INVEST-SD: Investment Law and Policy Weekly News Bulletin, April 13, 2004

Published by the International Institute for Sustainable Development
(www.iisd.org/investment)

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Arbitration Watch:
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1. Methanex Tribunal Accepts Two Amicus Briefs,

A tribunal presiding over a dispute between the Canadian-based Methanex Corporation and the United States government has signaled its acceptance of amicus curiae briefs submitted by two would-be interveners in an arbitration under the North American Free Trade Agreement (NAFTA).

In an order dated April 6, 2004, the tribunal acknowledged that neither party to the dispute objected to the submission of separate legal briefs by two non-parties, the International Institute for Sustainable Development (IISD)* and a coalition of US-based environmental groups.

The tribunal noted informed the parties that it will make further orders regarding the procedure for the parties to provide comments on the arguments raised in the amicus briefs. The two briefs were filed last month, following the tribunal's determination that it

had the authority to entertain such interventions, and its setting of a deadline for interventions by outside parties.

The Methanex arbitration arises out of the California government's ban of MTBE, a gasoline additive for which the Methanex company supplies a key ingredient: Methanol.

Sources:

Further information about IISD's amicus intervention in the Methanex case is available on-line at: http://www.iisd.org/investment/

Documents related to the Methanex case are available on the website of the US State Department at: http://www.state.gov/s/l/c5818.htm

*IISD is the publisher of the INVEST-SD News Bulletin

2. Investors Looking Beyond ICSID in Investment Treaty Telecoms Cases,
By Luke Eric Peterson

An investigation by INVEST-SD reveals that a number of telecoms-related disputes have been brought to arbitration in recent years under the terms of international investment treaties, many of them outside the confines of the major venue for treaty arbitration: the Washington-based International Centre for Settlement Disputes (ICSID).

Although ICSID is thought by many arbitration experts to see the lion's share of international arbitration under investment treaties, it is difficult to develop an accurate picture of the volume of non-ICSID claims, due to an absence of transparency under the other major arbitration rules provided in investment treaties.

Even while some portion of the legal iceberg remains hidden from view, a survey of available evidence reveals that when telecoms investors have turned to international treaties for respite, oftentimes they have turned to other arbitration rules - either out of choice, or because their host government had not acceded to the Washington Convention establishing the ICSID facility.

INVEST-SD's survey of the field reveals one telecoms case filed with ICSID, and at least 4 claims known to have been conducted outside of ICSID since the mid-1990s. Moreover, a further two arbitrations have been threatened, but have yet to be launched formally.

To date, ICSID has registered one telecoms claim under an investment treaty - Telefónica S.A. v. Argentine Republic - which arises out of an investment by the Spanish firm in the provision of basic telephone and long-distance service in Argentina.

According to a person familiar with the investor's claim, the Spanish firm alleges partial

expropriation of its investment following the imposition of emergency measures during the recent Argentine financial crisis. A fixed value has not been attached to the claim; however damages well in excess of 1 billion dollars (US) are expected to be alleged by the investor.

Apart from Telefónica's claim, two other major foreign investors in the Argentine telecommunications sector, France Telecom and Telecom Italia, have notified Argentina that they may exercise their right to arbitration under investment treaties concluded between France and Argentina and Italy and Argentina respectively. Company filings with the US Securities and Exchange Commission reveal that both notifications were made in the spring of 2003. Despite the expiration of the mandatory 6 month period for friendly consultations, these claims do no appear to have moved to formal arbitration. One source familiar with the Telecom Italia confirmed that the company was adopting a "wait and see approach" to the situation in Argentina.

Looking beyond these Argentine disputes, an INVEST-SD investigation confirms that 4 other telecom claims have been mounted under investment treaties, including an early claim brought by US-based Ameritech against Poland, as well as several arbitrations which are still pending or reportedly under appeal in national court settings.

During the 1990s, Ameritech provided analog cellular telephone service through a joint-venture with Poland's state-owned telephone company. However, the firm filed an arbitration against Poland, under the UNCITRAL rules in 1996, alleging that Polish authorities had violated contractual undertakings and provisions of the US-Poland bilateral investment treaty when Poland declined to award a digital GSM cellular license to Ameritech and instead put the license out for tender. According to subsequent filings with the US Securities and Exchange Commission, Ameritech disposed of its stake in the Polish joint-venture in December of 1996 and settled its arbitration claim with Poland around the same time.

The terms of this settlement are not disclosed in the firm's SEC filings. In 1999, Ameritech was taken-over by SBC Communications, and now operates under the SBC Ameritech name.

