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Arbitration Watch:
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1. Energy firms poised to notify Bolivia of potential investment treaty claims,
By Luke Eric Peterson

A handful of multinational energy firms are on the verge of sending notices of dispute to Bolivia – which would set in motion mandatory periods for consultations, after which the firms may turn to international arbitration under investment treaties.

According to a source familiar with the pending notices of dispute, the foreign energy firms object to a series of actions, decrees and measures taken by the Bolivian Government in recent months, culminating in the recent passage of a new Hydrocarbons law.

In recent months, Bolivia has been roiled by social unrest as indigenous protestors have pushed for nationalization of Bolivian natural resources. In response to political and social pressure, Bolivia's Congress passed a new Hydrocarbons Law last month, levying a new tax of 32% on hydrocarbons. Two lawyers familiar with investments made by international energy firms in Bolivia, but who declined to be named due to confidentiality concerns, note that the tax, which will be added to existing royalty payments of 18%, raises the effective royalty rate to 50%, thus imperiling the profitability of existing investments in Bolivia's natural gas industry.

The new Hydrocarbons law also forces energy companies to enter into new contracts with the Government within a six month timeframe.

At least five foreign firms are understood to be mulling potential arbitral claims against Bolivia in the near term: Repsol YPF, British Gas, Total, Pan-American and Vintage Petroleum.

Earlier this month, social unrest led to the resignation of Bolivian President Carlos Mesa and to the appointment of a caretaker President, former Supreme Court Chief Justice Eduardo Rodriguez. Demands continue to be made for the outright nationalization of the Bolivian gas industry.

2. US and Dutch investors in Estonian railway threaten BIT arbitration,
By Luke Eric Peterson

US and Dutch investors in a privatized Estonian railway have served the Estonian Government with notice of a dispute under the US-Estonia and Netherlands-Estonia bilateral investment treaties.

The US and Dutch investors are shareholders in Baltic Rail Services (BRS), which, in turn, holds a controlling interest in As Eesti Raudtee, the primary rail freight operator in Estonia, which was privatized in 2001.

According to a formal notice of dispute served on the Estonian government, and seen by this News Bulletin, Emerging Europe Infrastructure Fund, a Dutch company, and US-based firms, Rail Word Estonia and Railroad Development Corporation, object to recent measures taken by the Estonian government, including a decision to make 100% of available track capacity "available for bid to third-party operators".

The investors also object to the track access fees which will be paid for use of the tracks, arguing that these fees are not sufficient to provide the investors with a return on their investment, or to meet the “sustainable long-term costs of accommodating passenger and freight traffic”.

In their notice of dispute, the investors characterize the access charges as “confiscatory”, and “discriminatory”, adding that “the heavy cross-subsidy in favor of passenger traffic is a politically popular measure that favors Estonian commuters and other users at the expense of freight operators and especially the Investors.”

The US and Dutch shareholders of BRS have called for immediate consultations with the Estonian Government over its differences, and threatened to take the country to arbitration at the International Centre for Settlement of Investment Disputes (ICSID) or through some other arbitration channel, unless an amicable settlement can be reached in the coming months.

An inquiry to the Estonian Embassy in Washington D.C. was directed to a central press relations office in Estonia; no reply to a written request for information had been received as of press time.

Sources:

“Majority Owner of Estonian Railway may sue Estonian state”, Baltic News Service, June 9, 2005

Notice of dispute, dated June 7, 2005

3. NAFTA consolidation tribunal rejects Mexico’s request to merge sweetener disputes, By Luke Eric Peterson

A special tribunal has rejected a request by Mexico to merge two ongoing NAFTA Chapter 11 investment arbitrations with three US-based agricultural companies into a single “consolidated” arbitral proceeding.

Mexico had requested a “consolidation order” under the terms of a NAFTA provision which permits the merger of two or more cases where there are common issues of law or fact.

The Mexican Government currently faces two separate arbitrations arising out of investor objections to a Mexican tax on soft drinks containing the sweetener, high fructose corn syrup (HFCS). The investors - Corn Products International, Archer Daniels Midlands Company, and Tate & Lyle Ingredients Americas Inc. – contend that the tax is a blatantly protectionist measure which forces Mexican soft drink manufacturers to rely upon domestic sugar, rather than high fructose corn syrup, as a soft-drink sweetener. (Mexico has the second highest per capita consumption of soft drinks in the world.)

In October of 2003, Corn Products brought an arbitral claim to the International Centre for Settlement of Investment Disputes (ICSID) alleging that the HFCS tax violates various provisions of NAFTA Chapter 11. Subsequently, in August of 2004, ADM and Tate & Lyle mounted their own claim at ICSID.

