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Editor's Note:
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1. Providing further context for our news coverage

As of this writing, ITN lays claim to 1600 direct subscribers, and a wider readership thanks to redistribution through other channels (listserves, web publication, etc.). Our readers range from experts in the intricacies of investment treaty law, to those who keep one eye on this emerging field merely in order to monitor how investment treaties may have domestic policy repercussions.

Given this diverse readership, ITN receives occasional requests from readers who desire more explanation as to what a particular legal dispute or development may mean for policymakers. As a service to such readers, we are introducing a new feature which will provide occasional analysis of selected news-items, in much the same manner that newspapers sometimes complement their news stories with brief analytical pieces which place the news in its wider context.

While not intended to provide a comprehensive level of analysis, these new features should provide novice readers with greater clarity as to some of the potential implications of particular developments in this fast-evolving area of international law.

Arbitration Watch:

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2. Ecuador fails in bid to overturn Occidental award, but appeal in the works,
By Luke Eric Peterson

The Government of Ecuador has failed in a bid to challenge an arbitration award which was rendered in favor of the US-based Occidental Exploration and Petroleum Company in 2004.

Occidental had prevailed in its arbitration under the US-Ecuador bilateral investment treaty, convincing a tribunal that it had suffered violations of several treaty provisions, including guarantees of national treatment and fair and equitable treatment. The US company was awarded some 75 Million (US), but its pay-day was postponed when Ecuador turned to a United Kingdom court in an effort to challenge the arbitral award.

However, the UK High Court of Justice, in a ruling handed down on March 2, 2006, has dismissed Ecuador's challenge. Lawyers for Ecuador had argued that the arbitral tribunal had exceeded its jurisdiction – contrary to the UK's Arbitration Act 1996 – when it permitted Occidental to arbitrate a claim related to "matters of taxation".

At the crux of Ecuador's case was an argument that the tribunal had wrongly interpreted an article in the US-Ecuador bilateral investment treaty which indicates how the treaty applies to disputes related to "matters of taxation".

Article X (2) of the treaty played such a central role in the arbitration, and in the subsequent UK court review, that it is reprinted here in full:

"Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article III; (b) transfers, pursuant to Article IV; or (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in

Article VI (1) (a) or (b)"

While Occidental and Ecuador both agreed that this Article was designed to limit the treaty's application when investor-state disputes centred on "matters of taxation", they disagreed sharply as to how this Article was to be read.

Ecuador argued before the UK Court that the original tribunal had exceeded its jurisdiction by reading Article X(2) in such a way that it could find jurisdiction to examine claims for breach of other treaty rights (e.g. National Treatment or Fair and Equitable Treatment) which were not expressly mentioned in Article X(2)

In other words, Ecuador insisted that the proper reading of Article X(2) meant that the BIT applied to "matters of taxation" only where a claim alleged expropriation; interference with free transfers; or failure to observe or enforce the terms of an investment agreement or authorization (for e.g. a contract).

By contrast, Occidental argued that the arbitral tribunal had been correct to find jurisdiction to examine alleged breaches of National Treatment, Fair and Equitable Treatment and other BIT rights. On Occidental's view, Article X(2) of the BIT served as a 'gateway', which opened up all of the treaty's rights and protections – including those on National Treatment, Fair and Equitable Treatment, etc. - in cases where a dispute centred on expropriation; interference with free transfers; or failure to observe or enforce the terms of an investment agreement or authorization.

Ultimately, Justice Aikens of the UK High Court of Justice would endorse Occidental's reading of Article X(2), decreeing that:

"On its correct construction, if a 'matter of taxation' falls within the scope of paragraphs (a), (b) or (c), then the whole Treaty applies to that 'matter of taxation'."

Turning to the tribunal's application of Article X(2) to the particular facts of the Occidental-Ecuador dispute, Justice Aikens held that the dispute was not merely over VAT refunds, but also related to the performance of the obligations of an investment agreement (in this case, a contract between Occidental and Ecuador's state-owned agency Petroecuador).

