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Arbitration Watch:

1. International Treaty Implications Color Canadian Province's Debate over Public Auto Insurance,
By Luke Eric Peterson

Trade and investment considerations are looming large in a debate taking place in the Canadian province of New Brunswick over an all-party committee report which has recommended the creation of a public insurance scheme for automobile owners.

The insurance issue has been a thorn in the side of the provincial government, with public outcry over high private auto insurance premiums almost leading to the unseating of the governing Progressive Conservatives in an election last autumn. Upon squeaking out a one-seat legislative majority, the government promptly promised to examine the feasibility of a switch to a public monopoly auto insurance scheme (as employed in several other Canadian provinces).

An all-party committee was struck to examine the issue, and last month the committee released a final report calling for the creation of a public insurance scheme. That scheme would introduce a no-fault model of public insurance which would provide medical treatment, rehabilitation, income-replacement and other benefits to New Brunswickers injured in auto accidents.

In contrast to the existing system, the proposed scheme would not permit individuals to sue for financial compensation resulting from pain and suffering. According to the committee, the scheme could achieve average premium reductions of some 20% over existing plans, thanks in part to lower administration costs, the not-for-profit mandate of the public insurance provider, and the elimination of claims for pain and suffering.

The New Brunswick government is now reviewing the recommendations in the report and is expected to take a decision by the end of June.

Currently, New Brunswick drivers purchase insurance coverage through licensed agents or brokers. Under the proposed public scheme, these agents could be licensed to sell the public insurance package at a set commission. However, the proposed scheme has attracted the ire of insurance companies which underwrite the private policies currently sold by local agents.

The Insurance Bureau of Canada (IBC) which represents Canadian and foreign firms selling these insurance services have criticized the proposed public scheme for lacking “any merit”.

Moreover, the IBC warns that a move to a public scheme could trigger legal action by affected sellers, including under international trade and investment agreements.

In an interview with INVEST-SD News Bulletin, Randy Bundus, General Counsel for the IBC, argued that, depending upon how a public scheme was put into place, it could amount to an effective expropriation of existing sellers’ market share. Bundus adds that any foreign firms with a stake in the New Brunswick market would pursue any rights of compensation contained in agreements such as the North American Free Trade Agreement (whose Chapter 11 on investment would accord certain rights to US and Mexican investors in Canada). In addition to its commitments at the WTO and under NAFTA, Canada has also concluded a small number of bilateral investment treaties, some with Eastern (but not Western) European nations.

Other legal experts have flagged the possibility of investment treaty claims arising out of a move to a public insurance scheme. A legal brief prepared last autumn by the law firm

McCarthy Tétrault for the governments of four eastern Canadian provinces (including New Brunswick), warned that foreign firms might be able to construe “the replacement of private automobile insurance with a public insurance system” as an expropriation under NAFTA and other relevant investment treaties, provided that the public scheme deprived private firms of the use or expected economic benefit of their investments.

According to one investment lawyer involved in the New Brunswick debate, there is a “fairly strong” argument that a public scheme might constitute an expropriation under the terms of NAFTA - depending upon how the scheme were structured - but that even still, there would be uncertainty as to the level of compensation which might be owed to affected US firms.

Not all analysts, however, think that an expropriation claim would succeed under international investment law – and contend that, notwithstanding that possibility, such an international claim need not be an impediment to a move to a public scheme.

Scott Sinclair, a Senior Research Associate with the Canadian Centre for Policy Alternatives, a left-leaning think-tank, argues that "Neither the NAFTA nor the GATS (WTO General Agreement on Trade in Services) precludes New Brunswick from proceeding with public auto insurance. The impediments posed by the agreements are navigable."

"In the case of the GATS, the federal government can simply change its 1997 financial services commitments. There is a special GATS procedure for doing so. The NAFTA claim that a public scheme 'expropriates' foreign investors is highly controversial and aggressive. The federal government would fight such a case strongly and, if it ever succeeded, Ottawa not the NB government would be liable for any damages."

