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Contents at a Glance:

Arbitration Watch:
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1. Secret $185 Million award against Argentina comes to light in D.C. Court,
By Luke Eric Peterson

A major arbitration award subject to a confidentiality order has come to public light following a recent move by Argentina to overturn the award in the United States courts.

In an award dated Dec.24, 2007, Argentina was ordered to pay the UK energy company British Gas (BG) more than $185 Million (US) plus interest following a determination

that Argentina's treatment of BG following Argentina's financial crisis had served to violate provisions of the UK-Argentina bilateral investment treaty.

However, because of a confidentiality order issued by the three-person tribunal, the award did not become a matter of public record until it was appended to a public filing made by Argentina in a bid to vacate the award. Argentina lodged papers with the U.S. District Court of the District of Columbia on March 20th of this year.

BG, an indirect shareholder in the Argentine gas distributor MetroGAS, turned to arbitration in 2003, taking issue with various measures introduced by Argentina in an effort to stem its financial crisis, including derogation from an earlier-agreed tariff scheme and from an agreement to permit MetroGAS to calculate tariffs in US Dollars indexed to inflation.

Ultimately, a tribunal consisting of three members, Prof. Albert Jan van den Berg, Prof. Alejando Garro, and Guillermo Aguilar Alvarez, held that Argentina had not expropriated BG's investments, but that it was liable for denying those investments fair & equitable treatment and protection from "unreasonable" measures.

Notably, the tribunal rejected Argentina's efforts to invoke a "state of necessity" or state of emergency as a defence to any alleged treaty violations. On Argentina's view, any treaty breaches occasioned by emergency measures taken by the Argentine Government should be excused by the state of necessity which Argentina operated under from the onset of its financial crisis.

As chronicled in past editions of ITN, Argentina's necessity defence has divided arbitration tribunals to date, with three earlier tribunals rejecting the defence (in claims involving Enron, CMS, and Sempra), but a fourth tribunal (in the LG&E case) accepting the defence, at least for a 17 month time-frame during the peak of the financial crisis.

The decision of tribunals to accept or reject such a necessity defence is critical to the outcome of such cases, and to the determination as to whether Argentina will be liable for financial compensation to those investors whose treaty protections have been breached.

In the LG&E case - where Argentina's necessity defence was accepted in part - the tribunal determined that Article 11 of the US-Argentina BIT (dealing with essential security and public order exceptions) entitled Argentina to such a defence.

By contrast, the BG v. Argentina arbitration was conducted under a different bilateral investment treaty – that between the United Kingdom and Argentina – which contained no clause directly analogous to Article 11 of the US-Argentina BIT. Argentina insisted that it was implicit that a BIT should not preclude a state from taking necessary emergency measures to maintain public order in a financial crisis, however the tribunal hearing BG's claim disagreed.

The tribunal also poured cold water on any necessity arguments grounded in customary

international law.

As a consequence, Argentina was held liable for compensation for the BIT breaches suffered by BG. The UK firm sought some $238 Million (US), and the tribunal ultimately awarded more than $185 Million (US).

The BG award is the latest in a growing number of investment arbitration rulings against Argentina. In 2005, US energy company CMS was awarded more than $130 Million US.

In May of 2007, the Enron Corporation secured an award of $106 Million (US) in its claim with Argentina.

Meanwhile, US-based LG&E was partly successful in its own claim, with damages of $57.4 Million awarded for the period up to February 2005. And, in the autumn of 2007, another US-based energy firm, Sempra, secured an award for $128 Million (US), and further refund of $36 Million (US) in unpaid subsidies.

In several other cases not arising out of the Argentine financial crisis, Argentina has also been ordered to pay compensation to the foreign investors Azurix, Siemens and Vivendi.

Sources:

BG Award and D.C. District Court filing available on the website of Prof. Andrew Newcombe: http://ita.law.uvic.ca/documents/BGvArgentina.pdf

Past ITN reporting on Argentine cases, see items 1-3 in this newsletter: http://www.iisd.org/pdf/2007/itn_oct15_2007.pdf

2. ANALYSIS: Decrying past “contradictory” rulings, Argentina challenges arbitrator, By Luke Eric Peterson

Among the grounds upon which Argentina is seeking to vacate a $185+ Million arbitration award in favour of British Gas (see previous item) is one which criticizes the International Chamber of Commerce for failing to disqualify one of the three arbitrators presiding in the BG v. Argentina arbitration.

