INVEST-SD: Investment Law and Policy News Bulletin, July 13, 2005

Published by the International Institute for Sustainable Development
(http://www.iisd.org/investment/invest-sd/)

Contents at a glance:

Arbitration Watch

1. Tribunal renders award in Energy Charter dispute against Kyrgyzstan

2. Chilean firm seeks to annul arbitral decision in Peruvian environmental wetlands case

3. Energy firms serve Bolivia with notice of investment treaty disputes

4. Tribunal OKs treaty-shopping for better arbitration options in Gas Natural case

5. Tribunal affirms jurisdiction in AES arbitration with Argentina

Negotiation Watch

6. New Zealand-Thai Economic pact offers broad investment rules with some exceptions

Briefly Noted

7. WTO panel reportedly rules against Mexican tax which has stymied US investors

----
Arbitration Watch:
----

1. Tribunal renders award in Energy Charter dispute against Kyrgyzstan,
By Luke Eric Peterson

An international arbitral tribunal sitting in Stockholm has rendered an award in favor of a UK firm, Petrobart Limited, in its dispute with the Kyrgyz Republic. The Republic has since moved to challenge that award in the Swedish courts.

In its award dated March 29, 2005, the tribunal found that the Kyrgyz Government was liable for certain breaches of the Energy Charter Treaty (ECT), specifically by virtue of its failure to provide fair and equitable treatment and to provide effective avenues for

investors to enforce their rights under domestic law.

The arbitral ruling marks only the second known instance where an international tribunal has handed down a final decision on an investment dispute under the ECT, a multilateral trade and investment treaty governing the energy sector. An award was rendered in another case Nykomb v. Latvia in December of 2003 (See "Swedish firm wins Energy Charter Treaty case against Republic of Latvia", available on-line at: http://www.iisd.org/pdf/2003/investment_investsd_dec19_2003.pdf).

The Petrobart-Kyrgyzstan dispute stemmed out of a sales contract struck between the UK firm with KGM, a Kyrgyz state joint stock company charged with procuring and delivering energy to Kyrgyz consumers.

The two parties had agreed to an arrangement whereby Petrobart would deliver 200,000 tonnes of stable gas condensate to KGM over a one-year period, to be supplied on a monthly basis from outside the country.

According to the tribunal's finding of facts, Petrobart delivered five shipments but was only paid for the first two. Moreover, upon turning to domestic courts for recourse, the firm was frustrated by various moves on the part of Kyrgyz authorities, including a decision to privatize KGM, and to transfer its assets, but not its liabilities (including monies owed to Petrobart) to the new company.

A critical issue facing the tribunal was whether Petrobart had an "investment" in Kyrgyzstan for purposes of the Energy Charter Treaty. In an earlier arbitration, a separate tribunal had ruled in February of 2003 that Petrobart's sales contract with KGM did not qualify as a foreign "investment" under the terms of Kyrgyzstan's Foreign Investment Law.

After losing that arbitration claim, the firm turned to a second arbitration under the Energy Charter Treaty in September of 2003. The ECT arbitration was heard at the Stockholm Chamber of Commerce's Arbitration Institute before a tribunal consisting of Prof. Ove Bring, Mr. Jeroen Smets, and former Justice Hans Danelius.

In its ruling, that tribunal examined the provisions of the ECT, as well as other recent investment treaty arbitrations, and came to the conclusion that "a right conferred by contract, to undertake an economic activity concerning the sale of gas condensate is an investment according to the Treaty." This finding would pave the way for Petrobart to characterize its dispute with Kyrgyzstan as an investment dispute, one which could be resolved under the investment arbitration facility provided in the ECT.

In the end, the tribunal awarded damages to Petrobart for its unpaid invoices; however it declined to compensate the firm for future lost profits.

A full copy of the arbitral award has been posted on-line in the Documents Centre maintained by INVEST-SD: http://www.iisd.org/investment/invest-sd/documents.asp

2. Chilean firm seeks to annul arbitral decision in Peruvian environmental wetlands case, By Luke Eric Peterson

Following the rejection of its investment treaty claim against Peru, Chilean firm Lucchetti and its Peruvian subsidiary, are seeking to annul the ICSID jurisdictional decision which stopped the claim from proceeding.

The two sides have long been in dispute over the Chilean firm's pasta factory located adjacent to an environmental wetlands preserve in the municipality of Lima.

Lucchetti turned to arbitration in 2001, after the municipality revoked its license to operate, following earlier legal skirmishes over environmental permitting for the site.

