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Contents at a Glance:

Arbitration Watch:
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1. Ecuador faces another claim, Attorney-General reportedly decries 'abuse' of US BIT, By Luke Eric Peterson

US-based Noble Energy is mooting the prospect of arbitration under the US-Ecuador bilateral investment treaty (BIT) in relation to government measures impacting the operations of its Machala power generation plant in Ecuador.

Noble which has operated the Machala plant since 2002 has voiced concerns about recent subsidies introduced for consumers of electricity produced from residual fuel (a by-product of refining gasoline and diesel). Noble alleges that these subsidies put its gas-fired plant at a competitive disadvantage, and could run afoul of guarantees against discrimination contained in the US-Ecuador BIT.

In an interview, with INVEST-SD, a spokesperson with Noble Energy's US headquarters, noted that Noble has other disagreements with the Ecuadorian government, including over the system for payment of invoices.

A recent press report in an Ecuadorian publication, El Comercio, has warned of the possibility of investment treaty arbitration over the disputed matters.

However, Noble's spokesperson stressed to INVEST-SD that the firm has "good relations" with the government of Ecuador and remained hopeful that the dispute could be resolved through negotiations, without needing to follow through with formal arbitration.

At the same time, he noted that the firm does enjoy recourse to the investment treaty and that the Ecuadorian government was aware of this fact.

In a related development, El Comercio reports that Ecuadorian business groups have reacted angrily to a proposal to review the terms of the US-Ecuador bilateral investment treaty. Attorney-General Jose Maria Borja has come under fire from these groups for accusing US investors of abusing the treaty and reportedly proposing that the treaty be reexamined.

Earlier this summer, Ecuador was on the losing end of an arbitration under that treaty with US-based Occidental Petroleum in relation to a multi-million dollar tax dispute. (See "Occidental Wins Investment Arbitration Against Ecuador; Ecuador Vows 'Appeal'", INVEST-SD News Bulletin, July 16, 2004)

As reported in INVEST-SD earlier this month, the Ecuadorian government is challenging the final award in that arbitration in UK courts.

Sources:

INVEST-SD Interviews

"Ecuador: Attorney-general under fire for wanting review of investment treaty", BBC Worldwide Monitoring, Sept. 25, 2004

"Analizan cuales tratados internacionales firmados por Ecuador siguen vigentes", El Comercio, Sept. 24, 2004

"Ecuador podria enfrentar arbitraje internacional con Machala Power", El Comercio (Ecuador, Sept. 15, 2004

"Ecuador challenges arbitral award, threatens to sever contract, facing second claim", By Luke Eric Peterson, INVEST-SD News Bulletin, Sept.8, 2004)

2. India pleads difficulty in finding law firm to defend GE-Bechtel treaty claim, Luke Eric Peterson

The Indian government earlier this month appealed to an arbitration tribunal for more time to mount its defence in a high-profile arbitration under the India-Mauritius bilateral investment treaty.

Following a change of government in May, the new Indian Attorney-General severed ties with India's outside legal counsel, DLA, which had represented the government in the early stages of its dispute with US firms Bechtel and General Electric.

India had hoped to appoint the firm Eversheds to replace its former UK-based lawyers, DLA, however Eversheds was unable to take the assignment due to its involvement in other legal work for GE.

The UNCITRAL tribunal convened to hear the claim had set a deadline of Sept.30 for India to file its written statement of defence in the arbitration, however no evidence has emerged to signal that India has met that deadline. It is unclear if the deadline was extended by the tribunal, as all proceedings of the tribunal are closed to the public.

According to press reports in the Indian media, a date of July 2005 had been set for hearings in the dispute. The tribunal consists of Dame Rosalyn Higgins, a member of the International Court of Justice; Professor Martin Hunter, a UK-based litigator and academic; and Lord Cooke, a retired jurist on the UK House of Lords. Dame Higgins serves as President of the tribunal, while Prof. Hunter was appointed by GE-Bechtel, and Lord Cooke was appointed by the government of India.

The arbitral dispute arises out of GE and Bechtel's minority

shareholdings in the controversial Dabhol power plant - India's largest foreign direct investment, which now lies swaddled in mothballs following a falling-out between state authorities and the investors over the performance of the project's power purchase agreement.

