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Arbitration Watch:

1. Tribunal Finds Jurisdiction to Hear Enron Claim Against Argentina,
By Luke Eric Peterson

In a decision handed down earlier this year, and published this month, an international tribunal has upheld jurisdiction in an arbitration brought by the Enron Corporation against the Argentine Republic.

The case stems from Enron's objections to tax measures imposed upon an investment in a natural gas transportation company in which Enron is a minority shareholder. Enron contends that stamp taxes imposed by several Argentine provinces violate Argentine law and international law, including the provisions of the US-Argentine bilateral investment treaty.

In particular, Enron alleges that the tax measures amounting to some \$280 million US dollars are tantamount to expropriation of its investment; Argentina counters that much of this amount stems from fines and interest owing on the (still unpaid) taxes, and that the stamp taxes themselves amounted to only 1-2% of the value of the project contracts.

Subsequent to the filing of its original claim with the Washington-based International Centre for Settlement of Investment Disputes (ICSID), Enron also sought to introduce a new claim which alleged other damages, including ones arising out of the Argentine financial crisis and a series of measures put into place in response to that crisis.

Although the firm requested a suspension of the existing proceeding, and sought to submit a new (expanded) claim to arbitration, the tribunal determined that the firm's new claims could be joined to the first arbitration as an ancillary claim, and that the jurisdiction for each of the two claims would be determined separately. Thus, the recent decision on jurisdiction covers only the original tax claims.

And with respect to Enron's tax claim, the tribunal had little difficulty upholding jurisdiction to hear the case on its merits, rejecting a variety of jurisdictional arguments put forward by Argentina, including that the claimants should not enjoy standing to bring a claim due to the convoluted and indirect nature of their minority shareholding in the Argentine firm Transportadora de Gas del Sur (TGS), which was held thru a sequence of subsidiaries.

The tribunal did acknowledge a point raised by Argentina to the effect that a string of minority shareholders might be permitted to mount a series of separate and competing arbitrations. Accordingly, the tribunal attempted to draw a line by noting that, notwithstanding the firm's minority shareholder status, Argentina had clearly treated Enron as a covered investor under the terms of its bilateral investment treaty, because the authorities had solicited the US-based firm's investment in Argentina's newly-privatized natural gas industry.

Sources:

Enron Corporation and Ponderosa Assets L.P. v. the Argentine Republic, ICSID Case No. (ARB/01/3), Decision on Jurisdiction, January 14, 2004, published in International Law in Brief, American Society of International Law, March 15, 2004

2. Italian Firm Sues Mongolia under BIT and Energy Charter Treaty

An Italian investor in a Mongolian energy project has mounted a claim at the Washington-based International Centre for Settlement of Investment Disputes (ICSID) for damages under the Italy-Mongolia bilateral investment treaty (BIT) and the Energy Charter Treaty.

The arbitration, brought by Alstom Power Italia SpA, marks the tenth treaty-based claim to be brought to ICSID in 2004, with the Centre seemingly on course to set yet another record for the number of claims registered in a given year.

Negotiation Watch:

3. EU-Canada discuss revisions to investment treaties, and new talks on broader pact, By Luke Eric Peterson

Canada and the European Union (EU) have announced a framework to guide their negotiation of a Trade and Investment Enhancement Agreement (TIEA). In a news release last week, Canada's Department of International Trade noted that "the TIEA will move beyond traditional market access issues and offer concrete results to our business communities by reducing barriers to trade and investment flows."

Negotiations are slated to get under way this year.

A background document available on the Department's website indicates that the parties will focus upon measures designed to promote and facilitate investment flows between the EU and Canada. According to that document, the framework of discussion could include: enhanced dialogue, greater transparency, a study of factors affecting investment in their respective jurisdictions, and co-operation in the push for a multilateral agreement on investment.

Currently, Canada has no investment treaties with any of the 15 EU member states. However, Canada does have so-called Foreign Investment Promotion and Protection Agreements (FIPAs) with a handful of Central and Eastern European countries (Poland, Hungary, the Czech and Slovak Republics, Romania, and Latvia) which are slated to join an enlarged E.U. either in May of this year, or in 2007.

These existing investment agreements have attracted some scrutiny from the European Commission as it works to ensure that candidates for accession to an enlarged EU come into line with the EU's *acquis communautaire* (the body of laws of the European Community).

According to one high-level Canadian trade official, the European Commission has objected to several provisions contained in Canada's bilateral investment agreements with the aforementioned countries, and consultations are under way between Canada, the European Commission, and these countries to find a solution to this situation.

Another Canadian official familiar with these discussions tells INVEST-SD that the European Commission has voiced concerns with respect to several provisions, including those granting rights of pre-establishment treatment; those prohibiting certain performance requirements, and those protecting rights of transfer.