It was the long-running nature of Lucchetti's problems with Peruvian officials which led an ICSID tribunal to rule that the firm's dispute was a single one – stretching back to the period prior to the coming into force of the Chile-Peru bilateral investment treaty. By virtue of the dispute being held to have arisen prior to the entry into force of the treaty, the tribunal ruled that Article 2 of the treaty expressly excluded that dispute from being arbitrated under the treaty.

As was reported in an earlier edition of this News Bulletin, "In finding that the dispute predated the treaty's entry into force, the tribunal rejected arguments put forward by the claimants to the effect that there had been two separate disputes between the investors and the host government, with the first having been resolved when Peruvian courts overrode the annulment of the investors' permits in 1998, and the second having commenced only when the Lima municipality revoked the firm's operating licence in 2001."

Lucchetti's request for annulment was officially registered by the ICSID facility on July 1st, 2005. An ad-hoc committee, selected by ICSID's Secretariat, will now examine whether the arbitral award can be annulled on any of 5 grounds set out under the ICSID arbitration rules. These grounds are: "that the Tribunal was not properly constituted; that the Tribunal has manifestly exceeded its powers; that there was corruption on the part of a member of the Tribunal; that there has been a serious departure from a fundamental rule of procedure; that the award has failed to state the reasons on which it is based".

Of 92 investor-state arbitrations currently pending at ICSID - the vast majority of which arise out of investment treaties - 7 are currently in annulment proceedings. Outside of the ICSID system, opportunities for challenging arbitral awards typically lie with the domestic court system of the legal place of arbitration.

Sources:

“Chilean firm loses investment treaty claim against Peru”, Investment Law and Policy News Bulletin, February 22, 2005, available on-line at:
http://www.iisd.org/pdf/2005/investment_investsd_feb22_2005.pdf

3. Energy firms serve Bolivia with notice of investment treaty disputes,
By Luke Eric Peterson

Three multinational energy firms, British Gas, Total and Repsol-YPF, have served Bolivia with formal notice of disputes under bilateral investment treaties signed by Bolivia. According to a source familiar with the disputes, the notices set in motion mandatory consultation periods under the treaties with France, Spain and the United Kingdom. Following the expiration of these consultation periods, the firms could move to formal arbitration.

As was reported in the last edition of this News Bulletin, the firms object to a series of actions, decrees and measures taken by the Bolivian Government in recent months, culminating in the recent passage of the Hydrocarbons law. Of particular concern is the fact that the new Hydrocarbons law obliges foreign investors to enter into new energy contracts which impose a new 32% royalty to be tacked onto an already-agreed 18% royalty rate.

4. Tribunal OKs treaty-shopping for better arbitration options in Gas Natural case,
By Luke Eric Peterson

Another international arbitral tribunal has weighed in on the question as to whether “Most-Favored Nation” treatment offers foreign investors access to more favorable dispute resolution options found in other treaties.

In a jurisdictional decision rendered on June 17, 2005, a tribunal presiding over a claim by Spanish company Gas Natural SDG S.A. against Argentina ruled that the most-favored nation clause of the Spain-Argentina bilateral investment treaty entitled the investor to invoke more favorable dispute resolution provisions found in another investment treaty signed by Argentina with the United States. (Gas Natural is seeking compensation for losses to its shareholding in Argentine gas firm Buenos Aires Norte (BAN) following measures taken by Argentina during its financial crisis.)

The immediate upshot of the ICSID decision is to permit Gas Natural to ignore a requirement in the Spain-Argentina BIT for investors to have recourse to local courts for a period of 18 months, prior to turning to international arbitration of disputes under the treaty.

The tribunal, consisting of Mr. Henri C. Alvarez, a Canadian lawyer, Dr. Pedro Nikken, a former Judge of the Inter-American Court of Human Rights, and Andreas Lowenfeld, a

Professor at New York University, rejected Argentina's contention that the MFN clause extended to substantive investment protections, but not to procedural matters.

Lluis Paradell, of the law firm Freshfields Bruckhaus Deringer, represented Gas Natural in the arbitration. He says that the decision is notable because it reaffirms a decision in an earlier ICSID case Maffezini v. Spain. Paradell also notes that the tribunal seems to have gone further in deeming access to arbitration to be an integral part of the bundle of "substantive" rights offered in an investment treaty. In its reasoning, the tribunal ruled that access to "independent international arbitration is an important - perhaps the most important – element in investor protection."

