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Arbitration Watch:

1. ICSID sees further investor-state arbitrations registered,
By Luke Eric Peterson

Two more claims have been registered with the International Center for Settlement of Investment Disputes, one of which alleges violations of a bilateral investment treaty. Of the 28 arbitrations registered at ICISD so far this year, 26 are based upon alleged violation of an investment treaty. Of these 26 claims, one was brought under the Energy Charter Treaty - a multi-party treaty governing trade and investment in the energy sector -

whilst the remaining 25 arise under various bilateral investment treaties.

The most recent BIT claim to be registered by ICSID is brought by the Unisys Corporation, an information technology company, in relation to losses incurred as a result of the Argentine financial crisis.

One of the 63 claims currently pending before ICSID - some of which date back to the late 1990s - a full 26 of these are against Argentina. And of these claims against Argentina, all but 3 of arbitrations (the exceptions being Vivendi, Enron and Azurix) are understood to arise out of damages suffered during the financial crisis.

Recently, the London-based Financial Times newspaper reported that the Administration of President Nestor Kirchner continues to insist that it will not authorize increases in tariffs charged for public services until all contracts with foreign service providers have been revised, a process expected to take at least another year to complete.

Although the Argentine Congress, under pressure from the IMF, recently voted to give the Administration the authority to permit tariff increases, Mr. Kirchner insists he will not be pressured into a hasty decision.

Meanwhile, utility companies which have been squeezed by the precipitous decline in the value of the Argentine peso, are warning that in the absence of tariff increases - which they say could pave the way for investments in improved service - Argentina can expect energy blackouts as summer approaches in the Southern hemisphere.

As reported in an earlier edition of INVEST-SD News Bulletin, an ICSID tribunal has already found jurisdiction to hear the earliest claim mounted against the Argentine emergency financial measures by the US-based CMS Corporation.

Sources:

ICSID website: www.worldbank.org/icsid

"Battle over Argentine electricity prices gridlocked", By Adam Thompson, The Financial Times, Oct. 28, 2003

"Path Cleared for First Challenge to Argentine Emergency Laws to be Heard on Merits", By Luke Eric Peterson, INVEST-SD News Bulletin, Aug. 1, 2003, available at http://www.iisd.org/pdf/2003/investment_investsd_aug_2003.pdf

"Argentine Congress to allow utility rate hikes; impact on arbitrations unclear", By Luke Eric Peterson, Oct. 8, 2003, INVEST-SD News Bulletin

2. Swiss Arbitration Forum to examine conflicting investment treaty awards

The 10th Annual Geneva Global Arbitration forum will bring together leading lawyers,

trade negotiators, academics, businesspersons to discuss several arbitration-related topics over a two-day period from Dec.3-4. The morning of Dec.4th will feature a series of panel discussions arising out of the now-notorious CME-Lauder saga - which saw two separate arbitral tribunals hand down conflicting rulings in investment treaty claims lodged against the Czech Republic by a European broadcasting firm and its major shareholder.

Panelists will discuss strategies for preventing such conflicting rulings, including the possible use of an appellate body mechanism modeled after that of the World Trade Organization. The final panel of the morning will ask whether the proliferation of bilateral investment treaties (BITs) has gone too far and if a multilateral instrument would be superior to the current patchwork of BITs.

For further information contact: The Geneva Global Arbitration Forum, P.O. Box 5134, 1211 Geneva 11, Switzerland, Fax: +41 (0)22 311.45.92

3. NGOs issue briefing note on Glamis mining corp's NAFTA claim against US

Oxfam America and the US chapter of Friends of the Earth have produced a short briefing paper on a pending dispute between a Canadian mining firm and the US Government under Chapter 11 of the North American Free Trade Agreement (NAFTA).

In July of this year, Glamis Gold filed a notice of intent to arbitrate, arising out its alleged treatment at the hands of California authorities. Glamis seeks to challenge recent California state regulations which would require that Glamis back-fill and re-grade mining pits in close proximity to Native American sacred sites.

Officials with Glamis have publicly insisted that this new requirement would render their proposed mining enterprise unprofitable. Accordingly, Glamis - which already holds a federal permit to operate a mine in the area - filed an arbitration alleging that California's new regulatory requirements amount to measures tantamount to expropriation of its investment, as well as a denial of fair and equitable treatment.

In their briefing paper, Oxfam and FOE point to the environmental and cultural sensitivity of the contested site, and argue that the Glamis case offers a "dramatic" illustration of how "international investment agreements can undercut efforts to protect the public interest in the mining sector."

Sources:

The 4 page briefing paper is available for download in PDF format at:
<http://www.foe.org/camps/intl/greentrade/glamis.pdf>

A copy of Glamis's notice of intent to arbitrate is available at:
<http://www.naftaclaims.com/glamis.htm>

4. Ruling in GE/Bechtel vs. OPIC arbitration now publicly available, By Luke Eric Peterson

The award of a tribunal asked to resolve a political risk insurance claim lodged by two of the three investors in a controversial Indian power plant is now available on the website of the Overseas Private Investment corporation (OPIC).

