbitration.

Perhaps not surprisingly then, the tribunal has ruled in essentially the same manner as it did in 2005. In particular, the tribunal affirmed that it has the authority to permit non-parties to file legal briefs as amicus curiae in the Santa Fe case.

However, in contrast with the Buenos Aires case, the tribunal ruled that the petition submitted by the would-be amicus curiae in the Santa Fe case fails to provide sufficient information about the Argentine NGO and the three individual applicants, as well as their relevant expertise, and their interest in the particular case.

Accordingly, the tribunal invited the petitioners to provide the tribunal with further information and reasons about their amicus bid, in order that a decision might be taken on their petition.

Meanwhile, in keeping with its earlier ruling in the Buenos Aires case, the tribunal rejected a parallel bid by the petitioners to have the arbitral hearings of the Santa Fe case opened to the public. The tribunal noted that its hands are tied with respect to such a request, as the ICSID rules require the consent of the two parties to the arbitration. While the Argentine Government signaled its support for open hearings, the request was nixed by the claimant investors, Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.

The tribunal also denied a third request by the petitioners for the documents related to the arbitration to be made available to the public, on the grounds that the petitioners had not provided sufficient information about themselves so as to allow the tribunal to determine whether they could be permitted to intervene in the arbitration as amicus curiae. The tribunal noted that it would defer the basic question as to whether a non-party may have access to documents related to an ICSID arbitration, until such a time as a petitioner has been granted leave to intervene as amicus curiae in the arbitration.

Sources:

Order in Response to a Petition for Participation as Amicus Curiae, in the proceedings between Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.v. The Argentine Republic, ICSID Case No. ARB/03/17, March 17, 2006, available on-line by clicking here

Order in Response to a Petition for Participation as Amicus Curiae, in the proceedings between Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, May 19, 2005, available on-line by clicking here.

2. Analysis: "Non-Parties" waking up to investment treaty arbitration,
By Luke Eric Peterson

Intervention by outside parties in investment treaty arbitrations appears to be a growing trend. Two tribunals operating under the ICSID rules of procedure have now affirmed that they have the power to receive written submissions from non-parties.

The decisions make clear what had been left ambiguous by an earlier ICSID ruling.

In 2003, a tribunal presiding over the controversial Aguas del Tunari v. Bolivia arbitration, ruled on certain requests by a group of non-governmental organisations seeking to intervene in that case. In a letter from the Tribunal President written to the groups, Prof. David C. Caron noted that the tribunal lacked the power to open the hearings, disclose documents, or attach the would-be amicus curiae to the arbitration as actual Parties to the dispute.

Prof. Caron did not take a position, however, on whether "supplementary non-party submissions" (e.g. amicus curiae briefs) might be sought at some later stage of the proceeding.

In the event, that question was rendered moot, when the Aguas del Tunari dispute was settled by the parties shortly after the tribunal ruled that it had jurisdiction to examine the merits of the dispute.

Since then, however, two ICSID tribunals have clarified that non-parties may make such written submissions, provided that they meet criteria laid down by the tribunal.

It had already been established that investment treaty arbitrations conducted under the UNCITRAL rules may permit written interventions by non-parties. The Methanex v. United States tribunal was the first to affirm this, after having received petitions to intervene in that case from the International Institute for Sustainable Development (publishers of this newsletter), as well as several US-based environmental groups.

Several subsequent tribunals operating under the UNCITRAL rules of procedure have permitted such written interventions.

In the United Parcel Services (UPS) v. Canada arbitration, currently pending under NAFTA, three groups have made written submissions: the Council of Canadians, the

Canadian Union of Postal Workers, and the US Chamber of Commerce. Meanwhile, in another ongoing NAFTA arbitration, Glamis Gold Ltd. v. United States of America, two groups have intervened to date: Friends of the Earth, and the Quechen Indian Nation

What is unknown, however, is how tribunals operating under other rules of arbitration will rule on the question of non-party intervention. Under some investment treaties, investor-state disputes may be arbitrated under the auspices of commercial arbitration venues, such as the Stockholm Chamber of Commerce, the International Chamber of Commerce, and the Kuala Lumpur Regional Centre for Arbitration. Indeed, arbitrations at any of these venues are not typically publicized.

Recently, a small number of governments have taken steps to draft investment treaties which mandate that investor-state arbitrations will be publicly disclosed and open to the public. However, the vast majority of treaties currently in force, not to mention the bulk of those being negotiated at present, do not impose such publicity requirements.

