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Arbitration Watch:
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1. Detailed ICSID amendments tabled, openness pondered, appeals facility nixed,
By Bonnie R. Penfold

The Secretariat of the International Centre for Settlement of Investment Disputes (ICSID), a prominent venue for international investment treaty arbitration, has released a second discussion paper on procedural reform following up on proposals first published in October 2004.

In the October paper - "Possible Improvements of the Framework for ICSID Arbitration" – the ICSID Secretariat had suggested a variety of procedural changes to its arbitration rules, as well as the creation of a centralized appeals facility to be housed at the Centre.

In its follow-up paper released on June 2 (see: http://www.worldbank.org/icsid/052405-sgmanual.pdf), the ICSID Secretariat has revisited its proposals in view of extensive comments and inputs received from a broad range of stakeholders, including ICSID member governments, business and civil society groups, law firms and other international arbitration centers. The follow-up paper sets forth various proposed amendments which might be adopted by ICSID's Administrative Council in order to update its arbitration rules.

Notably, a proposal for a centralized appeals facility has fallen by the wayside. According to Antonio Parra, ICSID Deputy Secretary-General and the project's caretaker, three chief concerns arose during the consultation process. First, and foremost, an appeals facility was perceived as a big step, and one that should not be taken hastily. Second, there appeared to be a surprisingly wide range of technical issues to resolve if such a facility were agreed in principle; such issues include whether the facility would be a standing or ad hoc body, the appropriate standard of review, and certain obstacles associated with drafting amendments for the ICSID Convention Treaty.

Finally, Parra notes that the urgency for such a facility – which peaked in the fall of 2004 – has dissipated somewhat in recent months. He says that the spectre of multiple, treaty-specific appellate bodies loomed large when the text of the US-Central America Free Trade Agreement was first released (that agreement calls for the eventual elaboration of an appeals facility). Today, there seems to be less likelihood that a multiplicity of such appeals mechanisms will crop up in the short term.

Still, Parra say it was worthwhile that the initial "spade work" for such a body has now been done – and that if such a facility is designed in future, that ICISD is its logical home.

The remaining proposals first mooted in the October discussion paper have been addressed through proposed amendments to a number of the ICSID Rules of Arbitration. The ICSID is inviting public comment on these proposed amendments until June 30 of this year.

Parra indicates that public enthusiasm for the various proposals has differed. While proposals for the mandatory publication of excerpts of ICSID awards, as well as for preliminary procedures such as provisional relief and summary dismissal measures, were well received by stakeholders, there was less enthusiasm for opening hearings to the public.

Nonetheless, the proposed amendments do include one which would permit tribunals to open hearings to members of the public, following consultation with the parties to the

arbitration (but without requiring the consent of the investor and host government, which is currently the case).

As for a proposed change to ICSID rules so as to empower tribunals to receive legal briefs from non-parties to an arbitration (for eg NGOs or interest groups), this authority is now less controversial in the wake of a recent ruling by an ICSID tribunal which affirmed this power (See: "ICSID tribunal OKs amicus intervention in water case, but hearings to remain closed", INVEST-SD News Bulletin, May 27, 2005, available on-line at: http://www.iisd.org/pdf/2005/investment_investsd_may27_2005.pdf

Finally, higher disclosure standards for arbitrators have been contemplated by a proposed amendment which imposes a broader duty of disclosure upon arbitrators to disclose any circumstance – past, present, or future – which might impair their reliability for independent judgment.

Comments on the latest ICSID proposals may be submitted to the ICSID Secretariat in Washington. Input received by June 30, 2005, will inform the next step of the process. If widely endorsed, it is foreseeable that draft rule amendments could go to a vote of the Administrative Council at a meeting scheduled for September of this year. If approved, amendments could go into effect as early as 2006.

2. Argentine Bondholders girding for multi-billion dollar investment treaty claim,
By Luke Eric Peterson

A group representing more than 500,000 retail investors and more than 100 financial institutions with some $39 Billion (US) in outstanding Argentine debt appears to be inching closer to suing Argentina for damages under international law.

The Global Committee of Argentina Bondholders (GCAB) has rejected a recent offer by Argentina on restructuring of its outstanding sovereign debts – an offer that was accepted by some 76% of bondholders who received a reported 34 cents on the dollar.

In December of 2001, Argentina defaulted on its sovereign debt while in the throes of a severe economic crisis. While the Argentine crisis has spawned countless international lawsuits by foreign investors - many of whom held stakes in Argentine public utilities and sustained significant losses during the crisis – holders of Argentine debt have yet to turn to investment treaty arbitration for redress.

