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1. Belgian Court ruling postpones challenge to Eureko arbitrator for six months,
By Luke Eric Peterson

The Belgian Court of First Instance in Brussels has issued a ruling which has the effect of postponing a final decision on a request by Poland to remove an arbitrator from the tribunal which has been presiding over a high-profile investment treaty dispute.

As was reported earlier in ITN, Poland filed a challenge against Judge Stephen Schwebel in relation to his service as arbitrator in the arbitration between Dutch insurance firm Eureko and the Polish Government. (Poland has also sought to challenge a 2005 Partial Award issued by a majority of a three member tribunal in that case, and which had held Poland liable for breaches of the Netherlands-Poland bilateral investment treaty).

In a its recent ruling, the Belgian Court declined to rule on the merits of Poland's challenge to Judge Schwebel, and has given the Polish side a further 6 months in which to establish that the Court has jurisdiction to hear such a claim. In particular, the Polish authorities must demonstrate that the CEPANI Institute (A Belgian arbitration centre) is not, in fact, the appropriate venue for hearing such a challenge.

According to a press release issued by Eureko on June 28th, if the CEPANI institute determines that it was the proper venue for hearing such a challenge, the Belgian Court would likely decline to review the challenge. Moreover, Eureko argues that any challenge to the CEPANI institute would now be time-barred from proceeding at that venue, as such a challenge should have been initiated within one month of the petitioner's "having discovered its reasons for such a challenge."

For its part, the Polish Treasury Department has issued a press release which insists that a CEPANI official was contacted in advance of the decision to bring the challenge to the Belgian courts. The Treasury Department says that it was informed by that official that CEPANI was not the appropriate forum for such a challenge.

A hearing date of November 3rd has been set by the Belgian court to consider any new evidence which bears upon its jurisdiction over the case.

After handing down its Partial Award in August of 2005, the arbitration tribunal presiding over the Eureko v. Poland arbitration was to have turned to a consideration of damages owing as a result of Poland's liability for its investment treaty breaches. Eureko has sought damages in excess of 1 Billion (EUR) for its thwarted bid to acquire a controlling stake in Powszechny Zakled Ubezpieczen S.A. (PZU), Poland's largest insurance company.

However, the twin challenges by Poland to the Partial Award and to one of the members of the tribunal has had the effect of postponing a ruling on damages.

2. Tanzania wants open hearings in BIT arbitration over water concession,
By Damon Vis-Dunbar

The Tanzanian Government is pushing for greater transparency in an international arbitration with a UK-based water-services company.

Biwater Gauff Tanzania (BGT), whose major stock-holder is the British water services provider Biwater PLC, initiated arbitration proceedings under the UK-Tanzania bilateral investment treaty in 2005. The case, which is being arbitrated at the International Centre for the Settlement of Investment Disputes (ICSID), has attracted intense public interest.

In the UK particularly, where Biwater PLC is based, media reports were quick to contrast the large corporation with one of the world's more impoverished countries; "UK water giant to sue debt-laden Tanzania" ran the headline in the Observer newspaper.

In response, Biwater says the media has missed the point. “Even if Biwater was a multi-billion dollar global enterprise, so what,” said Steve Marinker, a Biwater spokesperson, when contacted by ITN. “The reality is we had a contract with the government of Tanzania, and they broke the terms of that contract.”

Despite the interest this case has generated, the proceedings are closed to the public. Tanzania has asked the presiding tribunal to open the hearings to the public, release all orders and decisions of the tribunal, and to permit interventions before the tribunal by third-parties, such as non-governmental organizations. But BGT has rejected these requests, according to the minutes of the tribunal’s first session, held earlier this year.

While BGT has consented to the publication of the final arbitral award, the firm prefers to debate the official release of other documents on a case by case base – although Tanzania is free to release decisions and procedural orders on a unilateral basis.

(Notably, BGT did give its consent to the official release of a procedural order in the case which dealt with the production of documents.)