Ameritech's claim was only the first of several treaty claims brought under non-ICSID rules.
More recently, Telekom Malaysia resorted to arbitration when its investment in Ghana's national telecommunications company turned sour.

When Ghana Telecom was privatized in 1997, Telekom Malaysia, through its subsidiaries, paid 38 million (US) for a 30% stake, with the remainder to be held by the Ghanaian government. The Malaysian firm took managerial control of the company, and in 2000, laid down a 50 million (US) deposit for a further 15% equity stake. However, as financial difficulties deepened - due to an industry downturn and the decline of the Ghanaian currency - the Malaysian firm also encountered rising local opposition to its control of Ghana Telecom.

According to Malaysian and Ghanaian news reports, the additional 15% stake was never acquired by Telekom Malaysia, nor was its $50 million down-payment returned to the company.

After a period of negotiation with a new Ghanaian government, the firm filed for arbitration under the Malaysia-Ghana bilateral investment treaty on February 10, 2003, alleging dispossession and loss of control of its investment, and claiming some $174 million (US).

According to filings with the Kuala Lumpur Stock Exchange, Telekom Malaysia discloses that the dispute will proceed under the UNCITRAL rules of arbitration, and that its nominated arbitrator, Emmanuel Gaillard, will sit on a three person tribunal along with Ghana's nominee, Mr. Robert Layton, and a Chairman agreed by the two parties: Albert Jan van den Berg. A timetable agreed by the parties will see hearings take place in The Hague in July of 2004.

Another arbitration known to be proceeding under UNCITRAL rules of arbitration has been brought by France Telecom against Lebanon. According to filings to the US Securities and Exchange Commission (SEC), France Telecom initiated this arbitration on June 20, 2002 under the terms of a bilateral investment treaty between France and Lebanon. According to these filings, a France Telecom subsidiary began offering wireless GSM telephone service in Lebanon in 1994 under the terms of a Build Operate and Transfer (BOT) contract. This contract was terminated prematurely in 2001, with the Lebanese government alleging the operators to have violated terms of the BOT contract. Under the terms of a law passed the following year, revenues from the sector were to accrue to the Lebanese state.

France Telecom pursued arbitration both at the International Chamber of Commerce, and under the UNCITRAL rules, however upon agreement between the parties, all claims are to be heard under the latter arbitration, and the former process was terminated on February 10, 2003.

According to France Telecom's SEC filings, the firm alleges that it was the victim of expropriation and failed to receive fair and equitable treatment at the hands of the Lebanese state. The French firm claims some $771 million in damages, including compensation for the remainder of the contract. For its part, Lebanon has mounted a counter-claim for $840 million in damages against France Telecom.

Apart from these ongoing arbitrations by France Telecom and Telekom Malaysia, INVEST-SD has also learned that an earlier treaty arbitration between a UK businessman, Mr. William Nagel, and the Czech Republic, is being appealed to a Swedish court.

As reported in INVEST-SD last year, an arbitral tribunal at the Stockholm Arbitration Institute found in favor of the Czech Republic in a claim mounted by Mr. Nagel under the

UK-Czech Republic bilateral investment treaty. Mr. Nagel had alleged that the Czech authorities reneged upon a commitment to award him a GSM mobile phone license.

After the authorities held a public tender for two mobile phone contracts - neither of which was awarded to Mr. Nagel - the UK businessman launched his arbitration against the Czech Government. That claim was ultimately dismissed by the tribunal on the grounds that Mr. Nagel's earlier understanding with the Czech authorities did not qualify as an "investment" under the UK-Czech treaty. In E-mail comments, Mr. Nagel told INVEST-SD: ""I confirm that, through counsel, I have undertaken legal proceedings in Sweden regarding the award, but have no further comment because the issues are pending before the Swedish courts".

One upshot of this move could be to place the arbitration award - which, to date, has remained confidential - in the public record.

INVEST-SD News Bulletin will endeavour to cover further developments in all of those arbitrations which are still pending or under judicial review.

