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NEWS: UNCITRAL TRIBUNAL DETERMINES THAT WHEAT SUPPLY CONTRACTS ARE NOT “INVESTMENTS” UNDER SWISS-UZBEKISTAN BIT

By Elizabeth Whitsitt

Swiss-based firm Romak S.A. has lost a protracted dispute against the Republic of Uzbekistan regarding alleged non-payment for wheat shipments to the country during the mid-1990s.

On November 26, 2009 an arbitral tribunal composed of Fernando Mantilla-Serrano, Nicolas Molfessis and Noah Rubins dismissed Romak’s claims against the Republic of Uzbekistan on jurisdictional grounds. Specifically, the tribunal determined that it did not have jurisdiction in the case given the absence of any “investment” underlying the dispute.

In the aftermath of the dissolution of the Soviet Union, Romak and several companies entered into a set of contracts for the supply of wheat to Uzbekistan. Having experienced difficulties in obtaining payment for wheat deliveries, Romak commenced arbitral proceedings against one of its Uzbek counterparties under the auspices of the Grain and Feed Trade Association (GAFTA). After obtaining an arbitral award in its favour, however, Romak was unable to enforce the award in several countries, including Uzbekistan. As a result, the Swiss company commenced arbitral proceedings against Uzbekistan under the Swiss-Uzbek BIT in accordance with the UNCITRAL Arbitration Rules.

Seeking more than USD \$30 million in damages, Romak alleged that Uzbekistan violated its obligations under the BIT. Arguing that the actions of its Uzbek counterparties were attributable to Uzbekistan, Romak claimed that Uzbekistan violated

numerous obligations under the BIT, including the guarantee of fair and equitable treatment, and the prohibition against expropriation or nationalization without compensation. Additionally, Romak argued that by refusing to enforce the GAFTA award Uzbekistan had violated its treaty obligations.

“Thus, the tribunal observed that ‘the term “investments” under the Swiss-Uzbekistan BIT has an inherent meaning...entailing a contribution that extends over a certain period of time and that involves some risk”

Uzbekistan denied those assertions and contested the jurisdiction of the arbitral panel. Specifically, Uzbekistan contended that the tribunal lacked jurisdiction in the case because neither the wheat supply contracts nor the GAFTA award qualified as an “investment” subject to protection under the BIT. In support of its arguments, Uzbekistan relied upon the “Salini test” sometimes used by ICSID tribunals as an analytical tool to determine the same jurisdictional question as the one presented in the instant dispute (i.e. whether there is an arbitral investment subject to BIT protection).

In response, Romak alleged that the Salini criteria were “inapplicable and irrelevant” to UNCITRAL proceedings given their development within the

NEWS: AD HOC COMMITTEE REFUSES TO LIFT STAY OF ENFORCEMENT OR REQUIRE SECURITY REGARDING ICSID AWARD AGAINST ARGENTINA

By Elizabeth Whitsitt

An ad hoc committee composed of Dr. Gavan Griffith Q.C., Judge Patrick L. Robinson, and Judge Per Tresselt has decided to continue to stay the enforcement of an award rendered against the Argentine Republic in favour of the Enron Corporation. According to the committee, the stay will remain in force until annulment proceedings have been concluded and without any requirement for Argentina to post security.

In May 2008, the committee was formed after Argentina requested the annulment of an arbitral award granting Enron damages in the amount of US\$106 million.

Since that annulment request was made, the parties have been enmeshed in a procedural tussle. Argentina has argued for the continued stay of enforcement of the award until a decision regarding annulment has been made. Enron, however, has asked that the stay be lifted, or that Argentina post security, so that if the award is not annulled, Enron is guaranteed payment of the damages to which it would be entitled.

In its first decision* on this issue, the committee focused on a fundamental disagreement between Enron and Argentina regarding the procedures for enforcing ICSID awards. In that decision the committee rejected Argentina's position that foreign investors must go to an Argentine court in order to obtain enforcement of their ICSID awards and gave the Argentine government 60 days (commencing October 7, 2008) to reconsider its position.

Enron made its second request to lift the provisional stay of enforcement of the award, or in the alternative, to condition such a stay on Argentina's provision of adequate financial security

in the form of a bank guarantee or its monetary equivalent. In support of its position, Enron reiterated its concern that Argentina was unlikely to comply with its obligations to pay the award (pending the outcome of the annulment proceedings).