While interest groups like Friends of the Earth and the US Chamber of Commerce may be intervening in investment treaty arbitrations which have made their way onto the public's radar, it remains the case that the existence of a certain portion of arbitrations still flies below that radar in 2006.

Sources

Decision on Application and Submission by Quechan Indian Nation, in the UNCITRAL proceeding between Glamis Gold Ltd. v. United States of America, available on-line by clicking here

Letter to J. Martin Wagner, Earthjustice, from Prof. David C. Caron, President of Aguas del Tunari v. Republic of Bolivia tribunal, January 29, 2003, available on-line by clicking here

Documents related to the UPS v. Canada arbitration available by clicking here

Documents related to the Methanex Corporation v. United States of America arbitration available by clicking here

3. Prominent arbitrator's impartiality questioned in two sports anti-doping arbitrations, By Damon Vis-Dunbar

A well-known Canadian arbitrator resigned last month from his position as chairman of a tribunal at the Switzerland-based Court of Arbitration for Sport (CAS) following allegations of a potential conflict of interest in a high-profile anti-doping case.

Yves Fortier flatly denies the charges. The Montreal-based lawyer, who serves as arbitrator in many significant foreign investment disputes, said he was “deeply disturbed” by the accusation, but chose to step down so that the anti-doping arbitration could resume with “confidence and serenity,” according to a statement by the CAS.

Mr. Fortier’s decision to resign came after lawyers acting for the Greek sprinters Kostas Kenteris and Katerina Thanou accused Fortier of a conflict of interest, citing the fact that a partner at Mr. Fortier’s law firm, Stephen Drymer, worked for the World Anti-Doping Agency (WADA), albeit in an unrelated case.

“Although this is an extremely unfortunate development, we accept Mr. Fortier’s resignation,” said Gregory Ioannidis, counsel for Mr. Kenteris and Ms. Thanou, in an email to ITN.

Last December, Tim Montgomery, a US sprinter under a two year suspension for doping offences, sought an appeal of an arbitral ruling at the CAS for a similar reason: Yves Fortier was on the tribunal hearing the Montgomery case at the same time that his law firm partner, Stephen Drymer, was representing the WADA on a separate matter.

The case against Tim Montgomery was brought to the CAS by the United States Anti-Doping Agency (USADA). In an interview with ITN, Mr. Montgomery’s lawyer, Robert McFarland, said that the WADA shares close ties to the USADA, and therefore had in interest in the outcome of the arbitration.

While the CAS has rejected the annulment request, in a January news report by the Financial Times newspaper, Mr. McFarland floated the possibility of challenging the CAS decision in U.S. District Court. Contacted recently by ITN, Mr. McFarland indicated that no court proceedings or annulment requests have been filed to date.

Meanwhile, Mr. Kenteris and Ms. Thanou, the Greek sprinters, face a potential two-year suspension after they failed to show-up to a drug test prior to the 2004 Games in Athens. The CAS panel in the Kenteris and Thanou case, slated to reconvene on February 22 and 23 in Lausanne, Switzerland, has been postponed until later this summer.

Mr. Fortier, a senior partner at Montreal-based Ogilvy Renault, has served as an arbitrator on many international arbitration tribunals - a significant number constituted on the basis of investment treaties - including Eureko v. Poland (insurance privatization dispute), Saluka v. Czech Republic (banking dispute), Fraport v. Phillipines (airport terminal dispute), and PSEG v. Turkey (electricity privatization dispute). In 2005, he was named by American Lawyer Magazine as the top lawyer in terms of service as arbitrator in major international investment arbitrations.

Mr. Fortier’s impartiality was challenged in an investment treaty case at the International Centre for the Settlement of Investment Disputes (ICSID) in 2001. That challenge was ultimately dismissed.

The 2001 ICSID challenge arose in relation to Mr. Fortier's service on a three-person annulment committee in the case of Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic. Earlier, a tribunal hearing the water privatization dispute had unanimously dismissed the claim against Argentina, but an annulment committee was convened, at the investor's request, to hear a request for annulment of the arbitral award.

Before that annulment hearing could take place, the Argentine Government challenged the ICSID facility's nomination of Mr. Fortier to the annulment committee. Argentina elected to challenge Mr. Fortier, after he disclosed that a partner at his law firm had advised Vivendi on a tax matter in the years just prior to Mr. Fortier's appointment to the annulment committee. This partner also continued to be paid by Vivendi on a retainer.