Last autumn, the United States agreed to amend a number of its investment treaties with several accession countries, in response to similar concerns from the European Commission. (See "EU-US agree to alter US BITs with EU accession candidates", INVEST-SD News Bulletin, September 19, 2003).

The Canadian official familiar with the Canada-EC discussions noted that one series of consultations took place earlier this month, and Canada hopes for further clarity from the European Commission with respect to its specific concerns. The nominal deadline for agreed changes to the treaties looms in a matter of weeks as the EU prepares to welcome 10 new member-states to the fold on May 1, 2004.

According to an EC official who spoke to INVEST-SD, should Canada, the EC, and Canada's accession-country treaty-partners agree to a political understanding with respect to needed changes to the Canadian FIPAs this might suffice to allay EC concerns in the lead up to May 1. A similar solution between the EC, the US and the US's accession-country treaty-partners was embodied in a memorandum of understanding signed last autumn, although actual legal changes to the treaties themselves are still working their way through the US political process.

In addition to Canada's discussions with the EC on these existing investment agreements, the newly-announced EU-Canada Trade and Investment Enhancement Agreement process will provide a second forum for investment discussions between Canada and Europe.

However, the high-level Canadian trade official told INVEST-SD that there are "no formal plans" for the EU-Canada negotiations to encompass the types of protection and market access provisions contained in standard investment treaties, and that the Department does not anticipate that negotiations will move in that direction.

Indeed, the European Commission currently lacks a powerful mandate to negotiate on the investment file, it requires the unanimous assent of member-states to negotiate agreements dealing with foreign direct investment (FDI), and EU member-states continue to negotiate their own investment protection treaties on a bilateral basis. However, the Commission has sought to acquire broader competence for investment - most recently through a proposed European Union Constitutional Treaty which was rejected by member-states at a summit in December of 2003, but which is still being discussed by EU member-states and accession candidates.

Under the changes proposed in the draft EU constitution, the European Commission would likely need only the consent of some specified majority of EU member-states in order to embark upon future negotiations. INVEST-SD will continue to monitor the consultations on Canada's investment treaties with EU accession candidates, its discussions with the EU on a Trade and Investment Enhancement Agreement, and the competence to negotiate investment agreements as set out in any EU constitutional treaty which comes into force.

Sources:

INVEST-SD Interviews

"New European Constitution would bring FDI under European competence", INVEST-SD News Bulletin, October 20, 2003, at:
http://www.iisd.org/pdf/2003/investment_investsd_oct20_2003.pdf

"EU-US agree to alter US BITs with EU accession candidates", INVEST-SD News Bulletin, September 19, 2003, at:
www.iisd.org/pdf/2003/investment_investsd_sep19_2003.pdf

Declaration on Canada-EU Relations, March 18, 2004, at:

www.dfait-maeci.gc.ca/canadaeuropa/EU/summit-ottawa2003-declaration-en.asp

Canada-European Trade and Investment Enhancement Agreement, Framework for the Agreement, at:

<http://www.dfait-maeci.gc.ca/tna-nac/rb/tiea-en.asp>

4. US-Colombia FTA Talks to Begin in May, Andean Neighbours Could Join

The Office of the US Trade Representative has announced that free trade negotiations with Colombia will commence on May 18 of this year. In a press release, USTR officials note that Peru and Ecuador could be added to these negotiations pending their willingness to resolve certain outstanding investment and labour disputes ("See Investment disputes play role in US review of Andean trade preferences", INVEST-SD News Bulletin, March 5, 2004)

According to the USTR release, Peru "has intensified its efforts in recent weeks to resolve outstanding disputes with U.S. investors, in a manner consistent with Peruvian law." Neighbouring Bolivia is also touted as a candidate to join the negotiations at a later date, much as the Dominican Republic has recently "docked onto" the free trade agreement concluded with between the US and several of its neighbours in Central America.

Sources:

"U.S. and Colombia to Begin FTA Negotiations on May 18", USTR press release, May 23, 2004, <http://www.ustr.gov/releases/2004/03/04-24.pdf>

For information on the Dominican Republic's accession to the Central America FTA, see: <http://www.ustr.gov/new/fta/cafta.htm>

Briefly Noted:

5. NY Times: Internal World Bank Report Urges Withdrawal from Funding Oil and Coal Projects

The New York Times reports that an internal study commissioned by the

World Bank has proposed wide-ranging changes to the Bank's policies on financing of investments in the developing world, including a call for a halt to the funding of coal and oil projects.

The study, prepared by a former Indonesian Environment Minister, has highlighted some of the tensions between poverty-reduction and environmental sustainability, and engendered a debate within the Bank about the report's recommendations. The World Bank's Directors are currently weighing the report's findings.

See: "Proposal to limit oil and coal projects draw fire", By Nicole Itano, Mar 24, 2004, The New York Times, available online at: <http://www.nytimes.com/2004/03/24/business/worldbusiness/24world.html>