Ultimately, even if the Federal Government were on the hook for compensation to affected investors under the NAFTA or affected home states under the GATS, quantifying such compensation is surprisingly difficult. The Insurance Bureau of Canada is still crunching the numbers to assess what portion of the New Brunswick auto insurance market is controlled by foreign firms; according to figures for the 2002 year, total private auto insurance premiums in New Brunswick amounted to nearly ½ billion Canadian dollars (350 million USD). And Randy Bundus of the IBC says that a “significant” (but, as yet, unquantified) amount of this sum is handled by foreign firms – predominantly European, but some American - operating in the New Brunswick market.

As the New Brunswick government mulls a public insurance scheme, it is yet to be determined what services would continue to be sold by private insurers. The all-party committee report had suggested that such firms could compete to sell less lucrative extended coverage packages and third-party liability protection (for e.g. where a vehicle is involved in a collision with something other than another vehicle).

Mr. Bundus of the Insurance Bureau of Canada anticipates that this would amount to a “very minuscule” role for these firms, thus encouraging his member firms to pursue

whatever trade and investment remedies are at their disposal.

Bundus warns that times have changed since other Canadian provinces adopted public insurance programs, and so too have the legal tools available to affected private sector players: "The world is a different place than it was back in the 1970s when Manitoba and British Columbia took action ... now we have NAFTA and GATT."

This very reality, and the prospect that a move to public insurance scheme could entail compensation to affected industry players, gives Scott Sinclair some cause for concern:

"The threats by the insurance industry underline how broadly worded investment treaties can interfere with democratic decision-making about public services and why these treaties need to be scaled back."

In 2002, Sinclair worked as a part of a research team commissioned by a blue-ribbon Canadian government panel to explore how trade and investment rules could constrain the expansion of public health insurance coverage in Canada. That report also warned that trade and investment rules could complicate, but not preclude, efforts to remove some forms of private insurance (dental, pharmaceuticals, etc.) from private provision in lieu of a public scheme.

Sources:

INVEST-SD Interviews

Select Committee on Public Automobile Insurance, "Final Report on Public Automobile Insurance in New Brunswick", First Session of the Fifty-Fifth Legislature, April 2004, available on-line at:

<http://www.gnb.ca/legis/business/committees/reports/2004auto/report-e.asp>

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

<http://www.cap-cpma.ca/images/worddocuments/Memo%20re%20International%20Trade.doc>.

"Auto insurers ready to fight public plan considered in N.B.", The Canadian Press (CP), April 8, 2004

"Govt Weighs Insurance Options", Canadian Broadcasting Corporation (www.cbc.ca), April 8, 2004

2. Swiss Firm Concedes Corruption Allegations, Abandons Treaty Arbitration Against Pakistan,

By Luke Eric Peterson

A Swiss pre-shipment inspection firm, SGS, has dropped its investment treaty claim against the Government of Pakistan. The dispute was being presided over by a tribunal at the International Centre for Settlement of Investment Disputes (ICSID), and was at the merits stage when a decision was taken by the parties to withdraw their claims and counter-claims.

In a press release dated May 6, 2004, the Swiss firm expressed regret for “breaches of its internal controls” in relation to a 1994 pre-shipping inspection contract agreed with the Pakistani government. The press release noted that SGS had agreed to contribute a specified amount to the legal expenses incurred by the government of Pakistan.

Several press reports in Pakistan and the UK have noted that SGS has admitted wrongdoing on the part of several of its employees, who made unlawful payments to government officials in order to secure its contract with a previous administration.

In a decision last August, the ICSID tribunal hearing SGS’s claim held that it had jurisdiction to examine alleged breaches by Pakistan of the Pakistan-Switzerland bilateral investment treaty. Following the recent settlement announcement, the tribunal will abandon its examination of the merits of the dispute.

Sources:

“Pakistan and SGS settle Bhutto dispute Corruption Allegations”, Financial Times, May 7, 2004

“Swiss Firm Apologizes to Pakistan President”, BBC Monitoring International Reports, May 6, 2004

“Senate-(PPP demands SGS settlement to be made public)”, Pakistan News Wire, May 6, 2004

“SGS Société Générale de Surveillance SA (SGS) and the Government of the Islamic Republic of Pakistan (GOP) have reached an amicable settlement”, SGS press release, May 6, 2004, available at:
http://www.sgs.com/sgs_and_the_government_of_the_islamic_republic_of_pakistan_gop_have_reached_an_amicable_settlement?viewId=1559

3. New Tribunal Constituted in Long-Running Vivendi-Argentina Water Dispute,
By Luke Eric Peterson

The Washington-based International Center for Settlement of Investment Disputes (ICSID) has struck a new arbitration tribunal to hear a claim which was first mounted in

1996 against the Argentine Republic. The case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* is the longest-running dispute on the ICSID docket and has now occupied the attentions of 9 different arbitrators in some capacity or another.