BGT has declined to see the arbitral hearings opened to the public and the media, while submissions by third parties will be handled under the recently revised ICSID rules. The new rules allow the tribunal to entertain interventions from third parties after consulting both parties, which essentially fulfills Tanzania’s earlier demand that procedures for would-be amicus curiae be fixed.

Some non-governmental organizations have been vocal in their concerns over the dispute with Tanzania, viewing it as a cautionary example of the risks involved in privatizing essential public services.

“This is a scandal,” said Peter Hardstaff, head of policy at the World Development Movement to the Observer newspaper. “Biwater should be ashamed of itself. It's yet another example of a failed privatisation and another example of rich countries persuading a poor one to apply a policy that doesn't work.'

BGT’s entry into Tanzania flowed from a donor-funded project to improve water and sewage services in and around Dar es Salaam, with some $145 Million US provided by a host of development agencies, including the World Bank, the European Development Agency and the British government.

The foreign funds hinged on a private sector operator taking over from the state-owned corporation that had previously operated water services in Dar es Salaam. The contract was ultimately awarded to a consortium, City Water, consisting of Biwater PLC, the German firm Gauff, and a Tanzanian company called Super Doll Trailer Manufacturers.

Two years after the investment was made, Tanzania took back control of City Water, alleging that the consortium had not made the investments in infrastructure that it had agreed to in its contract.

Two parallel arbitrations are now in progress: one brought by BGT under the UK-Tanzania bilateral investment treaty (BIT), and a second contractual dispute between the Tanzanian company City Water – in which BGT holds a majority stake - and a state-owned water company DAWASA.

Tanzania had pushed to consolidate the treaty and contractual arbitrations, proposing that Tanzania would pay any award issued against the state-owned DAWASA, while BGT would take responsibility for an award issued against City Water. BGT rejected that offer, however, preferring to keep the arbitrations separate.

Although the UK-Tanzania BIT does contain a so-called umbrella clause, which might be used in an attempt to bring contractual obligations under the protective cover of the BIT, BGT has not invoked this provision thus far in BIT claim.

Maintaining a separation between the contractual and treaty disputes could make strategic sense for BGT – allowing the firm to take an offensive posture in the BIT claim –where the responsibility of the state will be the focal point - while City Water handles the back-and-forth allegations of contractual non-performances in the separate contract-based arbitration.

The parties have engaged over a number of procedural matters as the ICSID arbitration gets underway, including access to documents housed in City Water's Tanzanian offices. In March, the tribunal ruled on this matter in response to a request by BGT for a "provisional measure", an application usually filed early in a proceeding requesting some urgent decision by the tribunal.

Tanzania had resisted the request, claiming that BGT's call for document disclosure fell beyond the intended scope of Article 47 of the ICSID Convention on provisional measures.

In its decision, the three-person tribunal asked that Tanzania deliver certain bank statements to BGT, but rejected the request that a number of other documents, such as ledgers, records and correspondence, also be disclosed. Such disclosure as a provisional measure, while possible, would be "exceptional," said the tribunal.

The tribunal did recommend that Tanzania preserve the documents in question, which is a measure that Tanzania had already promised to take. It also asked that Tanzania draw up an inventory of the types of documents that exist.

Oral hearings are currently slated for April 2007.

Sources:

ITN interviews

Minutes of the First Session of the ICSID arbitration between Biwater Gauff (Tanzania) Ltd. and the United Republic of Tanzania, available on-line from the ITN document centre by clicking here.

Procedural Order # 1 in ICSID arbitration between Biwater Gauff (Tanzania) Limited and United Republic of Tanzania, available on-line from the ITN document centre by clicking here.

"UK water giant to sue debt-laden Tanzania", By Nick Mathiason, The Observer, May 22, 2005

3. Tribunal will hear BIT arbitration over Suez Canal dredging,
By Luke Eric Peterson

An ICSID arbitration tribunal has upheld jurisdiction over a claim by two Belgian companies who allege that contractual misrepresentations and mistreatment at the hands of Egyptian courts.