Should the debt-holders do so, their cumulative claims could eclipse by a substantial amount the dollar value of all existing investment treaty claims arising out of foreign direct investments in Argentina. One source with the Argentine Attorney General's Office put the value of those latter claims at some $17 Billion (US).

For its part, GCAB insists that Argentina is in a position to offer better terms than those extended earlier this year to bondholders. GCAB has taken outside legal advice from the law firm White and Case in order to explore the possibility of using international investment treaties to obtain fuller compensation for losses.

In documents dated February 15th, 2005, and seen by INVEST-SD, White and Case advised GCAB that recent steps by Argentina could be construed as a sign that the government plans to close the door on further negotiation with hold-out bondholders who declined its recent restructuring offer. As such, the law firm advises that such a move might constitute an expropriation or "repudiation" of its debts contrary to its commitments under some 29 bilateral investment treaties signed by the country.

An invitation letter available on GCAB's website invites bondholders to signal their interest in a potential arbitration claim to be filed at the International Centre for Settlement of Investment Disputes (ICSID).

An ICSID claim by GCAB would not mark the first time that bondholders have used investment protection treaties in order to seek compensation after a default by bond-issuing governments. In the late 1990s, the Russian Government faced an investment treaty claim from a UK-based financial institution which held Russian bonds. The prospect of that claim had been hinted at in the mainstream media; however it was settled on undisclosed terms by the parties prior to formal arbitration.

Sources:

Global Committee of Argentina Bondholders, http://www.gcab.org

"Argentina debt rating upgrade", By Adam Thompson, The Financial Times, June 2, 2005

3. ICSID tribunal issues pair of jurisdictional decisions in financial crisis arbitrations, By Luke Eric Peterson

An ICSID tribunal presiding over two separate arbitrations brought by foreign investors in the Argentine natural gas sector has issued a pair of rulings upholding jurisdiction to hear claims that Argentina has violated the provisions of bilateral investment treaties (BITs) with the United States and Belgium-Luxembourg.

The decisions in Sempra Energy International (ICSID Case No. ARB/02/16) and Camuzzi International S.A. (ICSID Case No. ARB/03/02) were issued on May 11th, by a tribunal consisting of the Prof. Francisco Orrego Vicuna, The Hon. Marc Lalonde, and Dr. Sandra Morelli Rico. Copies of the decisions have been seen by the editor, and have been made available on a new website housing documents cited in this news publication. (See: www.iisd.org/investment/invest-sd/documents.asp)

The disputes arise out of investments made in the 1990s by the two foreign investors in two natural gas distribution companies which serve seven Argentine provinces. Camuzzi owns some 57% of two Argentine companies, Sodigas Sur and Sodigas Pampeana, whilst Sempra owned the remaining 43%. Through these Argentine intermediary companies, the foreign investors held large stakes in two further Argentine companies which hold licenses for natural gas distribution: Camuzzi del Sur S.A. and Camuzzi Gas Pampeana S.A.

At the root of the complaints by the US and Luxembourg firms are a series of measures taken by Argentina around the time of its financial crisis, which had the effect of suspending contractual provisions which were supposed to have ensured that periodic tariff increases would be made according to the US Producer Price Index (PPI), a commonly-used inflation index. The investors also object to the subsequent "pesification" of these tariffs under an emergency law passed by Argentina.

In the autumn of 2002, the foreign firms brought separate requests for arbitration to the International Centre for Settlement of Investment Disputes (ICSID). The two investors struck a deal with Argentina whereby a single tribunal would hear both claims concurrently, presumably to ensure a greater likelihood that the cases would be decided in a uniform manner.

Under the agreement, Sempra and Camuzzi would select one arbitrator jointly, Argentina would select another, and ICSID would select the President of the tribunal.

The decisions on jurisdiction in the two cases were handed down by the tribunal last month, a mere day before a separate tribunal, consisting of two of the same arbitrators - Messers Lalonde and Orrego – issued a groundbreaking final award in yet another Argentine case brought by a US gas company, CMS Gas Transmission Company. (See: "First domino falls on Argentina as tribunal rules in financial crisis arbitration", INVEST-SD News Bulletin, May 27, 2005, available on-line at: http://www.iisd.org/pdf/2005/investment_investsd_may27_2005.pdf)

In the decisions on jurisdiction in the Camuzzi and Sempra cases, the tribunal rejected a series of arguments put forward by Argentina in an effort to deny jurisdiction to the claimants, including that the alleged breaches of the BITs are in fact alleged breaches of contract, which should be handled in the Argentine courts.

The tribunal also rejected Argentina's argument that the shareholders could only claim for damages which arose out of direct losses to its legal rights as shareholders. Argentina had argued that the two foreign firms should not be permitted to claim for losses which impacted it only "indirectly" (i.e. as a result of government measures that had a direct impact only on the two Argentine companies which held the gas licenses).