The tribunal did take note of another arbitral decision, Salini v. Jordan, which touched upon the perennially thorny MFN issue - and which reined in the use of the MFN clause in another context. Perhaps more notable, however, was the failure of the Gas Natural tribunal to discuss a second recent arbitral decision rendered at ICSID in the case of Plama Consortium Limited v. Republic of Bulgaria. The Plama case was decided some time after arguments had been made in the Gas Natural case; however it was published several months before the Gas Natural tribunal issued its decision in June of this year. In the Plama case, an ICSID tribunal rejected an effort by the foreign investor to use an MFN clause to lay claim to better arbitration provisions found in another investment treaty signed by Bulgaria. Indeed, the tribunal ruled that the MFN clause did not apply to procedural matters because there was no express indication of such scope in the relevant treaty.

By contrast, the Gas Natural tribunal reached what Lluis Paradell characterizes as an opposite reading, when it gave the benefit of the doubt to investors in ruling that "Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for dispute resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement."

Apart from the MFN question, the tribunal in the Gas Natural claim also rejected arguments by Argentina which would have denied jurisdiction to hear the case on the grounds that it dealt with non-arbitrable "measures of general economic policy" and that, as an indirect shareholder in an Argentine gas firm, Gas Natural could not bring claims under the Spain-Argentina BIT.

After rejecting both of these jurisdictional objections, the tribunal paved the way for the claim to be heard on the merits. Whether or not the case will proceed, remains unclear. As was reported in this News Bulletin in March, Gas Natural has agreed to withdraw its claim at ICSID, and is pursuing a negotiated settlement with Argentine authorities, including renegotiation of its contracts. For the moment, however, the ICSID arbitration remains open.

Sources:

Gas Natural SDG S.A. v. Argentine Republic, Decision of the Tribunal on Preliminary Questions of Jurisdiction, ICSID Case No. ARB/03/10, June 17, 2005

Available on-line at: http://ita.law.uvic.ca/alphabetical_list.htm#gi or

http://www.investmentclaims.com/decisions/Gas%20Natural%20SDG%20-%20Jurisdiction.pdf

5. Tribunal affirms jurisdiction in AES arbitration with Argentina,
By Luke Eric Peterson

An ICSID tribunal has upheld jurisdiction to hear a claim by the US-based AES Corporation under the terms of the US-Argentina bilateral investment treaty. A copy of the April 26, 2005 decision on jurisdiction was recently obtained by this News Bulletin. It is now available on-line at: http://www.iisd.org/investment/invest-sd/documents.asp

AES has stakes in eight electricity generation companies and three "major" electricity distribution companies in Argentina. In its pleadings to the tribunal, the firm indicated that it has invested approximately $1 Billion (US) in Argentina. In common with a multitude of other foreign investors, AES seeks compensation for losses arising out of measures taken by Argentina in relation to its financial crisis.

AES's claim is being heard by a 3-member tribunal consisting of Professor Karl-Heinz Bockstiegel, Prof. Domingo Bello Janeiro, and Prof. Pierre-Marie Dupuy. In its decision on jurisdiction, the tribunal rejected five separate arguments put forward by Argentina in an effort to challenge the tribunal's jurisdiction.

Echoing other tribunals hearing claims against Argentina, the tribunal held that AES's claim did not seek to challenge general economic policies pursued by Argentina, but rather the impact of those policies on the legal and regulatory framework which AES had relied upon in making its investments in Argentina.

The case now proceeds to a hearing on the merits.

Negotiation Watch:
----

6. New Zealand-Thai Economic pact offers broad investment rules with some exceptions,
By Bonnie Penfold and Luke Eric Peterson

A Closer Economic Partnership Agreement (CEPA) between New Zealand and Thailand came into force on July 1st of this year. The agreement, which replaces a 1981 trade agreement between the parties, contains a broad spectrum of commitments, including provisions on investment, as well as on trade in goods, services, intellectual property, technical barriers to trade, sanitary and phyto-sanitary measures, competition, e-commerce and procurement. The agreement also includes side agreements on labour and the environment.

The CEPA's investment chapter does not apply to services or procurement, subjects which are dealt with in separate chapters of the agreement.

The investment chapter does offer a narrow and heavily reserved right to national treatment is agreed in respect of establishment and acquisition of investments. Most-Favored Nation treatment is provided at the post-establishment phase (i.e. once an investment has been established and approved); however this grant does not extend to the dispute resolution procedures. As such, the agreement squelches efforts by foreign investors to "shop" for better arbitration provisions under other investment treaties.