The two firms, Jan de Nul N.V. and Dredging International N.V. allege that Egypt is liable for contractual breaches, as well as breaches of two successive bilateral investment treaties in place between Belgium and Egypt.

The Belgian firms accuse Egypt's Suez Canal Authority (SCA) of intentionally misleading them with respect to the soil conditions and the amount of material to be dredged from the Suez Canal, thus inducing the companies to agree to widening and deepening portions of the canal on terms which were financially "disastrous". The claimants undertook the work in 1993-1994, while turning to the Egyptian courts in 1993 in an effort to sue the SCA.

After a long journey through the Egyptian legal system, the investors' claims against the SCA were rejected in May of 2003 by the Administrative Court of Ismailia. The claimants mounted their international arbitration at ICSID in December of 2003.

In a decision dated June 16th, 2006, the presiding ICSID tribunal has affirmed its jurisdiction to hear the merits of the dispute.

The tribunal was obliged to consider to what extent the dispute fell under the terms of two successive BITs in place between the two countries: a 1977 Belgium-Egypt BIT which remained in force until May 23, 2002, after which an updated Belgium-Egypt BIT came into force.

In opposing the jurisdiction of the ICSID tribunal, Egypt pointed to provisions in the 2002 BIT which precluded the arbitration of disputes which arose prior to the entry into

force of that treaty. Egypt also adverted to a 2003 ICSID decision in the case of Lucchetti v. Peru, where the presiding tribunal denied jurisdiction over a BIT claim on the grounds that the dispute was a long-running one which pre-dated the entry into force of the relevant treaty, and therefore was excluded from the treaty's dispute settlement mechanism by virtue of a provision which expressly excluded pre-existing disputes.

However, the tribunal hearing the Jan de Nul dispute ruled that there two distinct disputes, a contract claim pursued in the Egyptian courts and a treaty claim, with the latter only crystallizing in 2003 (after the 2002 BIT had come into force) and after the ruling of the Administrative Court of Ismalia rejecting the Belgian investors' contractual claims.

In other words, the treaty claim brought to ICSID was deemed to be a 'new' dispute by the tribunal, one which involved more than alleged contractual breaches under Egyptian law, and which also advanced allegations of denial of justice under the treaty, particularly as a result of the treatment experienced by the investors at the hands of the various Egyptian judicial system.

Thus, the dispute before ICSID was not held to be the same dispute which had arisen some years earlier, and which would have been barred by Article 12 of the 2002 Belgium-Egypt BIT, which stipulates that the treaty is "not applicable to disputes having arisen prior to (the treaty's) entry into force."

4. Ukraine reaches settlement in BIT claim by US-govt venture capital fund, By Luke Eric Peterson

An arbitration under the US-Ukraine bilateral investment treaty has been halted after the US venture capital firm, Western NIS Enterprise Fund (WNISEF), came to an agreement which will see the Fund reimbursed for loans made to a former Ukrainian business partner.

The US fund makes investments in small and medium enterprises in Ukraine and Moldova with seed money provided by the US Agency for International Development (USAID), a government agency.

In 1996, WNISEF entered into a joint-venture with a Ukrainian business partner in 1996 for the production of high-quality sunflower oil. According to a request for arbitration seen by ITN, the US fund extended a $1.25 Million line of credit to the joint venture firm in 1997. However, repayments of that loan were sporadic, and allegedly ceased altogether in 2000.

While WNISEF turned to commercial arbitration in New York City as provided under the loan agreement, the fund's Ukrainian partner turned to Ukrainian courts in an effort to declare the loan agreement void.

WNISEF prevailed in its commercial arbitration, securing an order for approximately $3.77 million in principal, accrued interest and penalties, however the Fund's Ukrainian partner had meanwhile succeeded in having the underlying loan agreement voided in the Ukraine courts.