As earlier reported in INVEST-SD, the Dabhol project has also attracted the attention of international human rights groups, amidst allegations of corruption surrounding the contractual negotiations arrangements and reports of heavy-handed treatment of protestors and critics of local opponents of the project. (See Enron's investment in Indian power plant still embroiled in legal battles", INVEST-SD News Bulletin, June 20, 2003)

Given that pleadings and proceedings occur behind closed doors, it remains unclear if human rights allegations will play any role in the arbitration.

Sources:

"India: New Indian Government drops DLA on Dabhol power project", The Lawyer, Sept.27, 2004

"Govt seeks 60 more days to file Dabhol defence", Financial Express, Sept.16, 2004

3. Croatian firm invokes investment treaty to challenge Czech eviction notice, By Luke Eric Peterson

A Croatian firm, Zipimex, has initiated a dispute under the Croatia-Czech Republic bilateral investment treaty. A Czech Finance Ministry spokesperson told a Czech media outlet that a six-month period of consultations has been launched, after which the firm could pursue formal arbitration.

Zipimex objects to an eviction notice served in relation to non-residential space owned by the Czech education ministry. According to a press report, the Education ministry has concluded a number of contracts related to the leasing of the space, however an internal review deemed those contracts to be 'disadvantageous' for the government.

The Croatian firm insists that its investment in the building has been expropriated without compensation, contrary to the terms of the investment treaty.

The Czech Finance Ministry has reportedly put out a tender for legal services to defend the Republic against an eventual arbitration.

Following a successful arbitration claim by Central European Media Enterprises under the Dutch-Czech investment treaty for upwards of one-third of a billion dollars (US), the Czech Republic has faced a growing number of arbitration threats - with Czech media recently reporting at least 8 known international arbitrations against the Czech government, by investors from Israel, the Netherlands, Italy, Belgium, Japan, and the UK.

It is unclear how many of these arbitrations invoke international investment treaties, however INVEST-SD can confirm that a majority are treaty-based, including William Nagel v. Czech Republic, Union Banka v. Czech Republic, Paolo Catalfamo v. Czech Republic, Nomura v. Czech Republic and the recently notified Zipimex arbitration.

Apart from the Nagel and Nomura arbitrations -which have been reported in INVEST-SD or the mainstream media - little is known about the other arbitrations, including the arbitration rules being used, the composition of the tribunals, the stage of the proceedings, and the details of the legal pleadings.

Earlier this month, the Czech finance ministry estimated that it will spend approximately 84 million Czech Krowns ($3.3 million US) to defend against international arbitration claims in 2004 - down from the 2003 total of 202.6 Czech Krowns ($8 million US based upon today's exchange rates). However, Finance Ministry projections for 2005 put the figure at approximately 350 million Krowns ($13.8 million US).

In a related development, officials announced earlier this summer that a parliamentary commission examining the circumstances surrounding the Czech government's arbitration loss to Central European Media will continue to hear new witness this autumn. The commission is expected to wrap up hearings by year's end - 6 months later than originally scheduled.

INVEST-SD will report on the commission's findings when they are made public.

Sources:

"Czech 2004 arbitration cost to be lower than expected", CTK Business News Wire, Sept.17, 2004

"Croatian firm launched investment protection dispute with CR-Euro", CTK Business News Wire, Sept.5, 2004,

"Parliament watchdog for CME arbitration to work till end of year", CTK National News Wire, June 23, 2004

"Czech Republic Hit With Massive Compensation Bill in Investment Treaty Dispute", INVEST-SD News Bulletin, March 21, 2003, http://www.iisd.org/pdf/2003/investment_investsd_march_2003.pdf

4. Champion Trading treaty claim against Egypt proceeds in part, By Luke Eric Peterson

A tribunal at the International Center for Settlement of Investment Disputes (ICSID) has upheld jurisdiction over certain claims filed against Egypt under the US-Egypt bilateral investment treaty.

The tribunal dismissed three claims brought by individual shareholders in the National Cotton Company (NCC), a firm involved in cotton processing and trading, however the tribunal affirmed jurisdiction over two related claims brought by US corporate entities, Champion Trading Company and Ameritrade International Inc., which each held larger stakes in the NCC.

