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# NEWS: SOCIÉTÉ GÉNÉRALE V. DOMINICAN REPUBLIC ARBITRATION PROCEEDS TO MERITS STAGE FOLLOWING DECISION ON JURISDICTION

*By Fernando Diaz Cabrera*

A dispute between the French company Société Générale and the Dominican Republic will proceed to the merits phase after the tribunal accepted jurisdiction.

As reported previously in ITN, TCW and its affiliates launched two separate claims against the Dominican Republic in 2007, seeking US$ 680 million as compensation in each case.

One claim was brought under the 2003 Dominican Republic-France bilateral investment treaty by TCW's parent company, Société Générale. The other claim was launched by TCW and one of its subsidiaries under the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR).

Among TCW's claims were that the Dominican Republic had expropriated its investments in the electricity distributer EDE Este, as a result of the country's alleged failure to allow for electricity rate increases and to control rampant electricity theft.

In November of 2007 the Dominican Republic objected to the tribunal's jurisdiction in respect of the BIT claim, which is governed by the UNCITRAL rules of arbitration.

*Continued on page 2*

# NEWS: CONTROVERSY ERUPTS OVER PRESS RELEASE IN SOCIÉTÉ GÉNÉRALE V. DOMINICAN REPUBLIC ARBITRATION

*By Fernando Diaz Cabrera*

Lawyers for the Dominican Republic have accused Société Générale of breaking confidentiality rules in an ad-hoc arbitration when it issued a press release announcing that the tribunal had ruled in its favour by rejecting the Dominican Republic's objections to jurisdiction.

A 3 October 2008 press release by TCW Group, a subsidiary of Société Générale, states that the Tribunal had "rejected the objections raised by the Dominican Government and allowed US$ 680 million in claims against the Republic to proceed to a final hearing and an award on the merits of the dispute."

Counsel for the Dominican Republic, Peter Thomas, partner at Simpson Thacher & Bartlett LLP, says the press release, at a minimum, violated the spirit of Article 32(5) UNCITRAL Rules by providing details of the confidential award.

Article 32(5) states that an "award may be made public only with the consent of both parties."

Mr. Thomas told ITN that the press release was an incomplete and misleading summary of the award, given that the company failed to mention two important objections

*Continued on page 3*

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# NEWS: CHEMICAL COMPANY WARNS CANADA OF A POTENTIAL LAWSUIT OVER PESTICIDE BAN

*By Damon Vis-Dunbar*

One of the world's largest chemical manufacturers may sue the Canadian government over the ban of a lawn pesticide in the Province of Quebec.

The Canadian government revealed on 21 October that, some two months earlier, it was served with a "Notice of Intent" by Dow AgroSciences LLC, a subsidiary of the U.S. Dow Chemical Company. Under the rules of the North American Free Trade Agreement's Chapter Eleven on investment, the notice sets in motion a 90-day period which must elapse before formally serving a claim.

Dow AgroSciences (DAS) complains that a lawn pesticide, 2,4-D, was banned in the Province of Quebec based on political motivations rather than scientific criteria. It cites, for example, internal Quebec government communication stating that the weed killer cannot be banned "on a scientific basis", but rather on "less 'firm' ground such as the precautionary principle ... or a policy decision resulting from the will of the population."

DAS claims breaches of the Fair and Equitable Treatment and Expropriation provisions of NAFTA's Chapter 11, and says damages are not less that US$ 2 million.

While DAS holds that national and international agencies have determined that the pesticide does not pose an unacceptable health risk, there are environmental and health groups in Canada that remain skeptical. Indeed, due to public pressure, the Province of Ontario is also on the verge of banning 2,4-D, and the municipality of Halifax, in the Province of Nova Scotia, has already enacted a similar ban.

The notice of intent is one of several such letters received by Canada in the last several months, which have drawn attention to NAFTA's investment protections in the national media. As ITN reported last month, a U.S. businessman, Melvin J. Howard, submitted a notice of intent in July, alleging expropriation of investments made in the health care sector.