As a consequence of this, the WNISEF was unable to have its award enforced in the Ukrainian courts. Thus, in 2003, the Fund initiated an arbitration at the International Centre for Settlement of Investment Disputes (ICSID), alleging that it had been deprived of its Ukrainian investments, and that the Ukrainian Government, and in particular its judicial system, was failing to live up to the terms of a US-Ukraine bilateral investment protection treaty.

The investor also alleged that the failure of the Ukrainian courts to enforce its commercial arbitration award amounted to a further breach of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

A tribunal was convened to arbitrate this dispute, however, after Ukraine voiced jurisdictional objections, the tribunal held that WNISEF had failed to provide a formal 6 month notification period as mandated by the US-Ukraine BIT. According to a source familiar with the case, the tribunal did not view this procedural defect as fatal from a jurisdictional perspective; however the tribunal did order the proceeding stayed for a period of 6 months so that the 6 month notification requirement could be respected.

During this cooling-off period, a settlement was reached between the parties. A source familiar with the case suggests that settlement talks had been ongoing for some time, and credits a change in government in Ukraine with having given impetus to the settlement.

The WNISEF case is not the only ICSID arbitration to see claims of BIT breach by a government for its failure to provide for the enforcement of a commercial arbitration award in its territory. At least one other ongoing claim, Saipem S.p.A. v. People's Republic of Bangladesh, involves a similar type of dispute; in the Saipem case, the Italian energy company insists that Bangladesh has failed to respect the terms of a commercial arbitration agreement and award.

The Saipem case is still pending before ICSID.

5. Lawyer says risk insurance claims may be alternative to BIT arbitration in Bolivia,
By Damon Vis-Dunbar and Luke Eric Peterson

Foreign investors in Bolivia's oil and gas sector whose assets have been seized may be better off turning to their insurance policies for compensation, while leaving their insurance companies to seek compensation through bilateral investment treaties (BITs), says a London-based insurance law specialist.

In a briefing note released this month, Christopher Cardona, a Partner with the law firm of Chadbourne and Parke LLP, urges foreign investors to look at their political risk insurance policies, which provide protection in cases of expropriation. Depending on the wording in those policies, foreign investors may be eligible for compensation in cases of partial expropriation. If such a claim could be made out, Cardona suggests that foreign investors might be better off invoking their insurance policies.

In an interview with ITN, Cardona noted that the costs of investment treaty arbitration can be prohibitive, as can the time required to fight such cases. Cardona concedes that it is rare for foreign investors to claim under their risk insurance, and to leave it to the insurer to pursue the host government for damages, however, many investment treaties leave open such a possibility.

"In fact, it may be more advantageous for the foreign investor to pursue a claim under the Political Risk insurance policy and allow the insurers to recover subsequently under any applicable investment treaty by way of subrogation," says his recent briefing note.

In the case of Bolivia, a May 1st nationalization decree by President Evo Morales has alarmed foreign energy firms, including the Spanish-based Repsol, British Gas, British Petroleum, Brazil's Petrobras, and the French firm Total. The firms are currently awaiting the new draft contracts to be proposed by government, and to ascertain whether Bolivia intends to offset investor financial losses in some way.

Most foreign companies with energy investments in Bolivia are protected by bilateral investment treaties and have already sent so-called triggering letters, so as to comply with the mandatory waiting periods imposed by BITs as a prelude to formal arbitration.

However, Cardona says that foreign investors might enjoy a less-noticed avenue of recourse: claims under their respective political risk insurance policies.

Some Political Risk plans provide narrow definitions of expropriation, in which case a partial loss of assets would not qualify, he says. But "other wordings provide cover for losses caused directly by an "Expropriatory Act," and may provide an easier route for investors than international arbitration.