Argentina had moved in June of 2007 to challenge the impartiality of Prof. Albert van den Berg, on the basis of what it characterizes as “contradictory” rulings signed by Prof. van den Berg in his capacity as arbitrator in other ICSID cases involving Argentina.

Although the disqualification bid was one of a growing list of challenges filed by the Argentine Government in relation to the dozens of investment treaty arbitrations that it faces, the grounds for the challenge were novel.

In the BG case, the Argentine Attorney General's Office contended that it had "justifiable doubts" as to the independence and impartiality of Prof. van den Berg due to the fact that he had signed earlier arbitration awards – in the LG&E v. Argentina and Enron v. Argentina cases – which Argentina says run "contrary" to one another on key points of law.

A particular concern for Argentina is the different disposition of a central question in the LG&E and Enron cases: whether Argentina can claim that it acted out of a "state of necessity" due to its recent financial crisis, thus absolving the country of liability for treaty breaches suffered by foreign investors.

Whereas the tribunal in the LG&E v. Argentina case accepted Argentina's necessity arguments - at least for a 17 month window of time when the financial crisis was at it peak - the tribunal in the Enron case rejected the necessity defence.

Argentina maintains that the LG&E and Enron disputes involve similar investments (in Argentina's natural gas sector) and raise similar allegations of breach of the US-Argentina bilateral investment treaty. Yet, Argentina contends that Prof. van den Berg endorsed "contradictory" conclusions in those two cases, without issuing a dissenting opinion or offering some explanation for this "drastic change of mind".

As part of its challenge-bid, the Attorney General's Office argued that the only explanation for this sharp divergence can be "arbitrariness or caprice" on the part of Prof. van den Berg, thus raising doubts as to his capacity for impartiality and independence in the ongoing BG v. Argentina arbitration.

ITN understands that Prof. van den Berg – who as an arbitrator cannot comment on the BG case - rejected Argentina's charge that he lacks the requisite impartiality or independence to sit in the case. Prof. van den Berg declined to withdraw from the BG tribunal, and informed the parties to that proceeding that he was unable to discuss the deliberations in the Enron and LG&E cases. Further, it is understood that he informed the parties that he takes the view that collegiality demands that arbitrators sitting on three-member tribunals reach a common view as to how the case should be resolved. (Prof. van den Berg is not known to have authored a dissenting opinion in any case where he has sat as arbitrator.)

In the face of Prof. van den Berg's decision to remain on the tribunal, Argentina proceeded with its challenge-bid by referring the matter to the Appointing Authority in the case: the Court of Arbitration of the International Chamber of Commerce (ICC).

In the course of so doing, Argentina also criticized the view that an arbitrator sitting on a three-person tribunal should reach a conclusion as a "collegial" body. Indeed, the Attorney General's Office argued that such a posture is antithetical to the requirement for arbitrators to exercise "independent" judgment.

Argentina had requested that the ICC provide reasons for any decision taken on its challenge-bid; as noted in past ITN reporting, Argentina has bristled at the practice of certain arbitration institutions which provide no reasons for decisions taken in relation to challenges to arbitrators.*

In a subsequent ruling by the ICC Court of Arbitration Argentina's challenge to Prof. van den Berg was rejected. However, the ICC did not offer any reasons for this decision.

In papers filed in the D.C. District Court, Argentina has decried the failure by the ICC to provide reasons for the rejection of its challenge, and characterized this failure as an excess of powers contrary to the U.S. Federal Arbitration Act. At the same time, Argentina has also argued in its filings before the DC Court that the BG arbitration was not resolved in an impartial fashion.

* See "Argentina and UK firm send arbitrator-challenge to venue where reasons are provided", By Luke Eric Peterson, Investment Treaty News, October 30, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_oct30_2007.pdf

3. Argentina settles several claims, others subject to negotiation or arbitration,
By Luke Eric Peterson

A Chilean investor embroiled in several pending arbitration claims against the Argentine Republic has consented to withdraw two of those claims, while placing a third in suspension, after making considerable progress in settlement talks with government officials.

In this latest settlement move, the Chilean firm, Compania General de Electricidad (CGE), has moved to suspend two of the three claims being heard in a single ICSID arbitration proceeding.* CGE withdrew claims related to electricity distribution concessions in the Argentine provinces of Tucuman and San Juan, following agreement which will see increases in the tariffs which may be charged to electricity customers by the Chilean firm. Meanwhile, CGE asked the tribunal on February 5, of this year, to suspend the proceeding as it relates to a final concession contract with the Argentine province of Jujuy. The parties continue to pursue settlement of that claim as well.