It was left to the other two members of the annulment committee, Prof. James Crawford and Prof. José Carlos Fernández Rozas, to judge the validity of the challenge. Ultimately, these arbitrators held that Argentina had not proven Mr. Fortier to be impartial, taking into account that he had been prompt in disclosing the relationship. The committee members noted that Mr. Fortier's colleague's work was unrelated to the Vivendi v. Argentina dispute, and that Mr. Fortier did not have a personal lawyer-client relationship with Vivendi.

A copy of the decision rejecting the challenge to Mr. Fortier is available on the website of the ICSID facility.

Sources:

A statement by the Court of Arbitration for Sport regarding Yves Fortier's resignation in matter of IAAF v/SEGAS & Kenteris & Thanou is available on-line by clicking here

The Decision on the Challenge to the President of the Committee in the matter of Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic is available online by clicking here

"Conflict of interest for sports doping arbitrator", By David Owen, The Financial Times, January 21, 2006

4. US car maker to sue Romania, latest in a string of arbitrations involving Romania, By Damon Vis-Dunbar and Luke Eric Peterson

An American manufacturer of off-road vehicles warns that it intends to file a claim against Romania for an alleged breach of the United States-Romania bilateral investment treaty.

The Miami-based company, Cross Lander, invested in a privatized automotive factory in Romania in 2003. “From the beginning of this business venture Cross Lander contends that it has been subjected to a continuous barrage of attacks,” says a statement by the Cross Lander.

The company blames “the Romanian government, former head of internal security, AVAS officials and sensationalist reporters,” for “efforts to discredit Cross Lander and wrestle away its control of the Aro factory.”

Contacted by Investment Treaty News, a spokesperson for the company said he would not comment on the case, beyond what had been released in a company statement.

For its part, Romania accuses Cross Lander of breaking the privatization contract, and has filed a claim in Romanian courts.

Last month – only days prior to the announcement by Cross Lander that it intended to initiate international arbitration - Romania’s privatization agency, AVAS, said that it was suing Cross Lander for $2.7 Million US. AVAS alleges that Cross Lander breached the privatization agreement by prematurely selling off Aro’s assets, according to a statement by the agency.

Former employees of the Aro plant have recently staged protests over a lack of severance payments.

“Aro employees cannot receive their wages from anyone else but from Aro’s owner, the company Cross Lander USA Inc, and after the liquidation process has started, they are going to be paid by liquidators,” said Razvan Orasanu, president of AVAS, in a statement.

Romania has faced a string of claims under its bilateral investment treaties in recent years, a number of which involve investments in newly privatized companies.

In fact, last month the Romanian government announced that it was increasing the budget of the Ministry of Public Finances by some $4 Million US to cover the legal fees resulting from these arbitrations.

Four cases involving Romania are currently pending at the Washington-based International Centre for the Settlement of Investment Disputes (ICSID).

Most recently, ICSID registered a case mounted by a Dutch incorporated firm that had invested in Rompetrol Group NV, one of the largest oil companies in Romania. The claim, brought to ICSID under the Netherlands-Romania bilateral investment treaty, was sparked by an investigation by Romanian authorities into alleged tax evasion, which the investors claim to be a “sham.”

A claim has also been launched by EDF Services, an American-Israeli operator of duty-

free stores in Romania. The investor alleges that its contract was terminated after it refused to pay a bribe to a government official. According to the Financial Times newspaper, EDF is asking for $108 Million US in damages.

Also on the ICSID docket is a pending case by the Greek investor Spyridon Roussalis, the owner of Marine Continental, who filed a claim alleging harassment after the company's CEO was indicted on fraud charges.

While several investors have launched lawsuits against Romania, the country has been vindicated in the only dispute to date to see a final ruling issued by the tribunal. In the case of Noble Ventures v. Romania at the ICSID facility, US investors in a privatized steel mill failed to convince an arbitral tribunal that they had suffered breaches of the US-Romania bilateral investment treaty.

Indeed, the tribunal took issue with some of the financial decisions of the US investors, and noted that a judicial restructuring of the investment, which had been initiated by creditors, was not arbitrary given the straitened circumstances of the company and its workforce.