"the committee reasoned that the ICSID system would be undermined if an award subject to annulment proceedings could be used by strangers to the arbitration proceedings as a means through which to secure enforcement of their own unrelated claims against the respondent."

For its part, Argentina maintained its position that foreign investors must go to an Argentine court in order to obtain enforcement of their ICSID awards. Argentina also argued that: (i) the cost of providing financial security in this case was prohibitive, (ii) given Enron's bankruptcy any security provided by Argentina may be subject to attachment claims made by Enron's creditors, and (iii) providing financial security created unacceptable risks of claims made by other creditors of Argentina. With respect to the last two arguments, Argentina raised concerns about its ability to recover any security it provided should it succeed in having Enron's ICSID award annulled. Specifically, Argentina argued that creditors in other disputes involving either Enron or Argentina might have the right to receive the security posted by Argentina.

In a subsequent decision rendered in May 2009, but only recently made available to the public, the committee sided with Argentina. Specifically, the

committee reasoned that the ICSID system would be undermined if an award subject to annulment proceedings could be used by strangers to the arbitration proceedings as a means through which to secure enforcement of their own unrelated claims against the respondent.

Acknowledging that it may be impossible in all situations to remove all risks regarding irrecoverability, the committee held that where that risk is very high, as it is in this case, that fact will militate strongly against lifting a stay or against requiring security to be provided as a condition of any continuation of a stay.

* Decision on the Argentine Republic's request for a Continued Stay of Enforcement of the Award in Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic is available here:

http://ita.law.uvic.ca/documents/Enron-Stay_001.pdf

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"Argentina ordered to reconsider its position on payment of ICSID awards," By Damon Vis-Dunbar, Investment Treaty News, 14 October 2008, available here:

<http://www.investmenttreatynews.org/cms/news/archive/2008/10/14/argentina-ordered-to-reconsider-its-position-on-payment-of-icsid-awards.aspx>

NEWS: ICSID TRIBUNAL SIDES WITH CHILE, REJECTS CLAIMANT'S PARTIAL REVISION REQUEST IN LONG RUNNING DISPUTE OVER EL CLARIN NEWSPAPER

By Fernando Cabrera Diaz

An ICSID tribunal has rejected a partial revision request by Pey Casado and the Presidente Allende Foundation of an award rendered in their long-running dispute with Chile over the takeover and closure of the El Clarin newspaper during the early days of the Pinochet regime. This is the first time that an ICSID tribunal has issued a decision relating to a revision request.

As reported previously by Investment Treaty News, the dispute traces its roots to the 1973 coup which overthrew the socialist Chilean President Salvador Allende. Mr. Pey Casado claims he is the rightful owner of El Clarin which was taken over by the dictatorship of General Augusto Pinochet and expropriated by decrees issued under Law No. 77 of 1973, allegedly due to the paper's sympathies to the Allende Government.

Mr. Pey Casado fled Chile in 1973 to return to his birthplace of Spain. He has assigned 90% of his claim against Chile to the Salvador Allende Foundation, a non-profit group established in 1990 to promote freedom of the press and democratic values in Spanish speaking nations.

The tribunal's May 8, 2008 decision on the merits awarded the claimants just over US\$ 10 million plus interest, a fraction of the US\$ 400 million in damages they originally sought. The claim was fundamentally based on the alleged expropriation of El Clarin in 1973. However, the tribunal rejected the expropriation claim and instead found a violation of the fair and equitable treatment provisions of the 1994 Chile-Spain BIT. Specifically, the tribunal found that Chile breached its obligations under the BIT when in April of 2000 it compensated third parties US\$ 10 million for the expropriation of the newspaper, instead of the claimants.

Subsequently, the claimants requested revision of the tribunal's award under ICSID Convention Article 51. In particular, the claimants argued that they had become aware of new information for the tribunal's consideration with respect to its expropriation claim. The tribunal ultimately disagreed, however, holding that the claimants could not meet the burden of proof in establishing that the information would have changed the outcome of the award.

"The tribunal, however, ultimately based its decision on a finding that the claimants did not meet the third requirement, that the 'new' fact would have a decisive effect on the underlying award."