Source:

"Will recent nationalizations in Bolivia give rise to claims under political risk insurance policies", By Christopher Cardona, Chadbourne & Parke briefing note, available on Mondaq, June 14, 2006, available on-line by clicking here.

ITN interviews

6. Cemex looks to exit Indonesia, ICSID arbitration continues for the time being,
By Damon Vis-Dunbar

A plan by a Mexican firm to divest itself of its stake in an Indonesian cement company after an acrimonious stay in that country has so far been frustrated, as the government tries to ensure that those shares do not fall into the hands of another private investor.

Cemex, a major Mexican firm, bought a 25 percent stake in PT Semen Gresik, Indonesia's largest cement manufacture, in 1998. It later tried to increase its ownership stake to 51 percent, a right the company says it was promised under a purchase agreement.

However, that move was blocked by the government in the face of strong opposition from workers and local politicians in the volatile province of West Sumatra, igniting a dispute that was eventually brought to the International Centre the Settlement of Investment Disputes (ICSID) by a Singaporean subsidiary of Cemex under the ASEAN Agreement for the Promotion and Protection of Investments, in 2004.

According to its security filings, Cemex seeks a rescission (rescinding) of the purchase agreement, repayment of costs and expenses and compensatory damages – all of which have been estimated at several hundred million dollars by the company.

Cemex has remained mum about its Indonesian exit strategy since announcing in a short statement in May that it had agreed to sell its stake in PT Semen Gresik to the Rajawali Group, an Indonesian conglomerate, pending government approval. But intense speculation has followed the matter in Indonesia as the government reportedly looks for a way to ensure that government-owned entities purchase the Cemex shares in the local firm.

Both the second and third largest cement companies in Indonesia are owned by foreign investors, leading the government to argue that it is in the national interest that Gresik remain firmly under government control.

However, in recent weeks Indonesia has softened its tone, indicating that it may approve the sale, after opposition members questioned whether Indonesia could afford to buy out Cemex. "Basically, there is no problem with Rajawali," the Minister for State Enterprises, Sugiharto, told the Jakarta Post. But the ongoing ICSID arbitration has presented another barrier. Sugiharto said approval of the sale hinged on withdrawing the ICSID case, according to Jarkarta Post and other news media.

A source close to Cemex in this matter recently told ITN that the company has not been discussing a settlement agreement with Indonesia; although this person said that if Cemex did sell its stake in PT Semen Gresik, it would likely mark the end of the ICSID arbitration. The likely termination of the arbitration, if the government were to approve the proposed sale, has been invoked by opposition parties as a reason to criticize the government's reluctance to facilitate Cemex's sale of its Indonesian assets.

“Don’t try to mess up this deal as it is the government itself that will benefit most from avoiding international arbitration,” said Dradjad H. Wibowo, a legislator in the opposition National Mandate Party, as reported in the Jakarta Post.

And while Cemex has been tight-lipped about its strategy, the Rajawali Group has not shied away from using the prospect of terminating Cemex’s arbitration to pressure the government into approving the sale. “We believe that the government will approve the purchase as it would certainly end the ownership dispute between the government and Cemex over Gresik,” said Darjoto Setyawan, Rajawali’s Managing Director, to the Dow Jones news service.

Sources:

“Cemex agrees to cancel arbitration case of Semen Gresik”, AFX International Focus, June 16, 2006

“Government told not to meddle in Cemex, Rajawali affair”, The Jakarta Post, May 12, 2006

“Rajawali sees government project revenue from Semen Gresik”, By Edhi Pranasidhi, Dow Jones Newswires, May 5, 2006

Negotiation Watch:

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7. China and Australia seek ambitious investment agreement through an FTA,
By Damon Vis-Dunbar

Australia and China plan to include a chapter on investment in their forthcoming free trade agreement (FTA), despite initial hesitation by the Chinese. Once completed, the new FTA would replace a bilateral investment treaty between the two countries which dates to the late 1980s.