Meanwhile, a law firm issued a press release in October announcing that it had recently submitted a notice of intent on behalf of a William Greiner and Malbaie River Outfitters, which organizes hunting and fishing trips in Quebec. According to the release, Mr. Greiner had fishing licenses revoked, which rendered his business "essentially worthless."

## SOCIÉTÉ GÉNÉRALE V. DOMINICAN REPUBLIC...

*Continued from page 1*

The Dominican Republic raised four objections: (i) that Société Générale had not made an investment that could be protected by the BIT because there was no contribution to the Republic's development as the preamble to the BIT envisages; (ii) that the facts alleged by the claimant, even if true, did not amount to an expropriation; (iii) that the events that gave rise to the claim occurred before the BIT came into effect in January of 2003; (iv) and that the dispute occurred before the French company Société Générale acquired the investment in November of 2004, and therefore the claims are not protected by the Dominican Republic-France BIT.

In a decision on jurisdiction handed down in late September, the tribunal rejected the first objection and held that despite the indirect and complicated structure of Société Générale's investment, which involves several subsidiaries and joint ventures, and which was acquired for a nominal fee of two dollars, it did fall under the BIT's broad definition of investment.

In rejecting the second objection, the tribunal held that if proven at the merits phase, the facts alleged by Société Générale were capable of resulting in a breach of the BIT, and should therefore be adjudicated at that phase.

The tribunal's decision on the third objection was mixed. It accepted the Dominican Republic's view that events occurring before the BIT's entry into force could not be considered as violations due to the principle of non-retroactivity. But the tribunal held that these events could be considered as continuous acts that may have resulted in violations after the BIT's entry into force.

Finally, the tribunal again accepted the Dominican Republic's argument that Société Générale could not make claims for acts and events occurring before it became involved in the investment in November of 2004. It also limited the claim to the portion of the investment that belonged to Société Générale, thereby excluding from its jurisdiction over 50% of the investment which it determined was owned by American investors.

The case will now move on to the merits phase with the temporal and nationality limitations imposed by the tribunal.

# NEWS: CZECH REPUBLIC FAILS TO OVERTURN PARTIAL LIABILITY AWARD BEFORE PARIS COURT OF APPEAL

*By Suzy H. Nikièma*

The Czech Republic's effort to overturn a partial award on liability rendered in favour of a Croatian businessman has been rejected by a Paris court of appeal, while a separate challenge to a US$ 1.5 million ruling on damages is still pending.

The awards in question arise out of a dispute between a Croatian investor, Pren Nreka, and the Czech Republic. In 1996, ZipMex, a Czech company owned by Pren Nreka, concluded a contract with the Educational Center of Prague of the Ministry of Education, Youth and Sport. Under the contract, ZipMex was to renovate and develop certain non-residential premises, before renting them for commercial use. However, in 2002, the Ministry decided to recover the premises and succeeded in having the contract severed under orders by a court in Prague.

Pren Nreka retaliated by suing the Czech Republic for breach of the Czech Republic-Croatia bilateral investment treaty (BIT). In a February 2007 partial award, which has not been published, a tribunal found that the Czech Republic had violated both the fair and equitable treatment and expropriation provisions of the BIT, and in a subsequent ruling rendered this year, it found the Czech Republic liable for US$ 1.5 million in damages to the claimant.

On 15 March 2008, the Czech Republic launched a challenge to the partial award, with a decision rendered by the court on 25 September. On 5 August 2008, the Czech Republic initiated a second challenge, in this case against the ruling on damages. A decision on this matter remains pending.

In its bid to overturn the partial award on liability, the Czech Republic argued that: no arbitration agreement existed because there was no investment as defined by the BIT; that the tribunal exceeded it powers; and that the award violated French public policy. All three arguments were rejected by the Paris court.

> *"This in not the only instance of the Czech Republic challenging arbitral awards"*

In dismissing the first argument, the court held that the contract was an "investment" as envisioned by the BIT, which refers broadly to "any kind of asset invested in connection with economic activities". The court also rejected the notion that there must be a "contribution to the economic development of the host country". While certain tribunals have held that this is an implicit condition for an economic activity to be deemed an investment, the Paris court decided that this would be reading too much into the BIT, given that it does not refer explicitly to such a condition.