Sources:

INVEST-SD Interviews

"Ghana govt admits to 50 mln usd liability payment to Telekom Malaysia", AFX News Asia, April 1, 2004

"Gov't Admits $50m Liability to Telekom Malaysia", Ghanaian Chronicle, April 2, 2004

"Arbitration Proceeding Between Telekom Malaysia Berhad and the Government of the Republic of Ghana", Telekom Malaysia General Announcement filed with the Kuala Lumpur Stock Exchange, October 31, 2003

"UK investor fails in BIT claim against Czech Republic", INVEST-SD News Bulletin, October 11, 2003, at: www.iisd.org/pdf/2003/investment_investsd_oct11_2003.pdf

"France Telecom Claims Compensation From Argentine Government", Les Echos, July 18, 2003

Telecom Argentina Stet France Telecom SA, SEC 20-F Report, June 30, 2003

Telecom Italia, SEC 20-F Report, June 26, 2003

France Telecom, SEC 20-F report, March 21, 2003

"Ghana Battles with Telekom Malaysia", BBC News, January 6, 2003
http://news.bbc.co.uk/1/hi/business/2632509.stm

Ameritech, SEC10-K report, March 13, 1997

3. British Institute to Hold Conference on Appeals of Treaty Arbitrations

The London-based British Institute for International and Comparative Law (BIICL) is to hold a one-day conference on May 7 to address the subject of appeals and challenges to investment treaty awards.

The event will feature a series of panels composed of practitioners, arbitrators and academics. In recent months, the subject of an appeals process has become ever more pressing. For the moment, there is no single, consolidated process for review of arbitral awards.

Depending upon the rules of arbitration provided in a given investment treaty, a disputing party may be able to challenge a tribunal's award (ruling) in one of two distinct - and limited - manners. In the case of arbitrations conducted under the ICSID arbitration rules, awards may be reviewed according to one of several different internal processes provided by the Centre. However, in no circumstances, can such awards be challenged outside of the ICSID system.

Meanwhile, arbitrations conducted under various other sets of rules - including those of UNCITRAL, The Stockholm Chamber of Commerce and ICSID's so-called Additional Facility rules - may be reviewed in domestic courts in the country where the arbitration was legally sited, or in a country where enforcement of the award is sought. This form of judicial review will typically be quite limited in scope, and conducted pursuant to the country's domestic legislation governing commercial arbitration.

The question of review of investment treaty awards has become increasingly controversial as a number of awards have come up for review inside and outside ICSID - and because some of those cases deal with matters of public interest. Indeed, arbitrations under investment treaties have not been limited to narrow commercial matters, but instead can deal with sensitive government measures including tax policies, health and environmental regulation, and regulation of various public services (water, sanitation, telecommunications, transport) or regulation of sensitive industries (media, insurance, banking and natural resources).

At the same time, the investment treaty arbitration process - with its multiple sets of rules and lack of any single appellate institution - has permitted similar or related claims to be arbitrated by separate tribunals, leading, in at least one notable occasion, to conflicting awards being handed down by arbitration tribunals. In turn, this has spawned much debate amongst academics, practitioners, investors and governments as to whether some appeals mechanism is needed for investment treaty arbitration.

Sources:

For more information about the BIICL's conference on appeal of investment treaty arbitrations visit: http://www.biicl.org/edetail.asp?eventid=419&menuid=16.

Negotiation Watch:
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4. UN Human Rights Commission Handed Hot Potato on Corporate Responsibility

The United Nations Commission on Human Rights, a group of 53 UN member-states who meet annually in Geneva, is currently grappling with a proposal to table a draft code of corporate responsibility norms prepared by a UN working Group.
The draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights were earlier approved by the UN's Sub-Commission on Human Rights, an expert body consisting of 26 individuals who serve in their personal capacities.

Last August, the Sub-Commission passed a resolution recommending that the Commission table the norms at its meetings in March and April 2004, and solicit comments from governments, UN bodies, non-governmental organizations and other interested parties. However, press reports from Geneva indicate that governments are locked in a behind-the-scenes struggle over whether to table the norms for discussion during the Commission meetings (which convened on March 15 and are slated to run through April)

A number of business groups, including the International Chamber of Commerce, have objected to the draft norms. The US Government signaled its opposition in comments reported in the Financial Times newspaper last week. However, non-governmental human rights agencies have hailed the draft norms for collating and clarifying the existing obligations of private companies under existing international laws. In a public statement, Amnesty International has endorsed the norms, noting that they provide "a useful statement of the scope of human rights obligations on private companies."

Sources:

"Company norms 'must be on UN rights agenda'", Frances Williams, Financial Times, April 8, 2004

Amnesty International, written statement delivered to UN Sub-Commisson on Human Rights, August 8, 2003, at:
http://web.amnesty.org/library/Index/ENGPOL300122003?open&of=ENG-200

UN Sub-Commission on Human Rights, norms on responsibilities of transnational corporations and other business enterprises with respect to human rights, http://www1.umn.edu/humanrts/links/norms-Aug2003.html

UN Sub-Commission on Human Rights, Resolution approving those norms, at: http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.L.8.En?Opendocument

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