Argentina saw a flood of BIT claims in the months and years after its financial crisis. While some of these claims remain pending, and a handful have resulted in awards in favor of foreign investors (see previous news item), a sizable number of claims have been withdrawn or suspended whilst negotiations take place.

Cases currently suspended include nine ICSID arbitrations brought by claimants such as Telefonica, AES, Camuzzi, Gas Natural, BP, EDF, Asset Recovery Trust, and Saur International.

* Compania General de Electricidad (CGE) S.A. and CGE Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/2

4. Namibian court reverses expropriation of foreign-owned farms,
By Damon Vis-Dunbar and Luke Eric Peterson

A Namibian court has struck down a government bid to expropriate farms belonging to three German landowners, in a case that has drawn widespread attention in Namibia as the first "test case" of Namibia's 1995 Land Reform Act. Although the court reviewed the government's action in light of Namibian law, it also noted that Namibia will need to heed any obligations it may have under an investment protection treaty with Germany.

In a decision handed down last month, the High Court in Windhoek held that the Ministry of Lands and Resettlement did not adhere to the Constitution and Namibia's Land Reform Act when it expropriated four farms belonging to German absentee landowners.

The German landowners were put on notice in 2004 that their farms were to be seized under a program of compulsory purchase. Following objections by the farmers, the government moved to formally expropriate the properties in question.

In turning to the Namibian courts, the farmers protested that the Ministry had not followed the appropriate steps for acquiring land as prescribed in the Commercial Land Reform Act. Under the 1995 Agricultural Commercial Land Reform Act, enacted to redress a post-colonial legacy of highly stratified land ownership, the government may expropriate land, if certain procedural steps are followed and compensation is paid.

But in a judgment issued in March of this year, the Court held that the Ministry had fumbled the land reform process, by, for example, not properly consulting with a special commission that was tasked with advising the government, and failing to carry out the obligatory research into the suitability of the targeted farms, as well as the impact any expropriation would have on the local employees currently working on those properties.

Notably, the court also held that the Namibian government could not target foreigners over Namibian nationals in its bid to acquire and distribute land more equitably. The court relied on the German-Namibia bilateral investment treaty to emphasize this point:

"As German citizens, the three applicants are entitled to the same treatment as Namibian citizens in terms of the Encouragement and Reciprocal Protection of Investments Treaty which was entered into by the Republic of Namibia and the Government of the Federal Republic of Germany," said the ruling.

The decision does not bar the Ministry of Lands and Resettlement from trying to expropriate the farms again. Indeed, the Court acknowledged that the government was under pressure to provide land to Namibians who have been disadvantaged. “However, that process should be done in terms of the provisions of the Act,” said the court.

The government has been ordered to pay the costs of the three German claimants.

The process of land redistribution has been the subject of intense debate within Namibia. Fears have been raised that Namibia would follow a model of forced expropriation similar to what occurred in Zimbabwe, while, on the other hand, there has also been criticism that the government is moving too slowly in its efforts to acquire and redistribute land to those who were marginalized and disadvantaged during the colonialization era.

As has been publicized in ITN in the past, a number of developing countries looking to redistribute land are finding that foreign-owners are resorting to arbitration (or threats thereof) under investment protection treaties in an effort to challenge such processes. While the German claimants in the present case have not initiated an international arbitration under the Germany-Namibia treaty, they have cautioned Namibia that they could do so.

Sources:

“German nationals challenge Namibia’s land reform as discriminatory”, By Damon Vis-Dunbar and Luke Eric Peterson, Investment Treaty News, July 12, 2007

“German Farmers challenge Namibia land reform, international arbitration considered”, By Damon Vis-Dunbar and Luke Eric Peterson, May 31, 2006

IISD Viewpoint:
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5. IISD urges UNCITRAL member-states to support transparency*

The critical question of whether investment treaty arbitrations conducted under United Nations rules of arbitrations should be subject to mandatory transparency will come to a head in June at a meeting of member governments of the UN Commission on International Trade Law (UNCITRAL).