On the question of whether the tribunal had violated French public policy, the Czech Republic took issue with the tribunal's assertion that introducing a lawsuit can, in itself, constitute unjust or inequitable treatment, regardless of whether the action is carried under national laws. In response, the court ruled that the tribunal was not challenging the Czech Republic's right to initiate a lawsuit per se; rather, the court said this right is not absolute, and can be limited by other obligations, such as the duty to provide fair and equitable treatment.

This in not the only instance of the Czech Republic challenging arbitral awards; as ITN reported in January, the Czech Republic is attempting to overturn a decision on jurisdiction in a separate arbitration involving a German businessman in the transport sector, named Rupert Binder. This challenge has been lodged with a court in Prague, the seat of the arbitration.

## CONTROVERSY ERUPTS OVER PRESS RELEASE IN SOCIÉTÉ GÉNÉRALE V. DOMINICAN REPUBLIC...

*Continued from page 1*

by the Dominican Republic that were upheld by the tribunal. As a result, the Dominican Republic aggreed to publish the award in order to make the full facts known. Counsel for the Dominican Republic has voiced their displeasure to the tribunal.

For their part, counsel for Société Générale, Christopher Dugan and Joseph Profaizer of Paul, Hastings, Janofsky & Walker LLP, said that Article 32(5) prohibits only the publication of the award itself, rather than references of the sort provided in the press release.

In an interview with ITN, David Caron, co-author of "the UNCITRAL Arbitration Rules, A Commentary" and C. William Maxeiner, Distinguished Professor of Law at Berkeley, said they do not view Article 32(5) by itself as prohibiting a press release reporting the basic decision of a tribunal. However, if an UNCITRAL tribunal did find a violation of the rule, it could order the offending party to refrain from repeating their actions, explained Mr. Caron.

## NEWS: TRIBUNAL PREPARES FOR *AMICI CURIAE* IN MINERS' DISPUTE WITH SOUTH AFRICA

*By Damon Vis-Dunbar*

Nonparties wishing to intervene in an international arbitration launched by Italian miners against the government of South Africa have been offered a set of procedures to follow.

A two-page document, available from the ICSID secretariat, summarizes the allegations made by the Italian miners, outlines the steps that need to be taken by non-disputing parties seeking to make an *amicus curiae* (friend of the court) application, and describes the criteria that will guide the tribunal in deciding whether to approve potential petitions.

The arbitration—*Piero Foresti, Laura De Carli and others v. the Republic of South Africa*—has received more attention than most international investment disputes given a discernible human-rights dimension to the claim. The claimants, two Italians involved in South Africa's granite mining industry, are seeking compensation for alleged expropriation that stems, in part, from legislation intended to boost participation and ownership by historically disadvantaged South Africans in the mining sector.

The claimants have alleged breaches of the Italy-South Africa and Benelux-South Africa bilateral investment treaties.

So far, there have not been any requests to make *amicus curiae* applications, according to the ICSID secretariat. However, civil society groups in South Africa are contemplating action. A non-profit law clinic, the Legal Resources Centre (LRC), says that it has already been instructed to advise on an *amicus curiae* submission, and it has received statements of interest from other civil society groups that are contemplating doing the same.

At this point, it is not clear what access non-disputing parties will have to documents—such as pleadings filed by the parties— or to the hearings. Neither party to the dispute has decided whether it will release their memorials to non-disputing parties, nor if the hearings will be open to the public. Under ICSID rules, a tribunal may accept written *amicus* briefs after "consulting" the parties, but both parties must consent before the hearings are opened up to nonparties.

*"A non-profit law clinic, the Legal Resources Centre (LRC), says that it has already been instructed to advise on an amicus curiae submission, and it has received statements of interest from other civil society groups that are contemplating doing the same."*

In deciding whether to admit written briefs by *amici*, the tribunal says it will take into account the written petitions by applicants, as well as: (i) "the views of the Claimants and Respondent"; (ii) "any undue burden or unfair prejudice which the acceptance of written submissions by non-disputing parties may place on the Parties, the Tribunal, and the proceedings"; (iii) and "the degree to which the proposed written submission is likely to assist the Tribunal in the determination of a factual or legal issue related to the proceeding."

