INVEST-SD: Investment Law and Policy Weekly News Bulletin, March 15, 2004

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

Contents at a Glance:

Arbitration Watch:
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1. Amicus briefs submitted to NAFTA Methanex Tribunal, and available on-line

In a first for international investment treaty arbitration, a tribunal convened to resolve a NAFTA dispute has received amicus curiae (friend of the court) legal submissions from two groups not party to the dispute.

In January of 2001, the tribunal in the Methanex v. United States dispute had signaled its inclination to entertain written arguments from interested third-parties, and following a recent statement setting out guidelines for such submissions, two amicus curiae briefs were filed with the tribunal.

The first of these briefs was filed by the International Institute for Sustainable Development (a non-profit, non-partisan research institute, and publisher of the INVEST-SD News Bulletin). A second brief was filed by a coalition of US-based environmental groups: Earth Justice, The Centre for International Environmental Law (CIEL), The Bluewater Network, and Communities for a Better Environment.

The Methanex dispute has attracted a great deal of public scrutiny because it arises out of a California decision to ban a controversial gasoline additive MTBE, which was linked to contamination of ground-water sources in the state. Following this move, a Canadian producer of Methanol - a key ingredient in MTBE - filed suit under the investment chapter of the NAFTA seeking some $970 million in compensation for its lost business-line.

In its amicus brief filed with the tribunal, the International Institute for Sustainable Development (IISD) highlights several key issues of law relevant to sustainable development, including the definition of expropriation, national treatment and government intent, burden of proof, and costs associated with litigation.

The separate brief filed by US environmental groups argues, among other points, that "that international law requires the tribunal to respect the right of governments to take action to protect important public values like the right to clean water."

Marcos Orellana, an attorney with the Center for International Environmental Law (CIEL), says: "The Methanex arbitral tribunal has set an important precedent by recognizing its powers to accept submissions from civil society. The millions of dollars likely spent by the United States in defending itself from Methanex's unwarranted claims further amplify the threats posed by the NAFTA Chapter 11 model to legitimate environmental and health measures, especially in the developing world."

Sources:

An IISD backgrounder of the Methanex arbitration is available at:
http://www.iisd.org/pdf/2003/trade_methanex_background.pdf

IISD's amicus brief is available on-line at:
http://www.iisd.org/publications/publication.asp?pno=608

Earth Justice's amicus brief is available at:
http://www.earthjustice.org/news/documents/4-04/MethanexAmicusSubmission.pdf

2. Occidental BIT arbitration against Ecuador confirmed,
By Luke Eric Peterson

US-based Occidental Petroleum is proceeding with an arbitration against Ecuador under the US-Ecuador bilateral investment treaty (BIT). According to company filings with the US Securities and Exchange Commission, this arbitration was initiated in November of 2002 and relates to a dispute over tax rebates allegedly owed to the company's Ecuadorian operations.

In a March 1, 2004 filing with the SEC, the company describes the events which triggered its treaty claim:

"Foreign oil companies, including Occidental, have been paying a Value Added
Tax (VAT), generally calculated on the basis of 10 to 12 percent of expenditures
for goods and services used in the production of oil for export. Until 2001, oil
companies, like other companies producing products for export, filed for and
received reimbursement of VAT. In 2001, the Ecuador tax authority announced that
the oil companies' VAT payments did not qualify for reimbursement."

A number of firms have challenged their treatment in Ecuadorian courts, Occidental elected for investment-treaty arbitration.

The arbitration is proceeding under the UNCITRAL rules of arbitration. Occidental's legal representatives, Debevoise & Plimpton, confirm that the arbitration is proceeding, but declined to comment further at this time.

Sources:

Occidental, 10-K filing with United States Securities and Exchange Commission, March 1, 2004

INVEST-SD Interviews

3. Dutch Insurer Pursues Treaty Arbitration in Privatization Dispute with Poland,
By Luke Eric Peterson

A major arbitration between a Dutch insurance company and the Polish Government continues to proceed, amidst rumours that the Polish side hopes to settle the dispute.