At issue was a press release issued by Chile's Consejo de Defensa del Estado (CDE) on February 22, 2008 referring to a Chilean Supreme Court decision awarding damages in the expropriation of a different newspaper, Horizonte Presse. The claimants allege that they only became aware of CDE's press release on May 18, 2008, ten days after the tribunal's decision on the merits was handed down.

The claimants argued that CDE's press release acknowledged that there was consistent Chilean Supreme Court jurisprudence that the confiscation decrees issued under Decree Law No. 77 of 1973 were null and void *ab initio*.^{*} Based on that acknowledgement, the claimants reasserted that the government's expropriation of El Clarin was a continuing illegal act under Chilean law that began in 1973 and continued until

well after the Chile-Spain BIT came into force. Accordingly, the claimants argued that they were entitled to significantly more than a \$10 million damage award.

In analysing the revision request, the tribunal noted that under Article 51(1) the claimants were required to prove three things: (1) the discovery of a new fact; (2) that neither the claimants nor the tribunal knew of the fact at the time the award was rendered and that such lack of knowledge was not due to the claimants' negligence; and (3) that the fact would have changed the outcome of the award.

On the first requirement, the tribunal was satisfied that the contents of the CDE's press release, however characterized, constituted a fact. As to whether it was a new fact, the tribunal expressed doubts that the claimant, Mr. Pey Casado, and/or his lawyers were not aware of the agreement between Horizonte Presse and the CDE because the settlement in that case was widely reported, and in particular was reported in the El Mercurio newspaper to which Mr. Pey Casado was a subscriber.

The tribunal, however, ultimately based its decision on a finding that the claimants did not meet the third requirement that the 'new' fact would have a decisive effect on the underlying award, because it agreed with Chile that CDE's press release applied only to the Horizonte Presse case. Furthermore, given that legal precedent in and of itself is not binding under Chilean law in subsequent cases, even if the CDE's press release referred to jurisprudence beyond the Horizonte Presse case, such jurisprudence would not be binding on other cases such as Mr. Pey Casado's case. Based on these findings the tribunal rejected the claimants' request for partial revision.

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The three-member tribunal was composed of Pierre Lalive of Switzerland (President), Mohammed Chemloul of Algeria and Emmanuel Gaillard of France. The long-running dispute was first registered in 1998 and has seen three arbitrators resign, and both sides complain of the “glacial pace” of the proceedings.

On July 6, 2009 ICSID registered an application by Chile for the institution of annulment proceedings relating to the tribunal’s May 8, 2008 award on the merits.

* ITN spoke to Mara Senn, one of the lawyers representing Chile at Arnold & Porter LLP, who said that the CDE was

merely defending Chile’s settlement in the Horizonte Presse case and that the language cited by claimants did not refer to the jurisprudence of nullity but rather to the Supreme Court’s consistent position on the issue of damages.

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Revision Decision, November 18, 2009 available at investmnetclaims.com:

<http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iic-399-2009.pdf>

Award on the Merits, May 8, 2008 available at [investmentclaims.com: http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iic-324-2008.pdf](http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iic-324-2008.pdf)

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NEWS: CEMEX V. VENEZUELA: CHALLENGES TO ICSID ARBITRATORS MUST BE MADE “PROMPTLY”

By Elizabeth Whitsitt

On November 6, 2009 two members of an ICSID arbitral tribunal - Judge Gilbert Guillaume (President) and Professor Georges Abi-Saab - dismissed Venezuela’s challenge to the tribunal’s third member, Mr. Robert B. von Mehren. In a decision only recently made public, the two-man tribunal confirms that proposals to disqualify ICSID arbitrators must be made “promptly”.

Arbitral proceedings between Cemex Caracas Investments B.V., Cemex Caracas II Investments B.V. (Cemex) and Venezuela began in October 2008 some seven months after Hugo Chavez, President of the Bolivarian Republic, announced the nationalization of the country’s cement industry. In the context of a state-wide housing shortage and concerns about unaffordable housing, President Chavez’s nationalization of Venezuela’s cement industry was reportedly done to increase the availability and affordability of construction supplies to Venezuela’s domestic market.*

“Relying on Rule 9(1) of the ICSID Arbitration Rules, the two men confirmed that proposals for the disqualification of an arbitrator must be made ‘promptly’ and dismissed Venezuela’s challenge on that basis.”

