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Arbitration Watch:

1. UNCTAD Releases Data on Incidence of Investment Treaty Arbitration

The UN Conference on Trade and Development (UNCTAD) has released the results of an investigation* into the incidence of investment treaty arbitration.

UNCTAD found that investor usage of treaty-based arbitration has continued to grow over the last decade. While a lack of transparency hinders a full accounting of this form of legal activity, the study did find significant annual growth in the number of known claims, particularly over the last 5 years.

A spate of claims related to Argentina's financial crisis (34 known claims) has contributed to the recent surge in arbitral activity. However, even when these Argentine claims are controlled for, investment treaty arbitration is on an upward trajectory, with 14 non-Argentine claims mounted in 2001, 17 in 2002, 24 in 2003, and 20 as of November 2004. In every instance, the actual number of investment treaty arbitrations is likely higher, as claims under some rules (UNCITRAL, ICC, SCC, etc.) may proceed without any publicity.

A research note prepared by UNCTAD is available here:

http://www.unctad.org/sections/dite/ia/docs/webiteit20042_en.pdf

* The investigation was undertaken by Luke Peterson (Editor of this newsletter).

2. US Government mounts arbitration against India over failed power plant project, By Luke Eric Peterson

The morass of litigation surrounding India's largest-ever foreign investment project just became a little bit deeper when the US Government submitted a request for arbitration to the Government of India earlier this month, invoking the consent to arbitration found in a 1997 Investment Incentive Agreement.

The US Government, along with the Overseas Private Investment Corporation (OPIC), is seeking to recoup some \$110 million USD which was paid out to US investors in the ill-fated Dabhol power plant under the terms of OPIC political risk insurance policies.

As was reported in INVEST-SD last year, an American Arbitration Association tribunal ruled in September 2003 that the Government of India was liable for the expropriation of investments made by General Electric and Bechtel in the failed Dabhol project. Following this ruling, OPIC settled two insurance claims lodged by GE and Bechtel, as well as separate claims lodged by Enron (the majority investor in the project) and Bank of America (which financed part of the investment).

After paying out these claims, OPIC turned its sights to recovering the sums from the Government of India. After nearly a year of attempted negotiations over the matter, OPIC and the US Government filed a formal request for arbitration on November 4 of this year.

The arbitration is only the latest in a long string of international and domestic litigation spawned by the ill-fated project. Several international contract arbitrations have been launched by players in the Dabhol project. More recently, a pair of hefty investment treaty claims were brought by GE and Bechtel pursuant to a bilateral investment treaty between Mauritius and India, and are being arbitrated before a single tribunal.

And, earlier this year, seven financial institutions involved in the financing of the Dabhol project signaled their own intent to arbitrate against India under five different bilateral investment treaties (those of the UK, Austria, Netherlands, France and Switzerland). As of this writing, formal requests for arbitration were not known to have been made in these latter cases.

According to the US Government's request for arbitration, the claimants allege that India's actions and omissions in relation to the Dabhol project "violated established principles of public international law" and therefore render India liable for reparation.

In addition to their claims for payments disbursed under the political risk insurance policies, OPIC and the US Government have reserved the right to claim compensation for \$160 million USD in loans which OPIC made to the Dabhol project. Unless the government of India should agree to resolve the former claims by December 1 2004, the claimants warn that they may also seek reparations for losses related to OPIC's own partial-financing of the investment.

The Dabhol investment has been a particularly contentious one, with allegations of corruption and malfeasance lobbed at both the investment consortium and Indian authorities at one time or another. At its core, the dispute relates to the non-performance of a Power Purchase Agreement which had been agreed between the investor-led Dabhol Power Corporation with the local Maharashtra State Electricity Board.

The bilateral investment treaty-based claim brought by Bechtel and GE – the two minority shareholders in the project – is understood to be proceeding under UNCITRAL rules of arbitration. As was reported last month in INVEST-SD, India had had some difficulties in finding a foreign law firm to defend in the arbitration (See "India pleads difficulty in finding law firm to defend GE-Bechtel treaty claim", available on-line at: http://www.iisd.org/pdf/2004/investment_investsd_oct1_2004.pdf)

However, Indian press reports indicate that a firm has now been appointed to represent India in that case.