Dutch insurer Eureko launched an international arbitration under the Holland-Poland bilateral investment treaty (BIT) last year. The claim arises out of a 1999 privatization agreement, in which Eureko and its Polish partner Bank Millennium acquired a 30% stake in the Polish group. Eureko contends that the agreement also entitles it to purchase a further 21% stake in the Polish insurance company PZU. However, following elections in Poland, a new government expressed its opposition to any move to relinquish the state's majority control of PZU to the Dutch consortium.

Eureko responded by filing an ad-hoc arbitration under the Dutch-Polish BIT. In June of 2003, the Financial Times reported that Eureko seeks to recoup the more than 800 million dollars (US) which had been paid for its minority stake in PZU. It is unclear whether Eureko also seeks compensation for its thwarted attempt to purchase a further stake in the insurance group.

According to sources familiar with the claim, the jurisdictional phase is nearing completion, with the Polish Government to file its statement of rejoinder by April 30th, and a hearing on jurisdiction to be scheduled thereafter. The dispute is being heard by a three-member tribunal consisting of Stephen Schwebel, Yves Fortier and Prof. Jerzy Rajski.

Recently, the Polish press has reported that a newly appointed Polish Treasury Secretary will seek a negotiated settlement in the case. INVEST-SD understands that no formal offer has been made as yet.

Sources:

INVEST-SD Interviews

"No Offer for Eureko Yet, Says Treasury", Polish News Bulletin, March 12, 2004

"Treasury Determined to End Eureko Dispute", Polish News Bulletin March 9, 2004

"New Polish Minister to Seek Compromise in Insurer's Privatization Dispute", BBC Monitoring International Reports January 29, 2004

"PZU chief to ease rift over Dutch stake", By Stefan Wagstyl and Iwona Sarjusz Wolska The Financial Times, June 18, 2003

Negotiation Watch:
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4. Advisory Committee Members Differ on US Draft Model BIT,
By Luke Eric Peterson

Members of an advisory committee to the US State Department have issued a report which reveals broad differences of opinion with respect to the drafting of a new US model bilateral investment treaty.

Commenting on a draft treaty circulated last month (and publicized in the February 22 edition of INVEST-SD News Bulletin), representatives from the business, academic, labour and environmental communities, disagreed sharply over many of the proposed changes designed to update the existing (1994) model BIT.

In a report issued by the investment subcommittee of the US Advisory Committee on International Economic Policy, a number of substantive disagreements were highlighted, including: differences over the definition of expropriation, the need for provisions banning certain performance requirements, and the scope of the investor-state dispute settlement mechanism.
On the contentious issue of expropriation, various committee members contend that the draft model BIT either goes too far - or not far enough - in seeking to ensure that non-discriminatory regulations designed to protect the environmental, health or public safety would rarely be construed as forms of "indirect expropriation".

For example, representatives from business groups take the view that the motives of a government should be irrelevant to determining whether it has succeeded in undermining the value of an investment (and, thus, in the view of these representatives, violated the expropriation provisions of the treaty). Meanwhile, some labour and environmental groups expressed concern that treaty language, introduced so as to circumscribe challenges to health or environmental regulations, does not provide sufficient guidance to tribunals and falls short of presumably more stringent standards under US constitutional law.

With respect to performance requirements, some committee members expressed the view that host governments should retain the discretion to impose such requirements on incoming investors, rather than be prohibited from using such tools under the terms of the treaty. However, members representing investors generally support treaty provisions which prohibit the use of selected performance requirements.

Investor representatives tended to object to treaty language which permits the two governments party to a treaty to issue so-called interpretive statements which would bind future tribunals. According to these committee members, such a prerogative would "re-politicize" investment disputes by permitting governments to negotiate the terms which will apply to a dispute - rather than leaving the matter to the resolution of a legal tribunal.

A number of the concerns voiced by non-governmental environment, development and labour groups are also reflected in an earlier letter sent by several committee members to the US Department of State and US Trade Representative. This letter is the subject of a separate article in this edition of INVEST-SD (see below).