In February of this year, an UNCITRAL Working Group resisted calls by many States and non-governmental organizations (NGOs) to discuss introducing transparency requirements into UNCITRAL arbitration brought by foreign investors against Governments. However, the Working Group returned the issue to its parent body, the

UNCITRAL Commission, to further direct the Working group on this question.

UNCITRAL is currently revising its signature Arbitration Rules for the first time since 1976.

While the UNCITRAL rules are used for arbitrating commercial disputes between private parties, they are also used for so-called investment treaty arbitrations, where the public interest dimension of such disputes has led to calls for more openness.

What is at stake for public policy?

In the aftermath of the Working Group's latest revision session in February, the International Institute for Sustainable Development (IISD) and the Centre for International Environmental Law (CIEL) expressed their disappointment at the efforts of some governments to oppose the inclusion of transparency provisions in any revised rules.

The IISD and CIEL are now calling for member governments of the UNCITRAL Commission to instruct the Working Group to not delay further the important question of transparency – or postpone the question until some future process can explore the case for transparency.

Among the reforms which have been put forward for inclusion in a revised set of UNCITRAL rules are those which would improve the rules on public notice of proceedings, access to documents, open hearings, and amicus curiae (friend of the court) briefs in respect of each proceeding. Similar provisions already exist in other investment treaty arbitration contexts.

IISD and CIEL believe it is important to address the issue of transparency now, as part of the ongoing revision of the UNCITRAL rules. Thus, IISD and CIEL are asking the Commission to mandate the Working Group to include clear rules supporting transparent investor-state arbitrations as part of the current revision process.

"The only rationale for putting the transparency issues into another process is that it is too time consuming to do it now. But it is not. There are multiple precedents already, and no more than two pages of text are needed," says Howard Mann, Senior International Law Advisor to the IISD.

"On the other hand, it is clear that the proponents of secrecy in investor-state arbitration will use the completion of the initial process to never return to the issue. This will make secrecy the rule in UNCITRAL arbitrations for many years to come, and lock in this antiquated approach to dispute settlement under public international law. It is simply a strategic ruse by the proponents of secrecy."

Some Governments, including the Government of Canada, and certain developing countries facing investor claims, have come out in support of transparency, and the need

for the issue to be addressed at the present time. However, other governments, including the United Kingdom, have spoke against including mandatory transparency provisions in the current revision process.

Bloc of arbitrators dig in against mandatory transparency as showdown looms

Meanwhile, a group of 40 international arbitrators, under the auspices of the Chamber of National and International Arbitration of Milan, have signed a declaration supporting "the general principal of confidentiality in international commercial arbitrations and, in particular, in arbitrations taking place under the UNCITRAL arbitration rules".

The Milan bloc also opposes the inclusion of any special provisions in the UNCITRAL rules which would mandate that investor-state arbitrations be handled differently than other commercial arbitrations. Rather, the bloc proposes that transparency be handled through a non-binding solution, which could take the form of optional clauses that states and investors could insert into particular contracts or treaties on a case-by-case basis.

The opposition by some arbitrators and governments to mandatory transparency provisions in the UNCITRAL rules warrants criticism, says Howard Mann of IISD:

"Many delegates at the meeting noted the degree of influence exercised by some leading arbitrators who are opposed to proper transparency rules and the accountability that it brings to their work."

"It is inexplicable that states who advocate transparency in all other forms of business-government relations would abdicate this important public policy issue to individuals with a specific personal interest in the outcome. This is not an issue that requires reliance on technical expertise, but a public policy issue: should international law dispute settlement be transparent and accountable or secret and unaccountable? Should local communities impacted by an investment have knowledge of, and access to, the process? Should international law allow private investors to be able to choose private international arbitration over public local dispute settlement to avoid any public knowledge of their actions? The arbitrators have one goal."

"The abdication by some governments of responsibility on this issue is stunning," Mann adds.

Meanwhile, the UN Special Representative to the Secretary General on business and Human Rights has issued a statement urging that "adequate transparency where human rights and other state responsibilities are concerned is essential if publics are to be aware of proceedings that may affect the public interest."

The Special Representative, Prof. John Ruggie, adds that "such transparency lies at the very foundation of what the United Nations and other authoritative entities have been promulgating as the precepts of good governance."