The Romanian Government has sought to root out corruption in recent years, with the incentive of membership in the European Union a likely prospect. Romania signed an accession treaty with the EU in April of 2005, and the European Commission is expected to make a recommendation on Romania's bid in May of this year.

Recently, the former Prime Minister Adrian Nastase, who served from 2001 to 2004, became the latest (and most senior) former state officials to be indicted by Romania's anti-corruption agency.

Sources:

"Romania government ups budget for International Litigations by Ron 12M", MediaFax News Brief Service, March 8, 2006

"Romania prevails in BIT arbitration with US investors over privatized steelworks", By Luke Eric Peterson, Investment Treaty News, October 26, 2005, available on-line by clicking here

"Investors in Romanian oil firm file arbitration warning with Romania", by Luke Eric Peterson, INVEST-SD, September 15, 2005, available on-line by clicking here

Economist Intelligence Unit, Romania: Country Report, April 2006

5. Latvian firm sues Ukraine in ninth (known) claim to be filed under Energy Charter, By Damon Vis-Dunbar and Luke Eric Peterson

Investment Treaty News has learned that a Latvian company, Amto, has launched arbitration proceedings against the Ukraine for an alleged breach of the Energy Charter Treaty.

The claim was filed with the Arbitration Institute of the Stockholm Chamber of Commerce last November by Amto and its Ukrainian subsidiary, Elektroyuzhmontazh-10. Amto holds a 67 per cent stake in Elektroyuzhmontazh-10, a company that deals in the repair of high-voltage electrical equipment in nuclear power plants.

Elektroyuzhmontazh-10 was contracted to do work on the Zaporizhya nuclear power plant in eastern Ukraine, run by the state-owned company Energoatom.

According to knowledgeable sources, Energoatom stopped paying its debts in 2001. Eleven claims were filed by Amto in the Ukraine in which it sought payment for its work, and all were rendered in the company's favour. However, bankruptcy proceedings have protected Energoatom against enforcement of these court rulings.

Last month the Stockholm Institute held that it did not have jurisdiction to rule on the claim by the Ukrainian subsidiary Elektroyuzhmontazh-10, but proceedings involving the Latvian firm Amto are moving ahead, according to knowledgeable sources. All advanced payments have been made to the Stockholm Arbitration Institute and a three-member tribunal has been constituted. Amto is expected to file its statement of claim by the end of May.

The three-member tribunal consists of Bernardo Cremades (Chair), Per Runeland and Christer Söderlund.

Meanwhile, a parallel case has been lodged by Elektroyuzhmontazh-10 at the European Court of Human Rights in Strasbourg. The Ukrainian company alleges that the Ukraine has breached the Human Rights' Convention by not ensuring that court rulings are enforced.

The recent dispute with the Ukraine bears some similarity with an arbitration launched in 2004 against that country by US investors. In the 2004 arbitration taking place at the Washington-based ICSID facility, a US firm, Western NIS Enterprise Fund, accuses the Ukraine of failing to live up to the terms of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The investor alleges that the failure of Ukrainian courts to enforce payment of an arbitral award rendered in favour of Western NIS amounts to a breach of the obligations in the US-Romania bilateral investment treaty.

The more recent arbitration claim brought by the Latvian firm Amto against the Ukraine Government marks at least the ninth instance where a foreign investor has filed an

arbitration against a host government pursuant to the Energy Charter Treaty (ECT). However, there are no binding requirements for claimants to disclose such ECT arbitrations, so it remains unknown whether other arbitrations may have gone unpublicized.

According to a review conducted by ITN, the following governments have been served with ECT arbitration claims to date: Hungary, Kyrgyzstan, Latvia, Bulgaria, Mongolia, Slovenia, Georgia, Russia and, most recently, the Ukraine.

Sources:

"US Firm mounts BIT claim against Ukraine for failure to enforce arbitral award", By Luke Eric Peterson, INVEST-SD News Bulletin, available on-line by clicking here

6. Gas Natural and Argentina move cautiously towards a settlement,
By Damon Vis-Dunbar

Argentina ratified this month an agreement signed with the Spanish firm Gas Natural BAN – a move that is expected to bring a retroactive tariff hike and, eventually, a new tariff structure.

Should all go well, it marks a step towards a full settlement with Gas Natural SDG, which holds a majority stake in Gas Natural Ban, a natural gas supplier in Argentina.

