INVEST-SD: Investment Law and Policy Weekly News Bulletin, July 2, 2004

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

Contents at a Glance:

Arbitration Watch:
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1. Chairman of Tribunal Resigns After Dissenting in Investment Arbitration,

By Luke Eric Peterson

The Chairman of an international investment tribunal has resigned following a split decision on jurisdiction in a recent treaty-based arbitration at the International Centre for Settlement of Investment Disputes (ICSID).

As reported last month, Professor Prosper Weil dissented from a majority decision upholding jurisdiction in the case of Tokio Tokeles v. Ukraine.

Weil objected to the efforts of Ukrainian citizens to qualify as Lithuanian investors under the terms of an investment treaty concluded between the Ukraine and Lithuania.

A majority of the tribunal found jurisdiction to hear the claim, contending that parties to the investment treaty had clearly set the bar of corporate nationality quite low - permitting nationals of one state to incorporate in the other, and to re-invest in their home territory as "foreign" investors.

Following the issuance of a sharp dissenting opinion in the case - warning against the misuse of the ICSID system - Prof. Weil has resigned his chairmanship of the Tokio Tokeles arbitration.

According to Antonio Parra, Deputy Secretary General of ICSID, this marks the first time that a Chairman has resigned from a tribunal after dissenting from an interim decision in an arbitration.

In an earlier ICSID investment arbitration involving the government of Egypt and Southern Pacific Properties (SPP), an Egyptian-appointed arbitrator had dissented at the jurisdictional phase but remained part of the tribunal (and would go on to dissent at the merits phase of the proceeding as well).

Under the rules of ICSID, a new Chairman will be appointed in the Tokio Tokeles case by the ICSID secretariat, and the case will proceed to a hearing on the merits.

Sources:

INVEST-SD Interviews

"ICSID Tribunal splits sharply over question of corporate nationality", By Luke Eric Peterson, INVEST-SD News Bulletin, June 11, 2004

2. Canadian Province Rejects Public Auto Insurance; Think-Tank Sees Treaty Chill,
By Luke Eric Peterson

The Canadian province of New Brunswick has rejected a proposal for a public system of automobile insurance, leading to charges by one Canadian Think-Tank that the government caved in to fears of litigation under international trade and investment treaties.

In an announcement earlier this week, NB Premier Bernard Lord announced that his government would reject the findings of a Select Committee on Public Automobile Insurance which had recommended a move to a public

scheme.

Instead, the government will pursue a series of reforms and regulations designed to push down prices in the private marketplace.

Steep insurance costs became an election issue during provincial elections in 2003 and upon returning to power with the slimmest of legislative majorities the government promised to address the issue and struck a Select Committee to explore various policy options.

In a report handed down in April of this year, that Committee called for a "Made-in-New-Brunswick" insurance scheme which would be underwritten by a state-owned Crown Corporation.

This week the Lord government rejected the Committee's proposal, pointing to a separate study by the accountants PriceWaterhouseCoopers which questioned the savings that would be had by shifting to a public scheme.

As reported earlier in INVEST-SD News Bulletin, insurance industry officials had threatened litigation under international trade and investment agreements in the event that a public scheme was introduced in New Brunswick to the detriment of private insurers.

It is not clear to what extent these threats colored the decision of the New Brunswick government to reject a public scheme.

The study commissioned by the government from PriceWaterhouseCoopers did not seek to quantify the potential financial risks arising from litigation by affected foreign investors under international trade and investment agreements. Nor did the government refer to litigation risks in its public comments this week.

However, the government is known to have taken outside legal advice on the potential trade and investment law implications of the proposed public insurance scheme.

One source familiar with that outside legal advice received by the province of New Brunswick told INVEST-SD News Bulletin that the government was advised that a shift to a public scheme might constitute an expropriation of the market share of existing (foreign-owned) private-players in the NB market.

This view appears to be in line with separate advice provided to New Brunswick, and three other Eastern Canadian provinces, in a publicly available legal opinion of the Canadian law firm McCarthy Tetrault.

That opinion, given to the Council of Atlantic Premiers in September of 2003, warned that "to the extent that the replacement of private automobile insurance with a mandatory public insurance system were to deprive private insurance providers of the use or expected economic benefit of their investments" it might be argued that this constitutes an expropriation under the NAFTA and other bilateral investment treaties concluded by Canada with various other nations.

In a briefing paper issued this week, the Canadian Center for Policy Alternatives has criticized the New Brunswick government for backing down in the face of "aggressive threats of trade treaty litigation - and behind-the-scenes lobbying by federal trade officials"

The Center warns that the case illustrates how trade and investment agreements entered into by Canada's federal government intrude upon areas of provincial jurisdiction, and have come to exert a chill upon "democratic decision-making".