All five parties to the original claim alleged that Egypt had taken a series of measures which harmed the NCC's operations, leading to its eventual insolvency, and running afoul of the protections contained in the US-Egypt treaty.

However, the Egyptian government objected to the treaty claims on jurisdictional grounds, including that the three individual claimants, James, John and Timothy Wahba were all dual nationals of America and Egypt, and as such ineligible for arbitration under the ICSID system.

Counsel for the three individual claimants countered that the tribunal should employ the international law test of "real or effective nationality", which they contended would show that the three claimants "have not effectively acquired Egyptian nationality".

In the end, the tribunal did not wholly rule out the applicability of such a test in the ICSID context, but it was convinced that in the present case there could be little doubt that the claimants had sufficient ties to the Egypt that they were clearly excluded from ICSID

arbitration thanks to the ICSID Convention's Article 25(2)(1) which holds that dual nationals may not bring a claim against the host country of which they are also a national.

However, the tribunal acknowledged that there might arise a case where it would be manifestly absurd or unreasonable for a person to be classified as a dual national, perhaps where a third or fourth generation individual "has no ties whatsoever with the country of its forefathers" - and where a test of real or effective nationality might be appropriate to use in the ICSID context.

After dismissing jurisdiction for the individual claims, the tribunal upheld jurisdiction for the claims brought by the two corporate entities (in which each of the three individual claimants also had a personal stake) which owned a large chunk of the National Cotton Company. The tribunal observed that there was no bar to ICSID claims by companies whose shares were held by dual nationals of the two parties engaged in the arbitration.

The presiding tribunal consisted of Yves Fortier, an appointee of the claimant; Professor Laurent Aynes, an appointee of the Egyptian government; and Robert Briner, the President of the tribunal, who had been appointed by ICSID (with the consent of the two parties).

Counsel for the claimant were Emmanuel Gaillard, who serves as arbitrator in a number of other investment treaty arbitrations, and John Savage, both of the law firm Sherman & Sterling. Representing Egypt were Robert Saint-Esteben, Tim Portwood and Matthie Pouchepadass of Paris law firm Bredin Prat.

Sources:

Decision on Jurisdiction in the case of Champion Trading Company, Ameritrade International Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt, Case No. ICSID ARB/02/9, October 21, 2003, available online at:
http://www.worldbank.org/icsid/cases/champion-decision.pdf

Negotiation Watch:
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5. Mexico, China BIT negotiation to begin this month

According to a Mexican press report, China and Mexico will commence negotiation this month on a bilateral investment treaty. A key negotiating objective of China is reported to be enhanced access for investors in the textiles industry.

The same Mexican press report notes that Chinese investors accounts for only 1% of current foreign investment in Mexico.

As reported in INVEST-SD last week, Mexico has also concluded a broader free trade agreement with Japan, including state-of-the-art provisions on investment. (See "Japan, Mexico agree to investment rules in new trade pact" INVEST-SD News Bulletin, Sept.24, 2004)

Sources:

"Mexico, China To Start Talks on Investment Treaty Oct 2004", Latin America News Digest via http://mx.invertia.com, Sept.23, 2004,

6. New York Times editorial criticizes international arbitration

An editorial in the New York Times takes to task the Chevron-Texaco company, and international arbitration more generally. The Times reports that Chevron-Texaco has resorted to arbitration in an effort to force the Ecuadorian government to bear any of the costs which might arise out of a pending court-case which seeks billions in damage for alleged environmental and health impacts of Chevron-Texaco operations in Ecuador.

The Times editorial board compares arbitration unfavorably with domestic court litigation, writing that the former process is "often one-sided, favoring well-heeled corporations over poor countries, and must be made fairer than it is today". The Times also criticized the secrecy of arbitral proceedings and the lack of opportunity for public input:

"Unlike trials, arbitrations take place in secret. There is no room in the process to hear people who might be hurt, in this case Ecuador's rainforest dwellers. There is no appeal. And the rules of the game are such that when companies seek to recover damages, arbitration panels tend to focus narrowly on the issue of whether a company's profits were affected by a government action. They need not consider whether the action or law in question was necessary to protect the environment or public health, or even to stop a corporation's harmful behavior."

The full editorial is available online at:
http://www.nytimes.com/2004/09/27/opinion/27mon3.html

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