According to a press release dated August 20, 2008, the world’s third largest cement-producer asserts that the nationalization of its investment “highlight[s] a lack of respect for the principles of international law and the treaties relating to the reciprocal protection of investments which forbid the occupation of goods and deprivation of rights without fair and effective compensation and without an expropriation procedure.”**

With the tribunal’s first session set to take place in Paris in mid-November 2009, Venezuela filed a formal proposal for disqualification of Mr. von Mehren on October 26, 2009 only three weeks before the tribunal’s scheduled first session and almost three months after the tribunal was constituted.

Venezuela’s challenge to Mr. von Mehren focused on his relationship with Debevoise & Plimpton LLP, a law firm representing swiss-based Holcim Ltd., another one of the world’s leading cement suppliers, in a similar dispute against Venezuela that was registered by ICSID on April 10, 2009. Counsel for Venezuela did acknowledge that Mr. von Mehren was a retired partner of the law firm. However, counsel also noted that the US national maintained significant connections with the firm as Mr. von Mehren was still listed on Debevoise website, and maintained an office, administrative services and an email account through the firm. Given such ties, Venezuela expressed doubts

NEWS: UNCITRAL CLAIMANT GIVEN 30 DAYS TO APPOINT NEW ARBITRATOR IN UK-ARGENTINA BIT DISPUTE

By Elizabeth Whitsitt

Later this month UK-based firm, ICS Inspection and Control Services Limited (ICS), is expected to appoint another arbitrator in its dispute against the Argentine Republic which began earlier this summer.

On July 28, 2009 in accordance with the UNCITRAL Arbitration Rules, ICS appointed Mr. Stanimir A. Alexandrov as its nominee to the three-member arbitral tribunal that would decide the outcome of its dispute with Argentina under the UK-Argentina BIT.

Subsequently, Mr. Alexandrov, a partner with Sidley Austin LLP, informed the parties that his law firm had previously represented PWC Logistics, a company with potential connections to ICS. In addition, Mr. Alexandrov notified the parties that he and his law firm were currently counsel to Compañía de Aguas del Aconquija S.A. and Vivendi S.A., claimants in a long-standing dispute against the Argentine Republic over the provision of water and sewer services (the Vivendi case).*

Less than a week later, Argentina challenged Mr. Alexandrov's appointment relying on Article 10(1) of the UNCITRAL Rules which provides that, "[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."

On December 17, 2009 Mr. Jernej Sekolec, the appointing authority designated by the Secretary-General of the Permanent Court of Arbitration to hear the challenge, sided with Argentina.

In reaching this conclusion, Mr. Sekolec rejected arguments raised in opposition to the challenge that the Vivendi case was coming to a conclusion and unrelated to the dispute between ICS and Argentina.

With respect to the former argument, Mr. Sekolec acknowledged that no more action may be required of Mr. Alexandrov given the status of annulment proceedings in the Vivendi case. However, he determined that this reality did not negate Mr. Alexandrov's conflict as there was still some possibility that the case may continue and "engage Mr. Alexandrov's firm's continued representation."

Regarding the latter argument, Mr. Sekolec noted that the Vivendi case and dispute between ICS and Argentina were "not entirely dissimilar" as "[b]oth matters are investment protection actions of considerable magnitude which raise broadly similar concerns against the same State party..." In addition, he noted that justifiable doubts as to an arbitrator's impartiality and independence may arise even in circumstances where an arbitrator has represented one of the parties "in an unrelated matter."

In sustaining Argentina's challenge, Mr. Sekolec acknowledged that there was "...no reason to doubt Mr. Alexandrov's personal intention to act impartially and independently..." However, he determined that Mr. Alexandrov and his law firm were "...in a situation of adversity toward Argentina..." and such situations should "be avoided, except where circumstances exist that eliminate any justifiable doubts as to the arbitrator's impartiality or independence."