INVEST-SD will continue to monitor developments in that arbitration as well as in the recent arbitration claim by the US Government.

Sources:

Request for Arbitration, US v. India, available at:

<http://www.opic.gov/foia/awards/GOI110804.pdf>

“Ruling in GE/Bechtel vs. OPIC arbitration now publicly available”, By Luke Eric Peterson, INVEST-SD News Bulletin, October 31, 2003, available on-line at: http://www.iisd.org/pdf/2003/investment_investsd_oct31_2003.pdf

3. Tribunal rejects NAFTA claims of US shareholder in Mexican sugar firm, By Luke Eric Peterson

A tribunal operating under the UNCITRAL rules of arbitration has rejected claims by US investor, GAMI Investment Inc, filed against Mexico under Chapter 11 of the North American Free Trade Agreement (NAFTA).

The tribunal, composed of Yale law Professor Michael Reisman, former WTO Appellate Body member Julio Lacarte-Muro, and Jan Paulsson, co- head of arbitration at the law firm Freshfields Bruckhaus Deringer, ruled that they had jurisdiction over GAMI’s claim, but found that Mexico had not violated NAFTA’s investment provisions.

GAMI holds a 14.18% stake in GAM, Mexico’s fourth largest sugar producer as of 2001. When the Mexican sugar industry took a turn for the worse, and a number of firms sought protection from their creditors, the Mexican government embarked upon a pattern of expropriation so as to bring failing firms under the arm of the state. Some 40% of Mexico’s sugar mills were expropriated by decree in September of 2001, including 5 owned by GAM.

The Mexican firm, GAM, successfully sought redress in the Mexican courts for the loss of three of those mills – with a claim still pending related to two others. Meanwhile, the firm’s US-based minority shareholder, GAMI, pursued its own international claim under the NAFTA – alleging that Mexico’s actions and omissions in regulating the sugar industry had violated NAFTA’s provisions on national treatment, minimum standards of treatment, and expropriation.

Although the tribunal took seriously the prospect that a minority shareholder could bring such a claim under NAFTA, it was not convinced by GAMI’s arguments that Mexico had violated the three substantive provisions mentioned above. The tribunal did affirm that an indirect investor (i.e. a shareholder in a firm which had invested in a NAFTA state) need not be the controlling or majority shareholder to bring a claim for damages, nor would an indirect investor need to prove that the host state had “explicitly interfere(d) with a share ownership”. So, for example, expropriation claims would need not be limited to those where the state had seized or destroyed shares held by a foreign investor, but might also encompass situations where actions by the state have led to a loss in value of those shares which could be deemed tantamount to expropriation.

In the event, however, the tribunal was not convinced that GAMI had suffered such a

loss.

The tribunal also dismissed GAMI's contention that Mexico's "maladministration" of the Mexican sugar industry led to a violation of NAFTA Article 1105 (international minimum standards and fair and equitable treatment).

However, it offered a word of caution for countries which conclude treaties containing such minimum standards guarantees:

"The duty of NAFTA tribunals is ... to appraise whether and how preexisting laws and regulations are applied to the foreign investor. It is no excuse that regulation is costly. Nor does a dearth of able administrators or a deficient culture of compliance provide a defence. Such is the challenge of governance that confronts every country."

"Breaches of NAFTA are assuredly not to be excused on the grounds that a government's compliance with its own law may be difficult. Each NAFTA party must to the contrary accept liability if its officials fail to implement or implement regulations in a discriminatory or arbitrary fashion."

The full GAMI award is available on-line at:

<http://www.state.gov/documents/organization/38789.pdf>

Negotiation Watch:

4. US announces investment negotiations with Oman and U.A.E.

The Office of the US Trade Representative has announced plans to launch free-trade negotiations with two Middle East nations, Oman and the United Arab Emirates. As is required by the 2002 Trade Act, the Bush Administration notified Congressional leaders last week of its intent to pursue these agreements.