Sources:

"Auto insurance reforms to lower rates, increase choice, help first-time drivers", Communications New Brunswick, News Release, June 29, 2004, available at:
http://www.gnb.ca/cnb/news/jus/2004e0750ju.htm

"public auto insurance and trade treaties", By Steve Shrybman and Scott Sinclair, CCPA Briefing Paper Vol.5, No.1, June 2004, www.policyalternatives.ca/whatsnew/autoinsurancepr.html

"International Treaty Implications Color Canadian Province's Debate over Public Auto Insurance", By Luke Eric Peterson, INVEST-SD News Bulletin, May 11, 2004

McCarthy Tetrault, Memorandum Re: Atlantic Canada Insurance Harmonization Task
Force, September 9, 2003, available on-line at:

http://www.capcpma.ca/images/worddocuments/Memo%20re%20International%20Trade.doc

3. UK-based firm pursues Energy Charter Treaty claim against Kyrgyzstan,

By Luke Eric Peterson

INVEST-SD News Bulletin has learned that a UK-based investor is pursuing a claim against Kyrgyzstan under the terms of the Energy Charter Treaty, a multi-party trade and investment agreement.

The claim marks the fifth* known case to surface under the Energy Charter regime - a system forged in the early 1990s to set common international ground rules for cross-border energy commerce.

According to a source familiar with the claim, the investor first mounted an unsuccessful arbitration under the Kyrgyz foreign investment law when the firm was denied payments under a gas delivery contract with a Kyrgyz state-owned entity.

A Stockholm-based tribunal in that case declared the claim inadmissible on the grounds that the contract did not qualify as an investment under the relevant law.

Following the tribunal's ruling, the UK firm has turned to the Swedish Court of Appeal in an effort to challenge the decision.

At the same time, the investor has opened up a second front in its legal battle by bringing suit under the Energy Charter Treaty.

According to the source, a tribunal is expected to convene hearings in the autumn. Kyrgyzstan objects to the second arbitration on the grounds that the dispute has already been resolved by the first tribunal, however the UK firm insists that the second arbitration is a distinct legal matter under a wholly different regime (i.e. the Energy Charter regime).

INVEST-SD News Bulletin will continue to monitor the two disputes as they go forward.

Sources:

INVEST-SD Interviews

* Other claims mounted under the Energy charter Treaty: AES v. Hungary (settled); Alstom Power Italia SpA and Alstom SpA v. Mongolia (pending at ICSID); Plama Consortium Ltd. v. Bulgaria (pending at ICSID); Nykomb Synergetics v. Latvia (see next story)

4. Latvia to Honor Energy Charter Treaty Award,
By Luke Eric Peterson

According to a source familiar with the case, the Latvian Republic plans to pay a damages award levied upon it by an arbitration tribunal in a dispute under the Energy Charter Treaty.

The Republic was ordered to pay damages arising out of a dispute with the Swedish firm Nykomb Synergetics. In December of 2003, a Stockholm-based tribunal ruled that Latvia had violated provisions of the Energy Charter Treaty when it failed to pay Nykomb a premium tariff, as had been earlier promised, for electricity generated by a Nykomb-owned plant in Latvia.

The award is thought to be the first to be handed down by a tribunal under the Energy Charter regime, and has not been published by the parties as yet.

The decision of Latvia to honor the award does not come as a complete surprise.

As reported in an earlier edition of INVEST-SD News Bulletin, the Republic underwent a bout of soul-searching following its loss in an earlier investment treaty arbitration - Swembalt v. Latvia - and the government's failed attempts to challenge that award in Danish courts.

An internal report prepared by the Latvian Justice ministry lamented the expense incurred in Latvia's unsuccessful challenge to the Swembalt award and concluded that the government "should have executed the ruling immediately".

Latvia's experience with the Swembalt arbitration may well have colored its handling of the more recent Nykomb arbitration.

A source familiar with the Republic's thinking in the latter case confirms that Latvia intends to honor the award - rather than challenge it - and has notified the Swedish firm of its intention.

However, the same source cautioned that payment would not be immediate due to the fact that a considerable amount of budgetary "red-tape" needs to be navigated before a payment can be disbursed.

Sources:

INVEST-SD Interviews

"Latvia Could See Two New Treaty Arbitrations; Reflects on Two Earlier Losses," By Luke Eric Peterson, INVEST-SD News Bulletin, April 5, 2004

"Swedish firm wins Energy Charter Treaty case against Republic of Latvia", By Luke Eric Peterson, INVEST-SD News Bulletin, Dec.19, 2004

5. US Supreme Court Upholds "Alien Torts" Suits Targeting Corporations, By Luke Eric Peterson

The US Supreme Court has handed down a decision which narrows - but reaffirms - the ability of non-US citizens to bring claims in US courts alleging violations of the laws of nations.