Following the launch of this second arbitration, the Mexican government requested the creation of a consolidation tribunal to examine whether the two arbitrations should be consolidated.

The question was handed to a tribunal consisting of three members, Bernardo Cremades, Arthur Rovine, and Eduardo Siqueiros, all practicing private sector lawyers.

In a ruling dated May 20, 2005, and recently published by the Mexican Government, the tribunal has rejected Mexico's request for consolidation.

In reaching its verdict the tribunal did find that there were common questions of law and fact between the two arbitrations, however the tribunal was persuaded by the claimants' objections to the consolidation request, including a concern that the "direct and major competition" between Corn Products and the other two US firms meant that the parties were not in a position to cooperate on a single claim.

For its part, Mexico warned that there was a significant risk that two separate arbitration proceedings could yield inconsistent rulings. While the tribunal credited Mexico's concerns, it ruled that they did not outweigh the potential "unfairness" which might arise for the investors if they were forced to participate in a single proceeding – one which might be characterized by "procedural inefficiencies" designed to shield the commercial secrets of the firms from each other.

In addition, the tribunal professed the belief that the separate arbitrations – while dealing with common issues of law and fact – would also address "numerous distinct issues of state responsibility and quantum (level of compensation)", thus affirming the need for separate proceedings.

A copy of the tribunal's decision, which is the first ever consolidation decision under the North American Free Trade Agreement, is available in Spanish and English on-line: http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Consolidacion/acuerdos/050520_Orden_de_Tribunal_de_Acumulacion.pdf.

4. Tribunal hears US request for consolidation of NAFTA forestry investment claims,
By Luke Eric Peterson

Coming close on the heels of last month's ruling by a NAFTA consolidation tribunal in

the Mexico corn syrup cases (see previous story), a second consolidation tribunal has been convened under NAFTA to hear a request for consolidation of three parallel investment arbitrations against the US Government.

If successful, the US consolidation request would require that the three claims - by Canadian softwood lumber producers Canfor Corporation, Tembec and Terminal Forest Products - be arbitrated together by the consolidation tribunal. The Canadian firms have brought damages claims under NAFTA Chapter 11, alleging that duties imposed upon Canadian softwood lumber exports have harmed the companies' US-based investments.

The tribunal convened to rule on the US consolidation request consists of three members: Professor Albert Jan van den Berg, Professor Armand de Mestral, and David R. Robinson.

In hearings held in Washington D.C. on June 16th attorneys for the US Government argued before the tribunal that it would be "hard to imagine circumstances more appropriate for resort to this consolidation mechanism than those before you here. Not only is the overlap between the cases so overwhelming. But consolidation would avoid the risk of inconsistent decisions …."

Elaborating on the latter concern, US lawyer Mark Clodfelter, warned that arbitrations proceeding in tandem could yield inconsistent decisions, and that this would be unfair to the different claimants, and to the United States, which could not "administer its law properly in the face of such inconsistency."

For its part, the three claimants in the individual cases are strongly opposed to the US consolidation request, and argued before the tribunal that there are various grounds which gravitate against bringing the three claims under the umbrella of a single tribunal.

A full transcript of the consolidation hearing is available on-line on the website of the US State Department: http://www.state.gov/documents/organization/48508.pdf

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Negotiation Watch:
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5. OECD offers statistics on volume of FDI covered by international treaties,
By Luke Eric Peterson

The Paris-based Organization for Economic Co-operation and Development (OECD) has released a study profiling recent trends in foreign direct investment (FDI), including the degree to which OECD investments are covered by international protection agreements.

According to the study, the twelve largest outward investors among OECD countries have amassed some 670 bilateral investment treaties (BIT), and a further 25 free-trade

agreements with BIT-like provisions. Notably, a mere 5 Western European countries – Switzerland, Germany, France, the United Kingdom and the Netherlands – have negotiated almost 70% of the international investment protection arrangements entered into by the OECD's 30 member-governments.

Curiously, however, these extensive treaty arsenals protect surprisingly small shares of the overall outward FDI emanating from European countries. The reason for this is that European governments target a large proportion of their outward FDI at other European countries; as such, these FDI flows are governed not by BITs or FTAs, but by European Union rules.

Outside of the European continent, the OECD study finds that Japanese outward investments are rarely covered by BITs or FTAs, with less than 12% of such investments traveling with treaty protections in hand. As the study notes, Japan has only recently embarked upon an effort to ramp up negotiation of such instruments.

The OECD report also looks at the proportion of inward FDI flows which are covered by treaty protections, and here Canada is the stand-out country, with a full 64% of its investment share covered by treaties (much of it by a single FTA with the US and Mexico). By contrast, inward investment into the United States is rarely covered (approximately 10%) by a treaty framework.