As support for his decision, Mr. Sekolec also referenced the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) and noted that there were two examples of potential conflicts of interest on the "Orange List" of the IBA Guidelines that were relevant to this case. First, justifiable doubts as to an arbitrator's impartiality or independence may arise where "an arbitrator's law firm

is currently acting adverse to one of the parties..." or second, where "[an] arbitrator has within the past three years served as counsel against one of the parties..."

Having found that the facts underlying Mr. Alexandrov's August 7th disclosure to the parties were reflected in those two scenarios, Mr. Sekolec held that the situation "...[gave] rise to objectively justifiable doubts as to Mr. Alexandrov's impartiality and independence." Accordingly, Mr. Sekolec gave ICS 30 days from December 17, 2009 to find a replacement arbitrator.

* Previous ITN reporting on the Vivendi case can be found here:

"Vivendi Will Resubmit Argentine Water Claim, Following Recent ICSID Decision," By Luke Peterson, Investment Law and Policy Weekly News Bulletin, 1 August 2003, available here:

http://www.iisd.org/pdf/2003/investment_investsd_aug1_2003.pdf

"Argentina liable for \$100+ Million after expropriating Vivendi water concession," By Luke Eric Peterson, Investment Treaty News, 30 August 2007, available here:

http://www.iisd.org/pdf/2007/itn_aug30_2007.pdf

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Decision on the Challenge to Mr. Stanimir A. Alexandrov in ICS Inspection and Control Services Limited (United Kingdom) v. Republic of Argentina, UNCITRAL is available here:

<http://ita.law.uvic.ca/documents/ICSArbitratorChallenge.pdf>

NEWS: AN ICSID TRIBUNAL SPLITS OVER WHETHER TO HEAR ANCILLARY CLAIMS IN DISPUTE OVER UNPAID GAS DELIVERIES

By Elizabeth Whitsitt

In a split decision, an ICSID tribunal has refused to hear ancillary claims advanced by American company, Itera International Energy LLC (Itera), and its Dutch parent, Itera Group NV (IGNV).

Itera and IGVN commenced ICSID arbitral proceedings against Georgia in June 2008, broadly asserting violations of the US-Georgia BIT and the Netherlands-Georgia BIT with respect to the claimants' investment in the chemical fertilizer company JSC Azot. In particular, the claimants asserted that Georgia "...orchestrated the bankruptcy of JSC Azot, a company majority-owned by [the claimants],... and sold Azot's assets to a third party." The claimants acquired Azot as part of a state-sanctioned attempt to restructure debts owed to them by Georgian state-owned entities for unpaid gas deliveries.

In their Request for Arbitration, Itera and IGVN also noted their concerns with respect to another debt restructuring arrangement intended to facilitate the further repayment of amounts owed to the claimants for unpaid gas deliveries. Specifically, the claimants noted that arbitration proceedings were already pending before the International Commercial Arbitration Court of the Chamber of Commerce of the Russian Federation (ICAC) with respect to this second debt restructuring arrangement. However, they reserved their rights to introduce additional claims in relation to the latter arrangement "should their losses not be fully compensated as a result of the ICAC proceedings."

Subsequently, Itera and IGVN attempted to enlarge their case against Georgia in the ICSID proceedings by seeking to admit claims related to the latter debt restructuring scheme. The claimants' arguments in support of this maneuver were largely focused on issues of procedural efficiency. Observing that "...the various claims currently before the Tribunal [were] inextricably linked...,"

the claimants went on to argue that "[a] separation [of the claims] would lead to parallel or consecutive proceedings and/or give rise to the avoidable risk of conflicting outcomes."

"In the majority's view ancillary claims should be accepted when '...the link between the claims [is] so strong that the examination of one claim cannot be carried out adequately without the other claim being adjudicated at the same time.'"

For its part, Georgia alleged that there was "no meaningful factual or legal connection" between the claims. Moreover, Georgia argued that only the tribunal's dismissal of the claimants' request for consolidation "...could avoid potentially conflicting decisions [between ICAC and the ICSID Tribunal on the ancillary claims] and serve interests of judicial efficiency and comity."