In terms of the dispute settlement provisions offered in the investment chapter, the agreement provides that the parties "may agree to submit" disputes to local courts or to international arbitration. The provision does not appear to provide for the automatic consent of state-parties to international arbitration; recourse to UNCITRAL and ICSID arbitration is offered on the condition "that the other Party does not withhold its consent".

Other protections extended by the agreement include a novel protection standard which guarantees "appropriate protection" for covered investments. Missing from the treaty are more familiar duties to provide "fair and equitable treatment" and "full protection and security".

In terms of protection in the event of expropriation, the treaty provides a standard guarantee of "prompt, adequate and effective compensation" in the event of expropriation or measures equivalent to expropriation. Notably, the treaty does not adopt clarification language similar to that introduced into some recent investment treaties to ensure that legitimate health, safety or environmental regulations will rarely be considered to rise to the level of an expropriation. However, the treaty does contain a general exception, applicable to the entire agreement - one rarely found in bilateral investment treaties - ensuring that the provisions of the agreement do not prevent the adoption or enforcement of legitimate measures "necessary to protect human, animal or plant life or health".

Free transfers (of profits, remittances, etc.) are protected under the agreement; however in cases of serious external financial difficulty, temporary restrictions on transfers are countenanced by the agreement. Notably, the agreement adds a novel caveat to its safeguards language: "In determining the incidence of such restrictions, the Parties may give priority to economic sectors which are more essential to their economic development. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular sector."

This is not the only concession to development policy-making. The agreement also safeguards the ability of a government to provide special subsidies or grants to its own domestic investors or investments, without needing to extend such treatment to non-nationals. Many narrower bilateral investment treaties fail to shelter subsidies in this manner.

The NZ-Thai agreement also introduces another novel innovation, whereby parties may, with three month's notification, modify their commitments made under Article 9.5 of the Agreement. The other party may request negotiations over the withdrawal of such commitments, "with a view to reaching agreement on any necessary adjustment required to maintain a general level of mutually advantageous commitments not less favorable to trade than that provided in schedules of specific commitments prior to such negotiations." Where the two governments fail to reach an agreement, they may refer the matter to state-to-state arbitration under the Comprehensive Economic Cooperation Agreement (CEPA).

Finally, the CEPA also reserves New Zealand's right to adopt legitimate measures which "it deems necessary to accord more favourable treatment to Maori (indigenous people) in respect of matters covered by this Agreement including in fulfillment of its obligations under the Treaty of Waitangi".

Sources:

New Zealand – Thailand Closer Economic Partnership Agreement
http://www.mft.govt.nz/tradeagreements/thainzcep/pdfs/thainzcep-december2004.pdf

Rt. Hon Helen Clark, Address Marking the Signing of the NZ-Thai CEP, April 20, 2005
http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=22753

"Thai Trade Agreement Comes into Force", New Zealand Government press release, July 1, 2005, http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=23545

Briefly noted:
----

7. WTO panel reportedly rules against Mexican tax which has stymied US investors

According to press reports, a preliminary ruling by a World Trade Organization dispute settlement panel has found Mexico's tax on high fructose corn syrup (HFCS) to violate world trade rules.

Reuters, citing several trade sources, reported on June 28th that an interim WTO panel decision sent to the US and Mexico held Mexico's HFCS tax to discriminate against US HFCS imports intended for use in the Mexican soft drink industry. A formal panel ruling

is expected this August. Mexico could elect to appeal that ruling under WTO rules.

The HFCS tax is also the subject of several arbitrations brought by US-based agricultural firms under the North American Free Trade Agreement. The US firms allege that Mexico is discriminating unfairly in favor of domestic sugar producers. As reported in the last edition of this News Bulletin, Mexico's effort to have those NAFTA investor-state arbitrations consolidated under the jurisdiction of a single tribunal was rejected recently (See: "NAFTA consolidation tribunal rejects Mexico's request to merge sweetener disputes", Investment Law and Policy News Bulletin, June 30, 2005, at: http://www.iisd.org/pdf/2005/investment_investsd_june30_2005.pdf)

To subscribe to INVEST-SD Bulletin, email the editor at:
lpeterson@iisd.ca

Past issues of INVEST-SD News Bulletin available on-line at:
http://www.iisd.org/investment/invest-sd/archive.asp

Subscribers may submit news articles, notices of events, press releases, analyses, questions and requests for information to lpeterson@iisd.ca

The opinions distributed in the INVEST-SD Bulletin do not necessarily represent the views of the International Institute for Sustainable Development (IISD) or its partners or funders. Nor does the INVEST-SD News Bulletin purport to provide legal advice of any kind.