The dispute arises out of the alleged expropriation of a water concession owned by Vivendi and its partners in the Argentine province of Tucuman. As noted in earlier editions of INVEST-SD News Bulletin, The investors complain of obstruction and harassment from various branches of the Tucuman provincial government while the Argentine Republic has accused the concession holders of various breaches of the concession contract. Notably, the claim pre-dates the Argentine financial crisis, and unlike many of the Argentine claims currently being arbitrated at ICSID, does not allege damages arising out of that crisis.

The Vivendi arbitration dates to February of 1997, when ICSID registered a claim by Vivendi and *Companie de Aguas del Aconquija S.A.* alleging that Argentina was in breach of its commitments under its bilateral investment treaty with France.

A tribunal constituted to hear that claim upheld jurisdiction to examine alleged treaty breaches, but went on to reject the claims on their merits, contending that they were intertwined with alleged contract breaches which fell under the sole jurisdiction of Tucuman administrative courts.

The claimants appealed this decision by invoking ICSID's annulment process, and a 3 member ad-hoc committee was struck to determine if there were grounds for annulling the tribunal's award. In a decision issued July 3, 2002, the committee handed down a decision which partially-annulled the earlier arbitration award. The committee ruled that the original tribunal had failed to exercise its powers when it declined to examine the alleged treaty breaches on account of the fact that this might entail some interpretation of the underlying contracts.

Following a subsequent request by Argentina for rectification of the committee's decision, the claimant was ultimately given the green light to re-submit its investment treaty claim to a new tribunal.

This claim was registered by ICSID in October of last year, and recently the three member tribunal was constituted, consisting of J. William Rowley, Gabrielle Kaufmann-Kohler, and Carlos Bernal Verea.

Mr. Bernal Verea acted as an arbitrator in another high-profile ICSID arbitration, that between *Técnicas Medioambientales Tecmed, S.A.* and Mexico, a case centering upon the treatment of a hazardous waste disposal business.

Ms. Kaufmann-Kohler, a Professor of Law at the University of Geneva, is also an arbitrator in three other ICSID claims brought by another French water company, Suez, in relation to its investments in Santa Fe, Cordoba and Buenos Aires provinces of

Argentina. These three claims arise out of disputes related to the Argentine financial crisis. The tribunals hearing these claims by Suez were recently constituted and are now proceeding.

Sources:

INVEST-SD Interviews

www.worldbank.org/icsid

4. Investment Treaty Dispute with Morocco Heading to Annulment Phase, By Luke Eric Peterson

An Italian construction firm is challenging an ICSID arbitral award handed down in its dispute with the Government of Morocco. In a decision in December of 2003, an ICISD arbitration tribunal dismissed all claims by R.F.C.C. Morocco that the Moroccan authorities had violated the terms of the Italy-Morocco bilateral investment treaty. According to sources familiar with the case, the Italian firm's claim arose out of a dispute over a highway construction contract.

Following a request from the ICSID secretariat to publish the resulting award on its website, the two parties did not provide their unanimous consent to such publication. Under the ICSID rules of arbitration, the secretariat may not publish the award in the absence of such consent, but it may publish "excerpts of the legal rules applied by the Tribunal" – something which ICSID officials indicate they plan to do so in due course.

Meanwhile, following the request for annulment submitted by R.F.C.C. Morocco, ICSID will nominate a 3 member ad-hoc committee to examine whether the arbitral award can be annulled on any of 5 grounds set out under the ICSID arbitration rules. These grounds are: "that the Tribunal was not properly constituted; that the Tribunal has manifestly exceeded its powers; that there was corruption on the part of a member of the Tribunal; that there has been a serious departure from a fundamental rule of procedure; that the award has failed to state the reasons on which it is based".