On December 4, 2009 a majority of the tribunal, composed of Judge Hans Danaelius and Professor Brigitte Stern, sided with Georgia. In so finding, the majority of the tribunal first addressed the parties' arguments regarding the connectivity between the claims. In particular, the majority recognized that there was a "link" between the claims as both disputes arose out of a common purpose – to ensure the payment of debts owed to the claimants. In the majority's view, however, the manner in which those debts were to be repaid involved two separate investments – a fact distinguishing this case from other ICSID cases* in which new claims had been accepted as "ancillary claims." Accordingly, the tribunal found that

"[w]hile the investor is the same [for both claims], it entered into two different types of relationships with Georgia, which in view of the Tribunal, [could not] be analyzed as a single investment."

In addition, the majority addressed both parties' arguments regarding efficiency. Specifically, the majority clarified that "...efficiency considerations are not in themselves decisive factors for whether or not a new claim shall be accepted as an ancillary claim..." In the majority's view ancillary claims should be accepted when "...the link between the claims [is] so strong that the examination of one claim cannot be carried out adequately without the other claim being adjudicated at the same time." Having found no such link in the present case, the two-person tribunal concluded that the conditions set out in the ICSID Convention and ICSID Rules regarding ancillary claims had not been satisfied.

In direct contrast to the majority, however, the third member of the tribunal, Professor Francisco Orrego Vicuña, would have admitted the ancillary claims in this case. Viewing the test for the admissibility of ancillary claims less strictly, Professor Vicuña posited that "[t]he facts do not need to be identical in one and the other dispute. It suffices that they both concern the same business operation, the same investor and the same State party."

Thus, in a two-page dissenting opinion Professor Vicuña, the claimants' nominee to the tribunal, emphasized that Itera's and IGVN's claims arose as a result of "mounting unpaid bills for the supply of gas." Accordingly, in his opinion, the claimants' investments were "...conceived as mechanisms to...make the Claimant[s] whole for the monies owed." In that context, the dissenting arbitrator determined

NEWS: SPANISH FIRMS LAUNCH ICSID DISPUTE AGAINST MEXICO OVER STALLED TOXIC WASTE DISPOSAL PROJECT

By Fernando Cabrera Diaz

Spanish firms Abengoa, S.A. and COFIDES, S.A. have launched a claim with ICSID against Mexico over the stalled opening of a toxic waste disposal plant built by them in the municipality of Zimapán, approximately 200 kilometres north of Mexico City.

The project has been the subject of ongoing protests by local citizens united under the group Todos Somos Zimapán (We are all Zimapán), who are concerned about the potential negative health effects that the plant will have on their population.

The facility began receiving toxic waste in trucks under federal military escort on April 11, 2009 but local protests managed to turn back at least one of the trucks headed to the facility, according to Mexican daily La Jornada.

A few days later the protests prompted the municipal council of Zimapán to withdraw the project's license to deposit toxic waste at the site. In doing so the council cited irregularities in the granting of the permit by the previous mayor, reports La Jornada.

The facility was again scheduled to receive toxic waste trucks under military escort on September 3, 2009 after federal government officials announced that the plant would open the following day with or without municipal authorization.

Apparently due to public pressure the company did not proceed with the plant's re-opening. Instead a meeting was held between the federal, state and municipal governments in another attempt to resolve the dispute.

After that meeting, Hidalgo governor Miguel Ángel Osorio Chong announced to La Jornada that new studies were to be conducted by a 'prestigious institution' to determine if the plant is

in fact viable and whether it would put the health of the local community at risk.

ITN contacted Dr. Ramon Ojeda Mestre, a lawyer at Mexico City-based Ojeda, Ojeda and Associates and a leading member of protest group Todos Somos Zimapán, who said that no agreement to conduct a new study was reached at the meeting.

According to Dr. Ojeda, the group did propose that a new interdisciplinary and inter-institutional study be conducted to determine the viability of the plant in order to definitively resolve the dispute, but the federal government has yet to respond to the proposal. However, the company has continued to keep the plant closed, confirms Dr. Ojeda.

Explaining his group's opposition to the facility, Dr. Ojeda says that under previous Mexican regulations a facility with these characteristics could not be placed within 25 km of a population of over 5,000 inhabitants.

Dr. Ojeda says that a week before Abengoa was granted its license for the waste facility the regulation was changed to 5 km. Zimapán's municipal seat happens to be 6 km from the waste disposal site and has a population of 15,000 inhabitants, he adds.