The dispute saw GE and Bechtel each recoup 28.5 million dollars from OPIC, following a tribunal's ruling that the actions of the Indian Government (and several of its sub-divisions and agencies) amounted to a "total expropriation" of GE/Bechtel's investment in the Dabhol Power Corporation.

The Dabhol case has seen a slew of litigation inside and outside of India, and the American Arbitration Association tribunal charged with resolving this particular claim saw fit to acknowledge that the investment has been "from its inception to the present day ... a political lightning rod."

GE and Bechtel were minority partners in an Enron-led project to build and operate power facilities in the Indian state of Maharashtra. Over time, the terms of a power purchase agreement (PPA) struck with the Maharashtra State Electricity Board came to be publicly denounced by critics who objected to what they deemed to be excessive rates payable to the foreign investors.

The Tribunal noted that payments to the investors ultimately ceased and that the PPA was ultimately scrapped by Indian authorities, not for reason of a lack of financial resources, but because it had become "politically unpopular".

Indeed, the Tribunal had little difficulty finding that the investor's treatment amounted to a direct deprivation of fundamental rights in the insured investment" - that is to say, the investor was "substantially deprived of the benefits of the investment".

The tribunal's award did not delve into allegations of corruption which have swirled around what remained India's largest-ever foreign investment - and which have been alluded to periodically in the international press.

As matters now stand, OPIC, a US-Government agency, will now approach the Indian government in an effort to recoup the more than 50 million dollars in compensation paid out by OPIC to GE/Bechtel.

For their part, GE and Bechtel are now pursuing compensation for more than a billion dollars in further damages (which were well in excess of their OPIC insurance coverage) through a bilateral investment treaty arbitration against the Government of India, (See "Bechtel and GE mount billion dollar investment treaty claim against India", INVEST-SD News Bulletin, Sept. 26, 2003)

Sources:

Bechtel Enterprises International (Bermuda) Ltd; Ben Dabhol Holdings, Ltd; and Capital India Power Mauritius I vs. OPIC, AAA Case No. 50 T195 00509 02, available online at: www.opic.gov/FOIA/Awards/2294171_1.pdf

"Bechtel and GE mount billion dollar investment treaty claim against India", By Luke Eric Peterson, INVEST-SD News Bulletin, Sept.26, 2003, See: http://www.iisd.org/pdf/2003/investment_investsd_sept_2003.pdf

"Money, Energy Politics and Enron's Costly Misadventure in Bombay", By Steven R. Weisman, The New York Times, February 3, 2002

"A blind eye: Whitehall's export credits guarantee department helps British companies win contracts overseas - but does it also underwrite corruption?", By Rob Evans and David Hencke, the Guardian (UK), June 10, 2003

Negotiations Watch:

5. WTO members set to consult informally on future of investment talks,
By Trineesh Biswas

World Trade Organisation Members will enter into informal discussions next week in an effort to reach agreement on the place of the so-called Singapore Issues in the Doha Round of trade negotiations. Countries differ widely as to which issues should remain on the negotiating table following the failed Cancun Ministerial Conference of September.

Matters are complicated by continuing uncertainty as to the stance of the European Commission - heretofore one of the principal demandeurs on the Singapore Issues- with regard to its post-Cancun positions on the four issues of investment, competition, trade facilitation, and transparency in government procurement.

Next week's informal consultations in Geneva fit into a broader framework outlined by WTO General Council Chair Ambassador Carlos Perez del Castillo (Uruguay) on October 14 - and endorsed by the WTO's governing General Council a week later.

Under the Castillo plan, Members will seek to find common ground on four contentious issues: the Singapore Issues, agriculture, non-agricultural market access (NAMA), and cotton subsidies. If the forthcoming talks on the Singapore Issues follow the pattern of last week's 'Green Room' consultations on non-agricultural market access issues, the investment discussions will likely be undertaken by some 30 of the WTO's 140+ Member governments.

Further confusion was fomented earlier this month at the APEC (Asia-Pacific Economic Cooperation) summit. There, the 21 APEC leaders issued a communiqué which expressed support for renewing WTO talks on the basis of the so-called Derbez text of 13 September, 2003. This document, the second Draft Ministerial text prepared by Cancun Ministerial Chair Luis Ernesto Derbez, had earned the ire of many countries in Cancun by explicitly linking a launch of investment negotiations to any movement on issues of key importance to developing countries: namely, agriculture and NAMA.

Oddly, several APEC members that subscribed to the recent communiqué (China, Thailand, and the Philippines) were members of the so-called G-21 bloc of developing countries in Cancun, which had denounced that same Derbez text for its conditioning of progress on agriculture, in particular, on the launch of investment negotiations.