4. NGOs warn on spread of IPRs in investment pacts but disputes slow to arise,
By Luke Eric Peterson

A prominent Geneva-based think-tank – which counts some 48 developing countries among its members - has published an analytical note which is highly critical of the increasing tendency for investment protection treaties to incorporate expansive intellectual property rights (IPR) protection.

In the note published last month, the South Centre examines recent investment treaties concluded by a range of developed and developing countries, and finds fault with various provisions designed to elevate intellectual property protection beyond the levels attained in multilateral forums such as the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO).

The Centre cautions that bilateral negotiations may be used to "circumvent" deadlocked discussions at the multilateral level, and that the resulting bilateral agreements could "undermine the flexibilities available to developing countries" under earlier IPR agreements struck by developed and developing countries.

The South Centre report comes on the heels of a research note by the non-governmental organization GRAIN published in the autumn of 2004. In GRAIN's report, prepared by University of Buenos Aires Professor Carlos M. Correa, concerns were raised that the bilateral agreements may narrow policy options for governments in relation to regulation, revocation or compulsory licensing of certain forms of intellectual property, including for purposes of biodiversity preservation.

Among the additional concerns highlighted in the more recent report from the South Centre is the prospect that investment treaty guarantees of "fair and equitable treatment", when extended to intellectual property investments, could undermine flexibilities found in the WTO's Trade Related Intellectual Property (TRIPs) agreement which currently permits countries to choose their own methods of national-level implementation and enforcement of IPRs.

Indeed, so acute are the concerns of the South Centre that it recommends that developing countries "should not sign BITs and investment chapters of FTAs except where there is a demonstrable long-term benefit for them." Noting an absence of clear evidence of any causal link between BITs and new investment flows, the group goes on to advise against signing new investment agreements which might harbour onerous new IPR commitments.

A particular concern raised by the South Centre report is the prospect that holders of IPRs might avail themselves of the dispute settlement provisions of investment treaties, so as to sue governments for measures which may be legal under WTO or other multilateral rules – but which contravene more exacting protections found in the given investment treaty.

Interestingly, a brief survey by INVEST-SD of known investment treaty arbitrations suggests that claims related to intellectual property rights (patents, trademarks, etc.) are highly unusual to date.

One experienced Washington-based lawyer and arbitrator with experience in intellectual property law, told INVEST-SD that it is "a very interesting question" why IPR-related cases are uncommon in investment treaty arbitration. Carolyn Lamm, a Partner with the DC office of White and Case, says she cannot see, in principle, why such claims would be precluded given that so many investment treaties offer broad definitions of investment which include intangible assets such as trademarks, copyrights and patents.

A pair of lawyers at another Washington firm, Covington and Burling, confirm that investment treaties have not been used much to date for intellectual property violations, but they note that scenarios can be envisaged where claims might be made. Eugene Gulland, a Partner with the firm's arbitration practice, suggests, for example, that it might be possible to construe a failure by a state to protect patents, trademarks or copyrights, as a form of denial of justice under an investment treaty.

His colleague, George Pappas, a specialist in intellectual property law, noted that time is often of the essence in cases of intellectual property violation, and that holders of patents or copyrights often look to domestic courts for immediate injunctions against other parties who may be violating a right. This view is echoed by others who spoke with INVEST-SD. Lucy Reed, an arbitration lawyer with Freshfields Bruckhaus Deringer, agrees that the time-sensitivity of IPR claims means that investment treaty arbitration, which can drag on for several years, will rarely be a first port of call for aggrieved IPR-holders.

Nevertheless, George Pappas of Covington and Burling thinks that "it may be a matter of time before (investment treaties) are used" to challenge certain failures by states to enforce intellectual property rights, for example where a state's claims to have a viable IPR protection system turn out to be a "sham" and foreign investors find themselves without basic legal protections they had counted upon.

Sources:

INVEST-SD Interviews

"Intellectual Property in Investment Agreements: The TRIPS-Plus Implications for Developing Countries", South Centre, Analytical Note, May 2005, available on-line at: http://www.southcentre.org

"Briefing paper analyzes Intellectual Property Rights rules in investment treaties", By Luke Eric Peterson, INVEST-SD News Bulletin, August. 23, 2004, available on-line at: http://www.iisd.org/pdf/2004/investment_investsd_aug23_2004.pdf

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Negotiation Watch:
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5. EU Constitution votes a set-back for European Commission on investment issue,
By Luke Eric Peterson

Recent “no” votes in referendums held in France and the Netherlands have put in doubt the future of the proposed EU Constitutional Treaty. If the proposed Constitution fails to be adopted by the European Union member-states, this may have implications for the European Commission’s efforts to obtain greater negotiating authority over foreign direct investment (FDI).