He says another issue with the site of the facility is that Mexican law on the transportation of toxic and dangerous waste prohibits vehicles from carrying such materials through urban zones, but that the highway that was to be used to reach the facility comes within three blocks of the center of Zimapán. Dr. Ojeda also cites the existence of 24 Níñhus indigenous communities and 20 fresh water springs within a 5 km radius of the waste facility, as reasons for his group's opposition.

The company for its part has argued that the facility is safe and without risks. According to company biologist Édgar Ramírez Hernández the true danger lies in the 390 thousand tons of dangerous waste produced in the state of Hidalgo, half of which he claims goes into rivers, ravines and streams, or runs in the backyards of industrial areas.

The case was registered by ICSID on December 11, 2009. Under the 2006 Mexico-Spain Bilateral Investment Treaty, the companies would have had to notify Mexico of their intent to pursue arbitration at least six months prior to filing for arbitration at ICSID.

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IN BRIEF: THE MERITS OF FORMER YUKOS SHAREHOLDERS' EXPROPRIATION CLAIM WILL BE HEARD

By Elizabeth Whitsitt

In a decision not yet released to the public, it has been reported that former Yukos shareholders may proceed to the merits phase of their multi-billion dollar expropriation claim against the Russian government.

According to various sources* a tribunal of the Permanent Court of Arbitration (PCA) in The Hague has ruled that Russia is bound by the Energy Charter Treaty (ECT), despite having never ratified the agreement.

The tribunal's decision appears to be based on Article 45 of the ECT. Under Article 45(1) signatory states like Russia agree to apply the treaty "provisionally" (to the extent that such provisional application is not inconsistent with its constitution, laws or regulations).

Russia's formal announcement terminating its provisional application of the ECT as of October 18, 2009 appears to have had little impact on the tribunal's jurisdictional holding, a finding likely supported by Article 45(3)(b) of the ECT. According to that

provision, for energy investments made in its territory prior to October 18, 2009 Russia remains bound by certain provisions of the treaty for twenty more years.

* "YUKOS owners win ruling in \$100 bln case vs Russia," By Dmitry Zhdannikov and Chris Baldwin, Reuters, 1 December 2009.

"Tribunal in \$100 Billion Yukos Arbitration Rules Russia Bound by Energy Charter Treaty," By Sanjay J. Mullick, Ronan J. McHugh & Irene Dallas (Pillsbury Advisory) 17 December 2009.

"Energy Charter Treaty ruling clarifies effect of Russia's "provisional application" accepting jurisdiction to hear Yukos' claim" (Investment protection e-bulletin) 4 December 2009.

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"MFN clause used successfully in bid by minority Yukos shareholders to sue Russia," By Luke Eric Peterson, Investment Treaty News, 5 February 2008, available here:

http://www.iisd.org/pdf/2008/itn_feb5_2008.pdf

CEMEX V. VENEZUELA...

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about whether Mr. von Mehren would "exercise independent judgment" in the dispute and whether his relationship to Debevoise "create[d] a risk of disclosure of confidential information."

The substance of those concerns is not addressed in the two-man tribunal's decision, however. Judge Guillaume and Professor Abi-Saab instead focused their reasoning on the timing of Venezuela's proposal to disqualify Mr. von Mehren. Relying on Rule 9(1) of the ICSID Arbitration Rules, the two

men confirmed that proposals for the disqualification of an arbitrator must be made "promptly" and dismissed Venezuela's challenge on that basis.

Specifically, Judge Guillaume and Professor Abi-Saab determined that "every material element of [Venezuela's] application for disqualification was well known to it" by the time parallel proceedings were initiated by Holcim Ltd. against Venezuela on April 10, 2009, at least six months prior to its proposal for disqualification. Having waited too

long, both men held that Venezuela had "waived its right" to request the disqualification of Mr. Mehren.

Sources:

* "Chavez Plans to Nationalize Venezuela Cement Industry," By Steven Bodzin and Thomas Black, Bloomberg.com, 4 April 2008.

** Cemex Company Press Release dated 20 August 2008, available on the company's website at: http://www.cemex.com/qr/mc_pr_082008.asp

AN ICSID TRIBUNAL SPLITS...

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that the claims were "...close enough as to require their simultaneous adjudication so that settlement of the dispute [would] be final."