Sources:

Report of the Subcommittee on Investment Regarding the Draft Model Bilateral Investment Treaty, Presented to: The Advisory Committee on International Economic Policy, January 30, 2004, available on-line at: http://www.ciel.org/Publications/BIT_Subcmte_Jan3004.pdf

INVEST-SD Interviews

5. Environment, Development and Labour Groups Criticize US Draft Model BIT,
By Luke Eric Peterson

In a letter to the US State Department and the Office of the Trade Representative, a group of seven US-based organizations criticizes the draft US model bilateral investment treaty, and urges the agencies to undertake "meaningful and effective consultation with the public and Congress" as it embarks upon this "major policy initiative". The letter is also copied to the various members of the US Senate Foreign Relations Committee, which has oversight responsibility for bilateral investment treaties.

The groups, which include the AFL-CIO, the Sierra Club and Oxfam America, warn that the proposed model BIT "perpetuates many of the flaws of the earlier treaties" and misses an opportunity to correct shortcomings and "chart a new course for investment rules that emphasizes a balanced approach to ensuring both investor rights and responsibilities."

Several proposals are put forward by the groups for consideration by the US Government, including the possible use of a screening mechanism similar to that used in arbitrations dealing with tax-matters, where governments could agree to prevent cases from proceeding if they would cause serious public harm, for example by undermining health, environmental or other sensitive regulations.

The groups also point to the lack of any requirement that foreign investors exhaust their domestic legal remedies before mounting an arbitration against a government under the investment treaty. Pointing to the exhaustion requirement in other areas of international law, including under international human rights treaties, the groups warn that the lack of such a safeguard "invited international tribunals to misread domestic laws and reach inconsistent and erroneous decisions." Additionally, the groups criticize the absence of an appellate mechanism for parties to challenge awards handed down by arbitral tribunals.

A number of substantive concerns are also raised in the letter to US officials, including fears about the reach of provisions on expropriation, national treatment, most-favored nation treatment, the minimum standard of treatment, and capital controls. Notably, the groups reject the value of proposed treaty language on environment and labour; pointing, in particular, to use of tautological language in the environment provisions which would safeguard environmental measures provided that they are "otherwise consistent with this Treaty".

Also, of note, the groups highlight the importance of preambular language in interpretation of the treaty by arbitral tribunals - and point to the alleged weakness of references to environment, worker's rights, health, and safety in the model BIT. Although the groups did not

buttress their case by pointing to the recent treaty arbitration between Swiss-based SGS and the Philippines, that arbitration did underscore that tribunals may view treaties thru the prism of investor interests, in the absence of other countervailing preambular language.

In the SGS case, the tribunal's Decision on Jurisdiction of January 2004 noted the relevant investment treaty's narrowly-focused preambular language - which laid its primary emphasis upon the creation of maintenance of favourable conditions for investors - as grounds for resolving "uncertainties in its interpretation so as to favour the protection of covered investments"

Sources:

AFL-CIO, Center for International Environmental Law, Earthjustice, Friends of the Earth, National Wildlife Federation, Oxfam America, Sierra Club, Letter to Wesley Scholz and James Mendenhall, January 16, 2004, available on-line at:
http://www.ciel.org/Publications/BIT_Comments_Jan1604.pdf

SGS v. Philippines, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, Para 116, available on-line at www.worldbank.org/icsid/cases/awards/htm

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Briefly Noted:
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6. NY Times: Venezuelan State Oil Company Looks to Become Social Spending Powerhouse

According to a report in the New York Times, Venezuela's state oil company, Petroleos de Venezuela (Pdvsa), has unveiled plans to undertake massive spending on development projects throughout Venezuela. The firm says that it will spend $1.7 billion (US) on building homes for low-income citizens, connecting water to communities, and supporting agricultural development projects. The Times notes that this figure dwarfs expenditures in past years, and has raised eyebrows amongst industry players and development groups alike.

The full article, "The Oil Company as Social Worker", By Brian Ellsworth, The New York Times, March 11, 2004 is available on-line at:
http://www.nytimes.com/2004/03/11/business/worldbusiness/11pdvsa.html

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