Hearings in the case, which will be held in The Hague, are currently slated for December 2009, although they may be pushed back to early 2010.

## NEWS: AWARD IS PUBLICLY RELEASED IN FAILED ENERGY CHARTER TREATY CLAIM AGAINST THE UKRAINE

*By Damon Vis-Dunbar*

Details of an arbitration involving a Latvian investor and the government of the Ukraine have emerged following the public release of the tribunal's final award, some seven months after the decision was rendered. The Ukraine has been absolved of charges that it had breached the Energy Charter Treaty (ECT), a multilateral agreement that governs investment in the energy sector.

The suit was launched in 2005 by Amto, an investment company based in Riga, owned by a holding company in Liechtenstein, and controlled by a Russian. In 1999, Amto purchased a majority stake in a Ukraine company called EYUM-10, which serviced the Ukraine's state-owned nuclear power company, Energoatom. Outstanding debt owed to EYUM-10 by the ailing nuclear power company formed the foundation of Amto's case against the Ukraine.

According to Amto, its efforts to invest in the Ukraine's nuclear power sector via EYUM-10 were met with resistance, and once the investment was made, the state-owned power company deliberately refused payment of debts owed to EYUM-10.

In particular, Amto drew attention to the Ukraine's judiciary and bankruptcy law, holding that they failed to live up to the standard required by

*Continued on page 6*

# NEWS: JURISDICTIONAL DECISION SEES LIGHT OF DAY IN DISPUTE BETWEEN A GREEK CLAIMANT AND SERBIA-MONTENEGRO

*By Damon Vis-Dunbar*

A previously unpublished 2006 partial award on jurisdiction in an arbitration between a Greek industrial group and the government of Serbia and Montenegro was released in October 2008, providing a description of the little-publicized dispute.

The row relates to a series of contracts between Mytilineos Holdings SA and RTB-BOR, a state-owned company involved in mineral extraction and metallurgy. Under the contracts, Mytilineos provided financing and spare parts to RTB-BOR, in exchange for the sale of copper. Mytilineos was also to be given priority to buy a stake in RTB-BOR in the case that it was privatized.

The cooperation failed, however, as RTB-BOR struggled to pay back its debts. Mytilineos registered a claim under the Greek-Serbia and Montenegro bilateral investment treaty in 2005, seeking some US$ 31 million in damages.

> *"The tribunal's jurisdiction was challenged, in part, on the grounds that the contracts between Mytilineos and RTB-BOR did not constitute an "investment" as imagined by the BIT. "*

The tribunal's jurisdiction was challenged, in part, on the grounds that the contracts between Mytilineos and RTB-BOR did not constitute an "investment" as imagined by the BIT. Notably, the tribunal diverged on this question, with two members (Prof. August Reinisch and Prof. Stelios Koussoulis ) arguing in favour of jurisdiction, while the third arbitrator (Professor Dobrasav Mitrovic) declined jurisdiction on the grounds that Mytilineos has not complied with national legislation on foreign investment.

With the majority of the tribunal deciding in favour of jurisdiction, the path was cleared for a ruling on the merits. But progress has been hampered, first with the resignation of Prof. Mitrovic, then later with the passing away of Prof. Koussoulis, according to counsel for Mytilineos, the Greek law firm Moussas & Tsibris. A tribunal has been reconstituted, however, and written pleadings on the merits have been filed.

# NEWS: CANADIAN INVESTORS SUE COSTA RICA ALLEGING FAILURE TO PROTECT THEIR FARM

*By Fernando Cabrera Diaz and Damon Vis-Dunbar*

A tribunal has been constituted in an arbitration that pits a group of Canadian investors against the government of Costa Rica. The claimants—Vancouver-based Quadrant Pacific Growth Fund L.P. and Conasco Holdings Inc—allege that Costa Rican authorities failed to protect their orange plantations from peasants who squatted on their land and sabotaged their operations.

The tribunal consists of Alejandro Garro, Bernardo M. Cremades (President) and Andreas F. Lowenfeld.

