

INVEST-SD: Investment Law and Policy Weekly News Bulletin, April 5, 2004

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

Contents at a Glance:

Negotiation Watch

1. OECD Group Calls in Outside Legal Experts to Review Key Investment Rules
2. US-Pakistan Slated to Negotiate Investment Treaty this Month

Arbitration Watch

3. Latvia Could See Two New Treaty Arbitrations; Reflects on Two Earlier Losses,

Briefly Noted

4. FT: Banks expected to oppose call for WB to get out of oil and coal financing
5. Investment Arbitration Event Scheduled for May 3 in Paris

Negotiation Watch:

1. OECD Group Calls in Outside Legal Experts to Review Key Investment Rules

As part of a meeting this week of the OECD Committee on International Investment and Multinational Enterprises (CIME), outside legal experts have been invited to convene with government delegates behind closed doors to discuss several contentious legal issues.

The CIME is a standing committee composed of delegates from the OECD's 30 member countries, as well as various observer countries. The Committee meets three times a year to discuss and review investment issues, and is perhaps best known for its role in championing negotiations on the (ultimately aborted) Multilateral Agreement on Investment (MAI) during the mid-1990s.

This week the CIME will preside over two sessions. The first will consist only of government delegates and will review papers prepared by the OECD Secretariat on various investment topics including most-favored nation treatment - a topic which has generated concerns amongst some governments for seeming to permit foreign investors to avail themselves of the most-favorable treatment contained in any of the full catalogue of investment treaties concluded by a given host government.

According to one government delegate planning to attend this meeting, discussions are generally closed to the public and outside groups. However, one designated session of the meeting will be open to representatives from the OECD's two civil society advisory groups, consisting of industry and trade union representatives, as well as an ad-hoc group of non-governmental organizations known as OECD-Watch.

A second sub-meeting of government delegates to be held this week will confer with a series of external legal experts invited by the OECD Secretariat to discuss two papers prepared by the Secretariat on minimum standards of treatment and indirect expropriation. Both of these topics have been the subject of much contention in recent investor arbitrations mounted against states under international investment treaties, and one source tells INVEST-SD News Bulletin that governments differ as to the substantive meaning of these common investment treaty provisions.

The papers forming the basis of these committee discussions are restricted and not publicly available. INVEST-SD News Bulletin will endeavour to monitor this process as it goes forward.

Sources:

INVEST-SD Interviews

OECD Watch (information in French):

<http://www.association4d.org/actualite/ocde.htm>

2. US-Pakistan Slated to Negotiate Investment Treaty this Month

The Pakistani Commerce Minister, Humayun Akhtar Khan has told the

Pakistani National Assembly that negotiations on a bilateral investment treaty area slated to begin this month in Washington.

Thanks to the US-led 'war on terrorism', Pakistan has shot to the top of the list of countries which are of geo-political importance to US foreign policy. The US has already concluded a looser Trade and Investment Framework Agreement with Pakistan, and the forthcoming Bilateral Investment Treaty is generally held to be a prerequisite for broader free-trade negotiations with the United States.

Pakistan has already concluded a number of bilateral investment treaties with other foreign states, and is subject to at least one investor arbitration under the terms of those treaties: a claim lodged by the Swiss-based SGS at the International Centre for Settlement of Investment Disputes. (See "Investment Treaty Tribunal Looks Under the Umbrella, INVEST-SD News Bulletin, February 16, 2004, at www.iisd.org/pdf/2004/investment_investsd_feb16_2004.pdf)

Sources:

"PAK, US Bilateral Investment Treaty to be Negotiated Next Month", March 29, 2004, Pakistan Press International Information Services Limited

Arbitration Watch:

3. Latvia Could See Two New Treaty Arbitrations; Reflects on Two Earlier Losses,
By Luke Eric Peterson

A Finnish-controlled fuel trading firm and a Swedish-owned hotel company have threatened separate arbitrations against the Latvian Republic under investment treaties concluded between their home countries with Latvia.

The Swedish owners of the Riga-based Eurolink Hotel warned last month that they will take a decision in April as to whether to proceed to arbitration in relation to a dispute over a hotel rental agreement with a Latvian property-owner.

According to local press reports, Eurolink signed a long-term rental agreement in 1991 with the owners of the Hotel Riga in Latvia to lease out the third-floor of that facility to Eurolink. However, in 2003, Eurolink charges that the new owners of the Hotel Riga requested that Eurolink sign a new rental agreement - which would have increased its monthly rent four-fold. Eurolink then threatened arbitration at the

Stockholm Chamber of Commerce against the Latvian Government - alleging that it has received no assistance or security from local authorities and the Latvian Privatization Agency, contrary to the undertakings of Latvia's investment protection agreement with Sweden.

Meanwhile, in an unrelated dispute, a Finnish investor, Neste Latvija, is also threatening treaty arbitration against Latvia.