As was first reported in INVEST-SD in autumn of 2003, the proposed Constitution would have given the Commission a strengthened hand by offering a mandate to negotiate international rules on FDI provided that a “qualified majority” of EU member-states gave their assent to such negotiations. (See: “New European Constitution would bring FDI under European competence”, By Luke Eric Peterson and Jan Ceyssans, INVEST-SD News Bulletin, October 20, 2003, available on-line at: http://www.iisd.org/pdf/2003/investment_investsd_oct20_2003.pdf)

At present, FDI does not fall squarely under the EU's Common Commercial Policy, and, as such, unanimity amongst member-states is required before the European Commission will be empowered to undertake international negotiations on FDI rules.

While the European Commission has spoken for the member-governments in investment discussions at the World Trade Organization and in the negotiation of various EU Association Agreements, which incorporate some investment liberalization elements, these forays have been with the unanimous assent of EU member governments.

At the same time, individual member governments have continued to negotiate their own bilateral investment protection treaties with preferred trading partners, in order to ensure protection against expropriation and other forms of interference with investments.

An official with the EU’s Directorate-General for Trade contacted for this article declined to comment on the proposed EU Constitution and its investment policy implications. INVEST-SD is aware of no publicly-available analyses which have explored these potential implications. Readers are invited to contact the editor at lpeterson@iisd.ca with further information on this issue.

6. Canada seeks input on environmental impact of Canada-Peru investment treaty,
By Luke Eric Peterson

The Canadian Government has issued a call for comments on the likely environmental impacts on Canada of a proposed investment treaty between Canada and Peru.

In an email release issued on June 6th of this year, the Government set a deadline of June 15th for public submissions.

This marks the first time that the Canadian Government will undertake an environmental impact assessment of an investment treaty negotiation, although other trade agreements have undergone the process in recent years.

According to figures provided by the Department of International Trade, Peruvian investment into Canada in 2003 amounted to a mere $1 Million (CAD), whereas Canadian investment into Peru was a much larger $1.7 Billion (CAD), with much of this in the mining sector. While recent press reports have highlighted social and environmental controversies engendered by Canadian and US mining investments in Peru, the Canadian Government's proposed Environmental Impact Assessment of the new treaty will not explore potential environmental impacts for Peru.

According to one Canadian trade and environment researcher, Canada's environmental impact process should be a two-way street. Gauri Sreenivasan, a trade policy officer with the Canadian Council for International Cooperation says that "We know that there are well-documented concerns, both from Canadian and local Peruvian groups, about the lack of regulatory control over investments in Peruvian resources extraction." By examining only the impact of Peruvian investment into Canada, Sreenivasan says that the government is not living up to its rhetoric about the importance of promoting sustainable development beyond Canadian borders.

According to a backgrounder produced by the Department of International Trade, negotiations on the Canada-Peru investment treaty are near completion, with talks expected to wrap up by month's end. No text has been released to the public. Historically, treaty texts are not released by Canadian authorities until the investment treaty has been ratified by the parties and entered into force.

Sources:

"Mining groups struggle to obtain 'social licence' for their operations in Peru", By Hal Weitzman, The Financial Times, June 4, 2005

Backgrounder on Canada-Peru BIT negotiation:
http://www.dfait-maeci.gc.ca/tna-nac/RB/peru-en.asp

Call for consultations on environmental impact of the treaty:
http://www.dfait-maeci.gc.ca/tna-nac/IYT/consult-regbil-en.asp#peru

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Briefly noted:
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7. New text offers comprehensive overview of foreign investment arbitration at ICSID

A recent study by French academic Sebastien Manciaux offers an overview of foreign investment arbitration at the International Centre for Settlement of Investment Disputes (ICSID). The book, Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats, arises out of Dr. Manciaux's PhD thesis examining the experience of the ICSID facility. Manciaux's book, which is published in French, is part of a series of works produced by the University of Bourgogne's Research Center on the Law of Markets and International Investment.

More information about the title can be found here:
http://www.decitre.fr/service/search/fiche_detail/-/ean-9782711005703/index.dhtml

8. Edited collection examines research on FDI and development

The Institute for International Economics has released a book which examines the evidence for the relationship between foreign direct investment (FDI) and development. Publicity materials for the book notes that it "gathers together the cutting edge of new research on FDI and host country economic performance and presents the most sophisticated critiques of current and past inquiries. It probes the limits of what can be determined from available evidence and from innovative investigative techniques."

The publication, which is edited by Theodore Moran, Edward M. Graham and Magnus Blomstrom, is available on-line at:
http://bookstore.iie.com/merchant.mvc?Screen=PROD&Product_Code=3810