However, signaling that a rocky road still lies ahead, the Argentine Ministry of Planning said that certain provisions in the agreement would have to be renegotiated, in order to protect households from a jump in gas fees, according to a report in the Argentine newspaper La Nación.

Moreover, Argentine regulators must now begin a so-called internal tariff review to determine future increases. For Gas Natural SDG, this is a crucial step towards a settlement.

Argentina froze tariffs on natural gas and other utilities in 2002, in the wake of a deep recession. That, among other measures taken by the Argentine government, prompted Gas Natural SDG to allege a breach of the Argentina-Spain bilateral investment treaty. The firm filed a claim at the International Centre for the Settlement of Investment Disputes (ICSID) in 2003.

However, a July 2005 draft agreement paves the way for a settlement, prescribing a number of obligations on each party. In line with this agreement, Gas Natural agreed to suspend the ICSID arbitration proceedings until August 1, 2006, by which point

Argentina promised a new tariff structure would be set in place.

As that August deadline looms closer, a knowledgeable source says that it has taken longer than expected for Argentina to ratify the agreement, and therefore completing the internal tariff review by August seems optimistic.

Should the review not be completed by August, Gas Natural SDG would have the option of extending the suspension, or restarting the arbitration.

Meanwhile, an American firm with a minority stake in Gas Natural Ban, Louisville Gas and Electric Company (LG&E), continues to wait for an award in its suit against Argentina, brought under the Argentina-United States bilateral investment treaty.

LG&E was one of the first companies to file a claim against Argentina following the country's financial crisis. Post hearing briefs were submitted in February 2005, and an award has been expected for some time.

Argentina had demanded that LG&E also suspend proceedings at ICSID as a condition of the July 2005 agreement with Gas Natural BAN. LG&E rejected that offer, prompting Gas Natural SDG to agree to pay the indemnity on behalf of the Argentine government in the case that an award is successfully executed.

To date, only a single tribunal has ruled on the merits of a claim lodged against Argentina in the aftermath of that country's financial crisis. (See: "First domino falls on Argentina as tribunal rules in financial crisis arbitration", INVEST-SD News Bulletin, May 27, 2005, available on-line by clicking here.

Sources:

ITN interviews

"Gobierno analiza una nueva oferta a Gas Natural", By Josefina Giglio, La Nación, April 12, 2006

Negotiation Watch:

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7. US pulls plug on Southern Africa talks as investment issue proves intractable,
By Luke Eric Peterson

Trade negotiations between the United States and the Southern African Customs Union (SACU) have been suspended, after three protracted years of on-and-off negotiations. In an oddly-worded press release the Office of the US Trade Representative, US officials

acknowledged that the two sides have “differences on some core issues in the FTA” – differences which will require “detailed examination over the longer term”.

As earlier reported in this newsletter, a source of friction in those talks had been a US proposal to include investment liberalization and protection provisions in the proposed free trade agreement.

Amongst the SACU countries (South Africa, Namibia, Botswana, Lesotho, and Swaziland) South African negotiators are understood to have led opposition to negotiating investment commitments, citing various concerns with the high-level commitments demanded by US negotiators.

While South Africa has concluded a large number of bilateral investment treaties, all of these agreements are on a European-model, and do not apply to the so-called pre-establishment phase of investments. As such, those agreements do not oblige South Africa to offer National Treatment to foreign investors when it comes to decisions on acquisitions of South African enterprises by foreigners or the establishment of new investments in the country.

A BIT negotiated by South Africa with Canada, and which does contemplate certain pre-establishment commitments similar to those sought by the United States, has never been ratified by the South African Government; according to a South African source, the Canada-SA BIT is unlikely to enter into force in future.

Another concern for the South African government has been the question of how to accommodate that country’s Black Economic Empowerment (BEE) policies with the stringent demands of a typical US-style investment agreement. The BEE programme is designed to bring about racial and social transformation of the South African economy, in harmony with principles of the South African Constitution.

However, certain US investors have stated concerns about elements of the BEE programme, which includes affirmative action requirements for businesses operating in South Africa, as well as obligations for companies to build sourcing relationships with local black businesses.

Sources:

“US Drops FTA with SACU, starts trade and investment work program”, Inside U.S. Trade, April 21, 2006

USTR press release, April 18, 2006, available on-line by clicking here

“US- Southern Africa Negotiations Stall; Race-based Affirmative Action an Obstacle?”, INVEST-SD News Bulletin, July 22, 2004, available on-line by clicking here

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