In their request for arbitration, the claimants complain that during 2003-2005, their property in Costa Rica was "invaded" by squatters who blocked access to the farm and intimidated employees. The Canadians accuse Costa Rican law enforcement agencies of failing to respond, despite repeated pleas for protection.

> *"Danelia Garciaz, one of the peasants who occupied the farm, said in an interview with ITN that they used what was then vacant land for the purposes of subsistence farming before being expelled three year later.."*

The farm operation had been dealt "a fatal blow" after "three years of upheaval," said management of Quadrant Pacific Growth Fund in a note to its investors earlier this year.

In 2005, the families who had been expelled from the claimant's farm protested outside the offices of the Costa Rican Agrarian Development Institute (IDA).

ITN spoke to IDA official Daniel Aries, who explained that the peasants had reached an agreement with the government, under which they would be re-located to another piece of land. He said the IDA was currently in the process of buying land to place the remaining 14 members of the group.

Danelia Garciaz, one of the peasants who occupied the farm, said in an interview with ITN that they used what was then vacant land for the purposes of subsistence farming before being expelled three year later.

*continued on page 6*

# IN MEMORIAL: PROFESSOR THOMAS WÄLDE (1949-2008)

A leading figure in the field of international investment law passed away suddenly on 11 October 2008 at age 59.

Thomas W. Wälde, a professor at the University of Dundee, Scotland, fell at his holiday home in Southern France. News of his death, which spread across the on-line forums that he founded and fostered, has been met with an outpouring of grief.

A prolific writer, speaker and educator, Professor Wälde's presence loomed large over the field of international investment law. He was a noted expert on investment law as it applied to the energy sector, and served as an expert witness, counsel and arbitrator in many international investor-state disputes.

Professor Wälde grew up in Heidelberg, Germany, and studied law in Germany and Switzerland, before receiving his L.L.M. from Harvard University.

In 1980, he took up a post with the United Nations as interregional advisor on mineral law, where he provided guidance to developing country governments.

From 1991-2001, he served as Director of the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee. At the time of his death, he was Professor and Jean-Monnet Chair of International Economic, Natural Resources and Energy Law at the same university. Many of the condolences that have been expressed come from students and young professionals to whom Professor Wälde served as a mentor.

Professor Wälde was the driving force behind wide-ranging discussions on his internet-based discussion forum OGEMID (oil-gas-energy-mining-investment disputes). Despite the name, the forum concerned itself with much more than litigation in the energy and mining sector, due, in large part, to Professor Wälde, who stoked the fire of a debate whenever the embers began to fade.

"Thomas and I disagreed on many things, but this was very much the point of his efforts in many cases. His encouragement of open debate and discussion set a benchmark for us all," said Howard Mann, Director of the International Institute for Sustainable Development's Investment for Sustainable Development Programme.

Professor Wälde is survived by his wife, Professor Charlotte Wälde, and his son and daughter.

## CANADIAN INVESTORS SUE COSTA RICA...

*Continued from page 5*

Quadrant Pacific Growth Fund L.P. and Conasco Holdings are alleging breaches of the fair and equitable treatment and the full protection and security provisions of the 1998 Canada-Costa Rica Foreign Investment Protection Agreement (FIPA), and say they are seeking at least US$ 20 million in damages.

The case was registered with the International Centre for the Settlement of Investment Disputes (ICSID) in March 2008.

## AWARD IS PUBLICLY RELEASED...

*Continued from page 4*

international law. These alleged deficiencies had frustrated efforts to retrieve the debt owed to EYUM-10 through a series of bankruptcy proceedings, argued Amto.

However, while the Ukraine's bankruptcy law is not flawless, the tribunal found no reason to believe that it did not give effective means for creditors to exert their rights. Nor did the tribunal find evidence that the government had interfered in the bankruptcy proceedings.

Indeed, the tribunal would go on to dismiss all of Amto's claims, including allegations related to denial of justice and the treaty's umbrella clause.

The Ukraine also submitted a counterclaim for arbitration costs and non-material injury; the latter stemming from alleged injury to the Ukraine's reputation. But the counter-claim was dismissed for lack of applicable law.

The arbitration costs are to be split between the parties, and each was ordered to bear its own legal costs.

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