Following an unfavorable award handed down by the Riga International Court of Arbitration, Neste Latvija's parent company - Finnish-based Fortum Oy (Fortum Shipping) - has warned that it might take Latvia to the Stockholm Court of Arbitration, if it fails to reach a negotiated solution to its dispute with Riga's port authorities.

The Riga port had initiated a claim at the Riga International Court of Arbitration alleging that Neste Latvija was not living up to the terms of a land lease agreement which set minimum targets for oil imports through the port. The port alleged that it was suffering significant losses as a result of the low volume of cargo passing through its terminal. The Riga arbitration culminated in an award on January 26, 2004 of some 1.9 US million in damages to be paid by Neste Latvija.

Neste Latvija has countered by threatening to launch an investment treaty claim for the total amount invested by the company in the port since 1998, some 22 million US Dollars.

Riga's port board has responded by proposing a committee to examine Neste Latvija's concerns and to seek a negotiated solution with the investor.

According to local news reports, the Finnish firm was one of the first and largest foreign investors in Latvia, and currently owns a major chain of gas stations in the Baltic state. Notably, some 65 percent of Neste Latvija parent company, Fortum Shipping, is owned by the Finnish Government.

Latvia's Government has expressed its desire for the parties to reach a negotiated solution in the port dispute. In recent years, Latvia has lost two international treaty arbitrations. Recently, Swedish-based Nykomb won an award under the Energy Charter Treaty (see "Swedish firm wins Energy Charter Treaty case against Republic of Latvia", INVEST-SD News Bulletin, December 19, 2004, available on-line at: www.iisd.org/pdf/2003/investment_investsd_dec19_2003.pdf

A second arbitration brought by Swembalt AB under the Sweden-Latvia investment treaty also led to an award against Latvia in 2000.

The latter case, involving a scrapped Swedish vessel which had been harboured in a Riga port, saw the Swedish investor recoup some 4 million US Dollars from Latvia. The controversy has since occasioned a flurry of criminal charges against Latvian government officials accused of negligence and wrong-doing in relation to the scrapping of the Swedish ship.

The Swembalt arbitration also led the Latvian Government to review its procedures for defending against such international arbitration claims. A report prepared by the Justice ministry offered a post mortem on its handling of the Swembalt arbitration - and subsequent efforts to have the arbitral award overturned in Danish courts - and concluded that the government "should have executed the ruling immediately" in view of the escalating costs of defending against the claim.

A Latvian language version of the Tribunal's award of October 23, 2000 in the Swembalt case is available on the website of the Latvian Ministry of Justice at: www.tm.gov.lv/str/23_swembalt.doc

Sources:

"Riga Freeport to try Settling Disagreements with Nest Latvija", March 29, 2004, Baltic News Service

"Swedish Owners of Eurolink Hotel to Sue Latvian State", March 9, 2004, Baltic News Service

"Riga Port Ready to Discuss Dispute with Finnish-owned Neste Latvija", March 1, 2004, Baltic News Service

"High Court to Hear Case Against Latvian Officials Charged Over Swedish Ship Scandal", February 16, 2004, Baltic News Service

"Finnish-Owned Neste Latvija Warns Latvia About Likely Intl Arbitration case", February 12, 2004

Briefly noted:

4. FT: Banks expected to oppose call for WB to get out of oil and coal financing

The Financial Times reports that a group of major banks involved in project finance are expected to call upon the World Bank to reject some

of the more far-reaching proposals mooted by an independent study commissioned to review the Bank's involvement in financing extractive investments such as oil, gas and mining.

The FT cites a draft letter to World Bank head James Wolfensohn being circulated amongst a number of leading international banks.

Last year, 20 major banks including Barclays, Citigroup, and the Credit Suisse Group signed the so-called Equator Principles, committing themselves to adhere to World Bank social and environmental standards. Thus, should the World Bank adopt all the proposals put forward in its recent Extractive Industries Review (EIR), then these "Equator banks" might find themselves under pressure to follow suit.

According to the FT, the draft letter to James Wolfensohn (which has yet to be signed and delivered by the various international banks) argues that, "We believe that the EIR has not given sufficient consideration to the fact that the extractive industries represent a very important means of creating revenues for government programmes."

Sources:

"Banks Likely to Oppose Ban on Coal and Oil Project Finance", By Demetri Sevastopulo, Financial Times, April 5, 2004

www.equator-principles.com

5. Investment Arbitration Event Scheduled for May 3 in Paris

A one-day event in Paris, France, to be held on May 3, 2004, will examine new developments related to arbitration of international investment disputes. The event is organized by the University of Paris and will feature sessions devoted to a variety of topics, including: the first arbitral award rendered under the Energy Charter Treaty; the role of the International Centre for Settlement of Investment Disputes; the meaning of "indirect expropriation"; and the implications of the so-called umbrella clause contained in some treaties.

For more information about the event or to register, please contact Claire.Toulet@u-paris2.fr