According to Bridges Weekly, a Geneva-based trade news digest, representatives of Costa Rica have "reportedly suggested linking progress in NAMA to progress on the Singapore issues," at an informal meeting on NAMA held this week in Geneva. This proposal was "roundly rejected" by other developing countries in attendance.

Meanwhile, India, an outspoken opponent of the investment issue at the WTO, has categorically rejected any suggestion that the Derbez text should serve as the basis for any renewal of Doha Round negotiations. Indian Commerce and Industry Minister Arun Jaitley told the Bangalore-based daily Deccan Herald that the text only provided for the "development of developed nations."

Jaitley warned that the text "did not reflect aspirations of large number of developing countries particularly on Singapore and agricultural issues" and that it "cannot be starting point for any future multilateral trade negotiations under WTO."

And further adding to confusion in the wake of Cancun's collapse has been the reticence of the European Commission. In an October 28 speech to the UK-based Journal of Common Market Studies, European trade Commissioner Pascal Lamy said that the European Commission "will shortly bring forward [it's] ideas" on the four Singapore issues. However, Lamy reiterated the view that the EU's offer to drop their demands for a WTO investment agreement - made at the 11th hour of the Cancun negotiations - no longer stands. At the same time, he acknowledged "that full political support for the Singapore issues remains elusive."

In his speech, Mr. Lamy also alluded to the possibility that like-minded WTO members might opt to negotiate controversial matters like investment on a pluri-lateral basis. (see "EU insists investment issue is not off the WTO agenda," Invest-SD Weekly News Bulletin, October 11, 2003)

Sources:

"India rejects Cancun draft for future talks," Deccan Herald, October 23, 2003, available online at <http://www.deccanherald.com/deccanherald/oct23/b1.asp>

Fifteenth APEC Ministerial Meeting Joint Statement, Asia-Pacific Economic Cooperation, October 21, 2003, available online at http://www.apecsec.org.sg/apec/ministerial_statements/annual_ministerial/2003_15th_apec_ministerial.html

"WTO Green Room Meets on Non-Ag Market Access; Singapore issues forthcoming", Bridges Weekly Trade News Digest, Vol. 7, Number 6, International Centre for Trade and Sustainable Development, Geneva, October 30, 2003, available at: <http://www.ictsd.org/weekly/index.htm>

"The EU, Cancun and the Future of the Doha Development Agenda," speech by Pascal Lamy, Journal for Common Market Studies, London, October 28, 2003; available online at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/03/499|0|RAPID&lg=EN&display=

Duly Noted:

6. Ecuadorian environmental lawsuit against Chevron-Texaco could have teeth in US

The New York Times reports that Chevron-Texaco is undergoing trial in Ecuador in a novel lawsuit alleging extensive environmental damage arising out of (then) Texaco Oil's operations in the Amazon rainforest from 1971 to 1992. Plaintiffs allege that Texaco dumped 18.5 billions gallons of toxic waste water and crude oil into more than 300 open, unlined pits. Although the pits were covered over, plaintiffs in the dispute are pushing for a full-scale clean-up of the site, which could cost up to a billion dollars according to one estimate. The case is interesting because it was originally brought in US Courts, but in 1993 a US Court of Appeal ruled that the case should be heard in Ecuador - and in a novel twist indicated that the final judgment and any financial penalty would be enforceable in US courts.

Source: "Texaco goes on trial in Ecuador pollution case", By Juan Forero, The New York Times, Oct. 23, 2003

7. Lawyers cast doubt on legality of Iraq's new foreign investment law

International lawyers have told the London-based Financial times that the US Coalition Provisional Authority in Iraq could be violating international law by selling state assets.

They also cast doubt on the legality of the recent Iraqi foreign investment law of September 19th. According to Juliet Blanch, a partner with Norton Rose in London, "Most (experts) believe that their actions are not legal. There would be no requirement for a new government to ratify their (actions)." Rose points to the requirement under international law that occupying powers respect the existing laws of a country "unless absolutely prevented from doing so". This view was buttressed by a confidential legal memo prepared for British Prime Minister Tony Blair by the UK Attorney General, and which was leaked to the press in the early stages of the latest war in Iraq.

Another international lawyer, Stephen Nelson, of Squire, Sanders & Dempsey told a London conference that the new Iraqi foreign Investment law is "strictly contrary" to the constitution of Iraq - which can only be amended by the Iraqi people. Casting doubt on the legality of any investment contracts entered into by the Coalition Provisional Authority, some legal experts went so far as to suggest that a handful of existing oil contracts with the ousted regime of Saddam Hussein might be more legally enforceable than any new deals inked with the occupying forces.

Source: "Business deals may be invalid, experts say", By Thomas Catan, The Financial Times, Oct.29, 2003

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