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Arbitration Watch:
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1. Path Cleared for First Challenge to Argentine Emergency Laws to be Heard on Merits, By Luke Eric Peterson

In a significant move, an arbitral tribunal at the International Center of Settlement of Investment Disputes (ICSID) has cleared the way for the US-based CMS Gas Transmission Company to pursue its claim against the Argentine Republic under the US Argentine Bilateral Investment Treaty.

In a decision on jurisdiction issued on July 17, 2003, the Tribunal held that it had jurisdiction to examine claims arising out of the treatment of CMS's stake in a privatized gas transportation firm, Transporta de Gas del Norte (TGN).

Although CMS holds only a 29.42% stake in the TGN, the tribunal ruled that this was no bar to CMS's claim. According to the tribunal, the relevant treaty - and several earlier ICSID cases - affirmed that minority shareholdings constituted arbitrable investments.

CMS alleges losses resulting from a decision by Argentina to suspend, and then to

abolish a tariff regime which had provided for tariffs (i.e. customer bills) to be calculated in US dollars and then converted to Argentine pesos for purposes of billing customers. According to CMS's agreement with authorities, tariffs were also to be regularly adjusted according to the US Producer Price Index (PPI).

However, with the onset of the Argentine financial crisis in 1999, the Argentine government passed a series of decrees and legislation which CMS alleges had an adverse impact upon its investment; amongst these was a decision to end the policy of pegging the Argentine Peso to the US dollar on a one-to-one basis.

One lawyer, who represents foreign investors in similar claims against Argentina, says that investors in privatized utilities "would not have touched these investments if they thought there was a peso risk." In order to secure foreign loans to finance the projects, foreign investors typically sought explicit contractual assurances from the Argentine government that tariffs would remain pegged to the US dollar.

Claimants in more than a dozen known cases against Argentina are contending that the collapse in the value of their shareholdings in privatized Argentine utilities which has been triggered by Argentina's emergency measures should be construed as a form of indirect expropriation in contravention of investment treaty guarantees.

The test which some lawyers are arguing that arbitrators should apply is that used in the NAFTA case of Metalclad v. Mexico, where an indirect expropriation was defined as: "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property"

Lawyers for the Argentine Republic might seek to counter allegations of indirect expropriation by arguing that the measures which have allegedly impacted investor shareholdings are temporary in nature, and remain the subject of ongoing negotiation with affected parties. This argument appears to be foreshadowed in the jurisdiction phase of the CMS case, where the Argentine Republic has contended that the impugned measures were "transitory in nature".

In at least one high-profile investment treaty arbitration, that of SD Myers v. Canada under the NAFTA, a tribunal did deem it to be significant that a government measure had been temporary, rather than permanent. The transience of the measure appeared to contribute to the tribunal's view that it did not constitute an expropriation under the circumstances.

Accordingly, Argentina may seek to rebut the investor claims against its emergency measures, by arguing that a precipitous decline in share values may not be permanent, as the Argentine economy will eventually be put back on track.

The tribunal's willingness to hear the CMS claim on its merits, represents a set-back for Argentina which had argued that the tribunal should deny jurisdiction to CMS on several

grounds, including that government authorities are currently in negotiations with TGN and other holders for public contracts and, also, because disputes related to the investment ought to have been referred to Argentine courts.

The tribunal rejected these arguments, noting that CMS was not a party to the licensing arrangement concluded by the Government and TGN, and thus was not bound by its arrangements for dispute settlement (i.e. recourse to Argentine courts). In any event, the tribunal noted that even if CMS were a party to the licensing agreement, this would not restrict CMS to pursuing its grievances in the local courts system. Citing earlier ICSID cases, the tribunal noted that:

"... the clauses in the License or its Terms referring certain kinds of disputes to the local courts of the Republic of Argentina are not a bar to the assertion of jurisdiction by an ICSID tribunal under the (bilateral investment) Treaty, as the functions of these various instruments are different."