The Court was asked to examine the Alien Torts Claims Act - a long-ignored eighteenth century statute which has been disinterred in recent years by victims of alleged human rights abuses.

Business groups including the National Foreign Trade Council and the US Council for International Business have long criticized the statute, arguing that Alien Torts claims can complicate US foreign policy by embarrassing allies and straining relations with those countries where US multinationals do business.

The objections of these groups have not been without some irony, however.

Many of the same business groups which oppose the alien torts process have been strong proponents of international investment treaties which permit commercial actors to file claims against foreign governments, including key US allies.

In recent months these groups have supported efforts by the Bush Administration to pursue such investment agreements with Australia, Costa Rica, and the Dominican Republic - all of whom were members of the US-led coalition which invaded Iraq in 2003.

Indeed, some dozen members of the so-called Coalition of the Willing have already concluded bilateral investment treaties which might expose them to potentially embarrassing international litigation by US business interests.

Moreover, the Administration is reportedly considering such an

arrangement with Pakistan - with whom the US has particularly sensitive foreign policy relations in the aftermath of the September 11th terrorist attacks.

Notwithstanding the potential for embarrassing investor-state claims to arise, the Administration has not signaled any discomfort with the prospect that US businesses might launch investor-state arbitrations which irritate key allies or jeopardize sensitive foreign relations.

Nevertheless, the Administration has criticized the alien torts process on the grounds that human rights suits against US corporations or other entities may have some knock-on impact upon foreign relations.

Indeed, US officials have intervened in several alien torts cases in an effort to have those cases dismissed by US courts.

In one case brought on behalf of Indonesian villagers allegedly harmed by Exxon-Mobil and Indonesian security forces, State Department lawyers argued that the lawsuit could have "a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism."

And, earlier this spring, the Administration argued before the Supreme Court in another case, Sosa v. Alvarez-Machain, that the mere filing of an Alien Torts claim can have the potential to "implicate and inflame international tensions or disagreements over highly sensitive matters".

Notwithstanding the desire of the Bush Administration and various business groups to shelter US allies from being implicated in potentially-embarrassing human rights suits, the Supreme Court declined this week to close down the Alien Torts process.

The Court signaled that claimants should continue to enjoy the right to bring claims for damages in US courts where there has been an alleged breach of a "narrow" category of international law norms.

While the court rejected Mr. Alvarez's efforts, in the instant case, to characterize a brief period of arbitrary detention as rising to the level of an alien torts breach, the Court noted that it would be appropriate to permit a claim based upon "a norm of international character accepted by the civilized world and defined with a specificity comparable" to 18th century (internationally) illegal acts such as piracy or interference with an ambassador.

The decision has been hailed by human rights groups as paving the way

for claims of egregious human rights abuses (torture, extra-judicial killing and genocide) to go forward in the US courts.

EarthRights International, which has brought several alien torts claim in US courts, including one on behalf of Burmese villagers allegedly harmed by the US-based Unocal corporation and Burmese security forces, has said that the Supreme Court's ruling will permit that case to proceed.

Rick Herz, Staff Attorney at EarthRights, said: "The Supreme Court has validated the last 24 years of consistent case law allowing victims to seek justice in U.S. courts. We are going to continue to seek to hold abusers, and the corporations that assist them, accountable."

Meanwhile, the National Foreign Trade Council has hailed the Supreme Court's 'raising of the bar' in the Sosa case, by narrowing the types of international claims which may be brought forward.

In a press release, the group reiterated its opposition to any use of the Alien Torts process: "Distorting the American legal system by using the ATS (Alien Torts Statute) helps no one - it strains U.S. bilateral relations, discourages much needed U.S. foreign direct investment in developing countries and actually impedes the goals of those filing the lawsuits."

Sources:

"NFTC and USA*Engage Cite U.S. Supreme Court Decision To More Narrowly Define Alien Tort Provision as Important Step In Curbing Erroneous Lawsuits", National Foreign Trade Council, Press Release, June 30, 2004

Sosa v. Alvarez-Machain et.al., US Supreme Court Decision of June 29, 2004, at:
http://a257.g.akamaitech.net/7/257/2422/29june20041115/www.supremecourtus.gov/opinions/03pdf/03-339.pdf

"ATCA Lives!", EarthRights International Press Release, June 29, 2004

"NFTC and USA*Engage Urge Supreme Court to Restore 'True Meaning' of Alien Tort Provision", Press Release, January 23, 2004
http://www.usaengage.org/press_releases/2004/20040123%20Sosa%20amicus%20filed.html

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