* IISD undertakes policy research and analysis and advances policy recommendations in the area of international investment law. Investment Treaty News (ITN) is a reporting service of the IISD with an editorially independent mandate to provide neutral reporting on developments in the area of foreign investment law and policy. On occasion the views of the IISD are communicated directly to ITN readers through “Viewpoint” or other similarly identified features. For more information on the UNCITRAL transparency initiative, contact: Howard Mann, hmann@iisd.ca or Fiona Marshall, Fiona.marshall@bluewin.ch

Further Reading:

An IISD-CIEL paper, “Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations”, is available on-line at:
http://www.iisd.org/pdf/2008/investment_revising_uncitral_arbitration_dec.pdf

Documents related to the Working Group tasked with revising the UNCITRAL rules are available on-line at:
http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html

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Publications Round-Up:
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6. New and notable publications on investment treaties*

*Editor’s Note: Prof. Andrew Newcombe, of the University of Victoria in Canada has compiled the following list of recently-published academic and other articles on investment treaty-related themes:

Bubb, Ryan J. and Susan Rose-Ackerman. BITs and bargains: strategic aspects of bilateral and multilateral regulation of foreign investment. 27 Int'l Rev. L. & Econ. 291-311 (2007).

Yannick Radi, The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse', European Journal of International Law 2007 18(4):757-774

William W. Burke-White and Andreas Staden, "Investment Protection in Extraordinary Times: the Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", University of Pennsylvania Working Paper, available at:
http://lsr.nellco.org/cgi/viewcontent.cgi?article=1156&context=upenn/wps

Christer Soderlund, "Intra-EU BIT Investment Protection and the EC Treaty", Journal of International Arbitration, Vol.24, No.5, Abstract available at: http://www.kluwerlawonline.com/toc.php?pubcode=JOIA

Stephan W. Schill, "Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?", Journal of International Arbitration, Vol.24, No.5, Abstract available at: http://www.kluwerlawonline.com/toc.php?pubcode=JOIA

Mabel I. Egonu, "Investor-State Arbitration Under ICSID: A Case for Presumption Against Confidentiality", Journal of International Arbitration, Vol.24, No.5, Abstract available at: http://www.kluwerlawonline.com/toc.php?pubcode=JOIA

Kim M. Rooney, "ICSID and BIT Arbitrations and China", Journal of International Arbitration, Vol.24, No.6, Abstract available at: http://www.kluwerlawonline.com/toc.php?pubcode=JOIA

John Savage, "Investment Treaty Arbitration and Asia: Review of Developments in 2005 and 2006", Asian International Arbitration Journal, Vol.3, No.1, abstract available at: http://www.kluwerlawonline.com/toc.php?area=Journals&mode=bypub&level=4&values=Journals~~Asian+International+Arbitration+Journal

Abba Kolo, "Investor Protection vs. Host State Regulatory Autonomy During Economic Crisis: Treatment of Capital Transfers and Restrictions under Modern Investment Treaties", Journal of World Investment and Trade, Vol.8, No.4, August 2007, Abstract available at: http://www.wernerpubl.com/frame_inves.htm

Valentina Vadi, "Access to Essential Medicines & International Investment Law: the Road Ahead", Journal of World Investment and Trade, Vol.8, No.4, August 2007, Abstract available at: http://www.wernerpubl.com/frame_inves.htm

Won Mog-Choi, The Present and Future of the Investor-State Dispute Settlement Paradigm, Journal of International Economic Law, Vol.10. No.3, September 2007, Abstract available at: http://jiel.oxfordjournals.org/

Barnali Choudhury: "Determining the Appropriate Level of Deference for Domestic Court Reviews of Investor-State Arbitral Awards" Queen's Law Journal, Vol. 32, No. 602, 2007

Chung, Olivia. Note. The lopsided international investment law regime and its effect on the future of investor-state arbitration. 47 Va. J. Int'l L. 953-976 (2007).

Andrew Newcombe, Book review, G. Van Harten, Investment Treaty Arbitration and Public Law (2008) 71 Modern Law Review 147.

7. New book explores impacts of FDI in post-NAFTA Mexico

The Enclave Economy:
Foreign Investment and Sustainable Development in Mexico's Silicon Valley*

By Kevin P. Gallagher and Lyuba Zarsky, (M.I.T. Press, 2007)

Foreign investment has been widely presented as a panacea for developing countries, a way to create good jobs, reduce poverty, and kick-start sustainable modern industries. "The Enclave Economy" offers a critical examination of such claims: For more on The Enclave Economy, and to order: http://www.ase.tufts.edu/gdae/Pubs/rp/EnclaveEconomy.html

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