In contrast to challenges to arbitrations under other sets of arbitration rules, for e.g. those of the UN Commission on International Trade Law (UNCITRAL), an ICSID annulment proceeding will take place in-camera unless the two parties were to agree to open the proceedings. By contrast, where arbitral rules permit awards to be challenged in domestic courts, recent cases involving investment treaties - including several arbitrations challenged in the Canadian court system - have seen those proceedings take place in public.

Sources:

INVEST-SD Interviews

ICSID Convention and Rules of Arbitration available at:

<http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>

Negotiation Watch:

5. India Reportedly Looking to Narrow Reach of Investment Treaty Provisions, By Luke Eric Peterson

According to a report in the Indian press, the Government of India may seek to amend its bilateral investment treaties in order to “dilute” the protections accorded to foreign investors.

A recent story in the Economic Times suggests that India has already agreed to less sweeping rights of arbitration and narrower protections against expropriation in a forthcoming free trade agreement with Singapore. That agreement is still under negotiation, and no draft texts have been published.

A “senior government official” told the Times that the Department of Economic Affairs may look to reopen its 57 existing bilateral investment treaties in order to bring them into line with the anticipated provisions of the Singapore-India agreement.

Among the changes being contemplated is a move to prevent foreign investors from having recourse to international arbitration while a claim is before the local courts. According to the official interviewed by the Times, the Indian Government has been chastened by its experience with the controversial Dabhol power plant investment, which has spawned a raft of international arbitrations, including claims by GE, Bechtel, and a string of foreign banks involved in the financing of that project. (See “India faces 6 new investment treaty claims in relation to Dabhol investment”, INVEST-SD News Bulletin, November 14, 2003 and “Bechtel and GE mount billion dollar investment treaty claim against India”, INVEST-SD News Bulletin, September 26, 2003).

The report in the Economic Times was unclear as to what changes were being proposed to the expropriation provisions of existing Indian investment treaties, however given that the India-Singapore negotiations are being used as a touchstone for these renegotiations, it is possible that the changes will reflect the language used in the recent Singapore-US free trade agreement. In particular, this would mean that the expropriation clause could contain language that clarifies that only in rare circumstances will exercises of non-discriminatory regulatory power be deemed expropriative.

Efforts to confirm the Economic Times’ story with investment policy officials in India’s Mission to the World Trade Organization in Geneva, Switzerland, have proven unsuccessful to date. INVEST-SD will continue to monitor this story as it develops.

Sources:

“India Seeks to Amend Trade Treaties”, The Economic Times, March 30, 2004

INVEST-SD Interviews

6. UN Agency Releases Upbeat Assessment of Future FDI Patterns, By Luke Eric Peterson

A survey of advisors to trans-national corporations has found that the overwhelming proportion predict an upswing in flows of foreign direct investment (FDI) in the next year.

According to the survey which was conducted by the UN conference on Trade and Development (UNCTAD), 77% of experts forecast an upturn in FDI flows for the 2004-2005 period. The past three years saw a stark decline in FDI, followed by a sluggish recovery. However, those working with TNCs on locational decision-making are confident that the global downturn is over.

UNCTAD also forecasts greater competition amongst countries to attract renewed investment flows. In addition to further liberalization, the creation of additional incentives, along with sector-specific targeting of investment, are expected to increase. According to UNCTAD’s investment division, several countries stand out as “hot spots”: China, India, the United States, Thailand, Poland and the Czech Republic. In Africa, South Africa is pegged as the most attractive locale, followed by Tanzania and Angola. As reported in INVEST-SD news Bulletin, Angola has been sharply criticized for international monitoring groups for its failure to account for revenues generated from existing investment in its oil sector. (See “Angola Reported to have Misplaced More Than \$4 Billion in Oil Revenues”, By Luke Eric Peterson, INVEST-SD News Bulletin, January 23, 2004).

Sources:

<http://www.unctad.org/Templates/webflyer.asp?docid=4720&intItemID=1634&lang=1>

7. UK Think Tank Publishes Trade/Investment Conference Materials On-line

The Royal Institute for International Affairs has created a web-archive of presentations given during its February conference on Sustainable Development in the WTO. The two-day conference was held at the Institute’s Chatham House headquarters in London and saw presentations on a wide range of trade-related issues including the governance of international investment.

Materials are available on-line at:

<http://www.riia.org/pdf/conferences//WTO.pdf>