Another striking finding of the OECD study is that the number of BITs concluded by OECD member-governments appears to be declining. This may reflect the fact that many European governments have sewn up BITs with large number of countries already. However, outside of Europe, there appears to be an increasing tendency for governments to negotiate broader free trade or economic partnership agreements, which incorporate BIT-style investment rules under their umbrella. Indeed, some countries now see much greater shares of their outward FDI covered by a handful of FTA arrangements, than by the comparatively larger numbers of BITs which they have concluded. The OECD finds that a full 60% of Australia's outward FDI is covered by a handful of FTAs; likewise, some 43% of Canada's outward FDI is covered by a similar handful of FTAs, while its larger number of BITs covers only 1% of these flows.

A copy of the OECD paper, which is slated to appear in the September 2005 publication, OECD International Investment Perspectives 2005, can be found on-line at: http://www.oecd.org/dataoecd/13/62/35032229.pdf

6. Canadian Parliamentary Committee wants human rights norms for resource firms,
By Luke Eric Peterson

An all-party committee of Canada's legislature has called upon the Government to tighten corporate accountability rules in order to hold Canadian mining and natural resources firms accountable for their operations in developing countries.

In a report released on June 23rd, the Standing Committee on Foreign Affairs and International Trade issued a list of recommendations, including that Canadian government support for business activity abroad be conditioned upon "clearly defined corporate social responsibility and human rights standards, particularly through the mechanism of human rights impact assessments."

The Committee also called for clear legal norms which would hold Canadian corporations accountable in Canada for environmental and/or human rights violations committed abroad.

One Canadian resources company, TVI Pacific Inc. was singled out for particular attention by the committee, for its mining operations in the Philippines. Noting that it had heard extensive allegations about the social, environmental and human rights impacts of the firm's operations upon the indigenous peoples of Mindanao, the Committee called upon the Government of Canada to conduct an urgent investigation of TVI's investment, and to cease all government support for the company's activities pending the outcome of that investigation.

For its part, the company has denied all allegations of wrong-doing, adding that its Canatuan mining project has brought extensive benefits to the local Mindanao population, including job-creation, tax revenues and, the provision of health care and education for locals.

Sources:

Fourteenth Report, Standing Committee on Foreign Affairs and International Trade, June 23, 2005, available on-line at:
http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=122765

TVI's website on its Canatuan mining project in Mindanao, Philippines:
http://www.tvicanatuan.com/index.php

Briefly noted:
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7. WTO members punt proposal to exempt poorest countries from TRIMs Agreement,

According to a report published in Inside U.S. Trade, a Washington newsletter, Member-governments of the World Trade Organization have agreed to put aside a proposal which would exempt Least-Developed Countries from any obligations under the WTO Agreement on Trade-Related Investment Measures (TRIMs). The decision, taken in the WTO's Committee on Trade and Development, serves to postpone a debate over

whether the poorest WTO members can enjoy permanent exemption from the WTO rules which restricts certain trade-distorting investment measures.

Sources:

"LDCs continue talks on four S&D proposals, drop TRIMs proposal", Inside U.S. Trade, June 24, 2005

WTO Committee on Trade and Development, http://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm

8. Canada- European Union conclude first round of investment enhancement talks

The Canadian Government has announced the completion of the first round of negotiations for a Trade and Investment Enhancement Agreement (TIEA) with the European Union.

According to a June 19th joint statement issued by the parties, the TIEA "is designed to focus on the main non-tariff related challenges and opportunities of the Canada-EU relationship". Negotiations are designed to run in parallel with the ongoing WTO Doha Round of trade negotiations, and are targeted at "priority needs" of Canadian and EU businesses, including: regulatory cooperation and investment, services, government procurement, intellectual property rights and trade facilitation.

On the investment front, Canada has signaled that the two sides will continue to cooperate to promote multilateral disciplines on investment, at the same time as they explore what bilateral disciplines might stimulate investment between the two areas. The latter work is expected to include an examination of "existing investment obligations under the network of multilateral, plurilateral and bilateral investment rules currently in place between Europe and Canada".

The next round of Canada-EU negotiations are slated for summer's end.

Sources:

Canada-EU Summit Joint Declaration (including information about TIEA talks): http://www.pm.gc.ca/eng/news.asp?id=514

Description of the framework for the TIEA negotiations between Canada and the EU: http://www.dfait-maeci.gc.ca/tna-nac/rb/tiea-en.asp

List of bilateral investment treaties concluded by Canada with European Union member governments: http://www.dfait-maeci.gc.ca/tna-nac/fipa_list-en.asp

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