* See *CMS Gas Transmission Co. v. Argentina* (ICSID Case No. ARB/01/8), Decision on Objections to Jurisdiction, 17 July 2003; *LG&E Energy Corp. LG&E Capital Corp. and LG&E International, Inc. v. Argentina* (ICSID Case No.

ARB/02/1), Decision on Objections to Jurisdiction, 30 April 2004, *Enron Corporation and Ponderosa Assets L.P. v. Argentina* (ICSID Case No. ARB/01/3), Decision on Jurisdiction (Ancillary Claim), 2 August 2004.

Sources:

The majority decision and dissenting opinion on Admissibility of Ancillary

Claims in *Itera International Energy LLC and Itera Group NV v. Georgia* is available at:

<http://ita.law.uvic.ca/documents/Itera-AncillaryClaims.pdf>

and

<http://ita.law.uvic.ca/documents/IteraAncillaryClaims-Dissent.pdf>

UNCITRAL TRIBUNAL DETERMINES THAT WHEAT...

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ICSID system. Pushing for a literal interpretation of the definition of "investments", Romak argued that the wheat supply contracts and the GAFTA Award fell squarely within the Swiss-Uzbek BIT. Alternatively, Romak asserted that the wheat supply contracts and the GAFTA award qualified as investments under the *Salini* test.

Romak could not, however, convince the tribunal that its long-running dispute was the proper subject for arbitration under the Swiss-Uzbek BIT.

In particular, the tribunal rejected Romak's literal construction of the term "investment" in the Swiss-Uzbekistan BIT. In so doing, the tribunal found that an ostensibly broad definition of "investment" in the Swiss-Uzbekistan BIT should not be interpreted in a way that "render[s] meaningless the distinction between investments, on the one hand, and purely commercial transactions on the other." Using the approach advanced by Romak, the tribunal postulated that "...every contract entered into between a Swiss national and a State entity of Uzbekistan...as well as every award or judgment in favor of a Swiss national... would constitute an investment under the BIT." Finding such a possibility untenable, the tribunal indicated that one-off sales contracts could constitute investments under the terms of a BIT only in cases where the wording of the BIT left "no room for doubt" that the contracting parties intended the term to carry such an extraordinary meaning.

The tribunal also disagreed with Romak's contention that "the definition of 'investment' in UNCITRAL proceedings (i.e. under the BIT alone) is wider than in ICSID Arbitration." According to the tribunal, Romak's suggestion would lead to unreasonable results by narrowing or widening the substantive protections afforded an investor under a BIT depending on the investor's choice of various dispute settlement mechanisms. Consistent with this reasoning, the tribunal held that there is no basis to suppose that the term "investment" has a different meaning in the ICSID Convention than it bears in relation to the Swiss-Uzbekistan BIT. Thus, the tribunal observed that "the term 'investments' under the Swiss-Uzbekistan BIT has an inherent meaning...entailing a contribution that extends over a certain period of time and that involves some risk."

The tribunal went on to determine that the wheat supply contracts and the GAFTA Award were "inextricably linked" and that any determination as to the existence of an "investment" under the BIT must be made with reference to the entire economic transaction at issue. On that basis the tribunal found that the Romak's wheat supply arrangement with, and subsequent arbitral award against, Uzbekistan failed to display the hallmarks of an "investment" under the Swiss-Uzbekistan BIT (i.e. contribution, duration and risk).

Specifically, the tribunal determined that Romak's delivery of wheat could not be considered a contribution indicative of an investment as it was "a mere transfer of title over goods in exchange for full payment." Similarly, the tribunal considered that the duration of Romak's wheat deliveries, which lasted some five months, did not reflect the sort of commitment normally associated with "investments." Finally, the tribunal noted Romak's economic transaction did not involve the risk normally associated with an investment. Specifically, the tribunal described the risk assumed by Romak as "...circumscribed to the possible non-payment of the wheat delivery, which is the ordinary commercial or business risk assumed by all those who enter into a contractual relationship."

Sources:

Award in *Romak S.A. (Switzerland) v. The Republic of Uzbekistan* is available here:

<http://www.pca-cpa.org/upload/files/ROMAK-UZBEKISTAN%20Award%2026%20November2009.pdf>

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