Neither country has an existing bilateral investment treaty with the US, and both negotiations are expected to incorporate investment provisions into the broader free trade agreement.

Further information about the negotiations can be found here:

[http://www.ustr.gov/Document_Library/Press_Releases/2004/November/U.S. Announces Intent to Negotiate FTAs with UAE Oman.html](http://www.ustr.gov/Document_Library/Press_Releases/2004/November/U.S._Announces_Intent_to_Negotiate_FTAs_with_UAE_Oman.html)

5. World Bank's Global Economic Prospects report warns on investment treaties

Earlier this month, the World Bank issued its annual Global Economic Prospects Report: Trade, Regionalism and Development. The report examines the recent surge in bilateralism and regionalism in the trade and investment arenas and assesses their implications for development.

Chapter 5 covers Services, Investment, Intellectual Property and Labor Mobility, and concludes that investment protection provisions – on their own – do little to stimulate additional flows of foreign direct investment or to promote development.

The report was more sanguine about the “positive impact” of broader regional trade agreements – which generally mix provisions on investment protection with those on trade liberalization and market access. However, the report's authors caution that “downside risks” of binding investment protection provisions can be high, particularly for “unsophisticated governments”.

The entire report is available for purchase at:

http://publications.worldbank.org/ecommerce/catalog/product?item_id=3426794

(This web-page also provides a link to a free downloadable copy of the report.)

Briefly noted:

6. IISD releases papers exploring investment, trade and sustainable development

A series of papers produced by the International Institute for Sustainable Development (publishers of the INVEST-SD News Bulletin) with the financial support of the Swiss Agency for Development and Cooperation are now available on-line for free download.

The four titles are:

“Implications of the Cotonou Agreement for Sustainable Development in the ACP Countries and Beyond”, by Konrad Von Moltke, available at:
<http://www.iisd.org/publications/publication.asp?pno=659>

“A Model Investment Agreement for the Promotion of Sustainable Development”, By Konrad Von Moltke, available at:
<http://www.iisd.org/publications/publication.asp?pno=660>

“Bilateral Investment Treaties and Development Policy-Making”, By Luke Eric Peterson,

available at:

<http://www.iisd.org/publications/publication.asp?pno=658>

“A Capabilities Approach to Trade and Sustainable Development: Using Sen’s Conception of Development to Re-Examine the Debates”, available at:

<http://www.iisd.org/publications/publication.asp?pno=661>

7. US reinsurance firm mounts BIT claim against Argentina

RGA Reinsurance Company, a US-owned firm, has filed a claim against the Argentine Republic under the terms of the US-Argentine bilateral investment treaty. The claim pertains to losses allegedly incurred as a result of the recent Argentine financial crisis, and as a result of a series of emergency measures put into place following that crisis.

The claim, which is being arbitrated at the International Centre for Settlement of Investment Disputes (ICSID), is the latest in a long string of investment treaty claims lodged against Argentina. The claim is the 22nd investment treaty arbitration to be registered by the Washington-based facility this year; it is also the 34th such reported claim against Argentina since its crisis in 2001.

8. Investor seeks annulment of ICSID award in case against United Arab Emirates

Mr. Hussein Nauman Soufraki has applied to ICSID in an effort to annul an award handed down earlier this year in a port concession dispute involving the United Arab Emirates (UAE). As earlier reported in INVEST-SD, an ICSID tribunal denied jurisdiction over Mr. Soufraki’s claim on the grounds that he was not deemed to be an Italian national under the terms of Italian law. Although a holder of an Italian passport, Mr. Soufraki was judged unable to bring a claim under the terms of the Italian-UAE BIT as an Italian national.

An ad-hoc annulment committee is being struck to examine the award which was handed down by the tribunal on July 7 of this year.

9. Book on Investment Rules and Sustainable Development Now Available

A new edited collection, *International Investment for Sustainable Development: Balancing Rights and Rewards*, is now available through UK publisher Earthscan. The book’s contributors include several Associates of the International Institute for Sustainable Development (publishers of the INVEST-SD News Bulletin).

For more information see:

<http://www.earthscan.co.uk/asp/bookdetails.asp?key=5029>

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