China has flagged investment and services as particularly sensitive topics, although both sides have recently made clear that the new FTA will be “comprehensive”.

“We’ve always known that this would be very difficult for China but it’s very important to us,” a senior Australian trade source told the Financial Review. “We will need good outcomes on services and investment in order to build community support in Australia for the FTA as a whole.”

Following a year of preliminary talks, the first formal round on negotiations kicked off last month, led by a 57-member Australian team and a 52-member Chinese team. The

negotiation is one of China's most ambitious trade and investment agreement talks since joining the World Trade Organization in 2001.

Still, the talks as a whole are said to be lagging, and the negotiations on investment and services are dragging behind the other chapters of the FTA. Negotiations on draft texts of the FTA began during the last negotiating round; however, a text of the investment chapter was not prepared at that time.

The Australians are scheduled to provide text of an investment chapter before a September negotiating round. Negotiators will likely use the Australia-United States Free Trade Agreement as an overall starting point for this FTA, said an Australian source. That agreement provides national treatment with respect to the establishment or acquisition of new investments, thus going beyond the existing Australia-China investment treaty which provides only post-establishment protections.

Neither the Austalians nor the Chinese work with a model investment agreement, such as the templates that the Americans and Canadians use when negotiating investment rules. The architecture of the China-Australia FTA is still being discussed and some structural matters need to be hammered out, an Australian source tells ITN. China is said to be uneasy about a negative list approach, which would provide national treatment to Australian investors in all industries apart from those explicitly excluded from the agreement.

Australia has signed three FTA's with investment chapters in recent years, with the United States, Thailand and Singapore, and each of those investment agreements bore distinct differences. For example, the Australia-Thailand FTA featured a positive-list approach to liberalizing investment, while both the US and Singapore used a negative list.

For its part, China is still relatively inexperienced when it comes to negotiating investment rules in free trade agreements, which explains their caution in the Australia-Chine FTA talks, said a source close to the negotiations. Moreover, with significant foreign direct investment already flowing into China, the Chinese have not seen investment rules as an urgent priority.

Nonetheless, Australia is looking for deep liberalization, particularly in services. Telecommunications, construction, mining and environmental services are all areas in which Australia will push for greater access for its investors, according to reports by Australia's Department of Foreign Affairs and Trade.

In many of these industries, Australian investors have complained of barriers to the repatriation of profits, and are looking to the investment chapter address the problem. "Some Australian firms have found that there can be limits on the amount of money that can be transferred to Australia at one time," notes an Australian government study. Investors in education services, for example, have encountered difficulties since China classifies education as a not-for-profit activity.

For its part, China has indicated that it is willing to open up its services sector to Australian investors. “We have no other option but to discuss further liberalizing of these sectors, as well as legal services and tourism and education,” said Zhang Xiangchen, China’s chief negotiator for the FTA, in an interview with the Australian newspaper.

Australian investors are also gunning for a stronger investment dispute resolution clause, according to an Australian government report. The current Australia-China BIT, like many Chinese investment treaties, reserves investor-state arbitration to disputes over compensation in confirmed cases of expropriation or nationalization. Australian investors have pushed for this dispute resolution mechanism to be extended for other alleged breaches of the agreement. A person close to the negotiations said the dispute resolution clause would be “modernized”, but that its features were still being discussed.

Recently, China has broadened the scope of dispute resolution clauses in its investment agreements. A recent BIT with Germany, for example, provides investor-state arbitration to “any dispute concerning investments between a contracting Party and an investor of the other Contracting Party”. However, Australia’s FTA with the United States was notable for the decision not to include an investor-state dispute settlement clause, at the behest of Australian demands that such disputes be resolved in local courts, or at the state-to-state level.

Sources:

ITN interviews

“FTA breakthrough firms with China”, By Rowan Callick, The Australian, May 29, 2006

“Services crucial to China FTA talks”, By Tracy Sutherland, Australian Financial Review, April 22, 2006

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