This underscores an important lesson for governments which have entered into bilateral investment treaties without a full appreciation for their implications: generally speaking, such treaties will express a generic consent to arbitration of claims alleging violation of the treaty's substantive investment protections.

Although alleged violations of the contract itself would need to be raised in the specified (local) court, foreign investors in Argentina will often enjoy the ability to allege violations of relevant investment treaties before international arbitration tribunals (indeed, this may even require that tribunals grapple with interpreting the contract, in order to assess the alleged breach of treaty protections; see next story).

Despite upholding jurisdiction in the case, the tribunal did acknowledge a concern raised by the Argentine Republic: that a finding of jurisdiction to hear CMS's claim could lead to a situation where the licensee firm, TGN, might come to a settlement with the Argentine Government in its ongoing negotiations, while an ICSID tribunal might go on to hand down a damages award to CMS, in relation to its minority shareholding in TGN.

Despite this concern, the tribunal noted that it was not for it to "rule on the perspectives of the negotiation process or on what TGN might do in respect of its shareholders, as these matters are between Argentina and TGN or between TGN and its shareholders." The CMS case will now proceed to a hearing on its merits which will remain closed to the public. At the conclusion of the arbitration, the final award is expected to be published by one or both of the parties.

Sources:

INVEST-SD Interviews

CMS v. Argentine Republic, Decision on Jurisdiction, July 17, 2003, available at:

http://www.asil.org/ilib/cms-argentina.pdf

2. Vivendi Will Resubmit Argentine Water Claim, Following Recent ICSID Decision, By Luke Eric Peterson

An annulment committee at the International Center for Settlement of Investment Disputes (ICSID) has issued a further decision in a high-profile dispute between the Argentine Republic and Vivendi Universal.

The case arises out of a hotly contested water concession in the Tucuman province of Argentina and pre-dates Argentina's financial crisis.

The investors, Compañía de Aguas del Aconquija S.A. and Vivendi Universal, have complained of obstruction and harassment from various branches of the Tucuman provincial government, amounting to violations of the France-Argentina bilateral investment treaty. Meanwhile, the Argentine Republic has countered that the investor was responsible for various failures under the concession contract.

The most recent decision in the Vivendi case finally turns a page on a dispute which was first registered at ICSID in February of 1997. The decision also paves the way for the claimants to mount a new investment treaty claim.

Vivendi is expected to mount such a claim later this summer.

It had appeared that Vivendi would mount such a claim last year after the annulment committee partially annulled an award handed down by the original tribunal. In that decision, the annulment committee had ruled that the tribunal failed to exercise its powers, when it declined to examine bilateral investment treaty claims which were closely intertwined with alleged contract violations.

Although the original tribunal had found jurisdiction to examine Vivendi's claim, it went on to dismiss the claim at the merits stage, on the grounds that the alleged treaty claims could not be disentangled from the alleged contract claims, and that the latter were to be examined by the administrative courts of Tucuman as specified in the concession contract.

The annulment committee rejected this reasoning of the tribunal, and held that the investment treaty gave the investors an avenue for claiming breaches of the substantive rights and protections set out in the treaty - and if analysis of the treaty claims required that a tribunal grapple with the interpretation of the concession contract itself, then the committee reasoned that this was the duty of the tribunal.

However, before the claimants could capitalize on the annulment committee's decision, and mount a new claim at ICSID, the Argentine Republic sought to challenge the annulment decision by invoking ICSID's process for supplementation and rectification.

This process is designed to permit a tribunal or committee the opportunity to address any questions which it had omitted to answer in its earlier decision or award, as well as to rectify any arithmetical, clerical or other errors.

The annulment committee has now examined these requests, and in a decision transmitted to the parties on May 28, 2003, it rejected most of Argentina's requests. Notably, it made certain to stress that the supplementation and rectification process: "... in no way consists of a means of appealing or otherwise revising the merits of the (annulment) decision".

Nor, the committee argued, does the process allow for an examination of the "correctness" of the underlying arbitral award which the committee had examined.

The committee went on to note that the Argentine Republic had requested rectification of 7 separate points, many of which went to "substantive" matters, rather than the merely "accessory" types of alleged errors which the process is designed to assess.

Although the rectification and supplementation process has now been concluded, the Argentine Republic may be afforded an opportunity to raise some of these substantive arguments when the investors resubmit their claim to ICSID later this summer.

Negotiations Watch:
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3. India Standing Firm Against WTO Investment Pact; Links Arms with China in Opposition,
By Luke Eric Peterson

On the margins of a WTO meeting of more than two dozen trade ministers in Montreal this week, representatives of India and China, the two largest developing countries, affirmed their opposition to a proposed WTO investment agreement.

Dismissing western calls for a launch of investment negotiations, Indian minister Arun Shourie warned that "Nobody would like to take the first step without knowing where it will all lead." India's position - now echoed by China - continues to be that the so-called modalities for negotiation must be explicit and clear, before any talks could be launched.

Sources within the Indian Commerce Ministry have been reported in the Indian press as criticizing the "extremely vague" proposals which have been put forward for a WTO Investment Agreement. A number of proponents of such a pact have argued that negotiations should be mounted at next month's WTO Ministerial conference in Cancun, despite widespread and continuing disagreements about what a WTO investment agreement should look like, and what it should cover.

Pointing to similar vagueness which surrounded another issue which was pushed onto the WTO agenda, intellectual property rights, Indian commerce ministry officials warn that India is not prepared to make another "blind" approach to negotiations on a potentially crucial set of issues.

Meanwhile, reports out of India suggest that the Prime Minister's office has given the Commerce ministry firm political backing to resist all efforts by developed countries to link western concessions on issues such as agricultural trade to Indian acquiescence to investment talks.

It was the recalcitrance of India at the 2001 WTO Ministerial Conference in Doha, which prevented investment negotiations from being launched at that time. Following an eleventh hour compromise, trade ministers agreed to an awkwardly drafted agreement that negotiations would be launched only "after the Fifth Session of the Ministerial Conference (i.e. the Cancun Conference in 2003), on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations."

Failure to agree on the level of detail of such "modalities", has led to deadlock between delegates at the WTO in Geneva, and might yet thwart movement on the issue in Cancun.

Sources:

"India to Oppose Multilateral Investment Regime at WTO", By Sushma Ramachandran, The Hindu, July 30, 2003

"India, China come Together on Key WTO Issues", The Economic Times of India, July 30, 2003

"India Warns WTO of a Backlash", By Sushma Ramachandran, The Hindu, July 31, 2003

4. Financial Times Readers continue to Joust over WTO Investment Pact

This week, readers of the Financial Times of London continue to joust over the arguments put forward in an earlier opinion column by Kavalit Singh (See "Financial Times Op-Ed Opposes Launch of WTO Investment Agreement", INVEST-SD News Bulletin, July 8, 2003).

Stockholm trade policy analyst, Kerstin Berglof, argues that the commitments on transparency and on pre-establishment treatment (i.e. before an investor enters a country) would distinguish any WTO investment agreement, from bilateral treaties which have proven less effective at stimulating new investment flows.

This view was countered by Steven Kelk, of the University of Warwick, who argued that demandeurs of a WTO investment pact are after far more than mere transparency: "They are about promoting far-reaching levels of market access for foreign investors and removing the right of a country to discriminate in favour of its fledgling, vulnerable industries."

Finally, Noboru Hatakeyama, a former Japanese Vice-Minister for Trade argues in a Aug. 1 op-ed piece that trade and investment are so closely intertwined that the latter ought to be dealt with at the WTO. Additionally, he argues that a multilateral pact could be designed to encourage greater investments by small and medium sized enterprises in developing countries.

Full texts of letters from Berglof and Kelk can be found at:
www.investmentwatch.org/articles/ft28july.html and
www.investmentwatch.org/articles/ft31july.html

A copy of Hatakeyama's op-ed piece can be found at:
http://news.ft.com/servlet/ContentServer?pagename=FT.com/StoryFT/FullStory&c=StoryFT&cid=1059478624618&p=1012571727126

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