Accordingly, Justice Aikens concluded that the tribunal was "correct in holding that it had jurisdiction" to examine claims of alleged breach of the US-Ecuador BIT's National Treatment and Fair and Equitable Treatment obligations. In other words, once the dispute came within one of the three "gateways" located in Article X(2) – in this case, a dispute over performance of an investment contract – the tribunal had jurisdiction to look at alleged breaches of other BIT provisions.

Thus, the UK Court held that there had been no breach of Section 67 of the Arbitration Act 1996, and Ecuador's challenge to the arbitral award failed on this basis.

Justice Aikens would also dismiss a separate challenge by Ecuador under Section 68 of the Arbitration Act 1996. Ecuador had contended that the tribunal exceeded its powers by making certain orders and pronouncements, which interfered with the sovereign, internal affairs of Ecuador, and which constituted a "serious irregularlity", and, ultimately, a "substantial injustice to Ecuador".

Meanwhile, Occidental had filed its own application with the UK Court, which would have challenged the original tribunal's ruling on expropriation; however this challenge was made on a "contingent" basis (i.e. it would only be relevant had the UK Court ruled in favor of Ecuador's challenges to the arbitral award). In particular, Occidental submitted that the original tribunal had dismissed its claim for expropriation under the US-Ecuador BIT, on jurisdictional grounds (rather than on the merits), and, as such, Occidental ought to be free to challenge that jurisdictional finding under the UK Arbitration Act 1996.

Although the UK Court's dismissal of Ecuador's challenges to the arbitral award, obviated the need to examine Occidental's "contingent" challenge, Justice Aikens did offer an opinion as to how he would have dealt with the latter challenge. Ultimately, he ruled that the earlier arbitral tribunal had rejected Occidental's expropriation claim on its merits – not as a jurisdictional matter – and, therefore, Occidental would have been unable to challenge that part of the tribunal's awards under Section 67 of the Arbitration Act 1996.

Justice Aikens' decision of March 2, 2006 may not mark the end of the Occidental-Ecuador dispute. Counsel for Ecuador tells ITN that the Ecuadorian Government will seek leave to appeal the decision to a higher court in the UK.

Meanwhile, in a related development, a spokesperson for the Canadian firm Encana tells ITN that the company will not seek to challenge the award rendered last month in its arbitration with Ecuador. Alan boras told ITN that "EnCana has sold all of its oil and pipeline interests in Ecuador and does not plan to continue pursuing the VAT matter."

Sources:

The Republic of Ecuador and Occidental Exploration & Production Co, in the High Court of Justice, Queen's Bench Division, Commercial Court, Case No. 04/656, Approved Judgment of March 2, 2006, now available on-line in the ITN Documents Centre by clicking here.

3. ANALYSIS: Ecuador and its Tax Arbitrations with Occidental and Encana, By Luke Eric Peterson

While failing in its recent effort to overturn a 2004 arbitral award rendered in favour of

US-based Occidental, the Government of Ecuador saw success last month in a separate arbitration with the Canadian energy firm Encana.

The facts of the Occidental and Encana arbitrations were closely related – with both foreign firms claiming that Ecuador's denial of VAT refunds breached undertakings in bilateral investment treaties that Ecuador had signed (with the US and Canada respectively). Yet, the outcome of these two arbitrations was starkly different, with Ecuador prevailing in its case with Encana, but losing its case with Occidental and being ordered to pay some $75 Million US in July of 2004.

On the face of it, these diverging outcomes may seem contradictory. However, the peculiar result in the two arbitrations may be traced to different language found in the US and Canadian treaties with Ecuador.

While opinions may vary as to whether the tribunals in the two arbitrations adopted the appropriate interpretation of the respective treaty provisions, it is clear that the US and Canadian BITs incorporated differently worded exclusion clauses for disputes involving taxation measures.

In the Encana case, which was profiled in ITN last month, the Canadian firm encountered a treaty provision, Article XII, which admitted of less ambiguity when it came to spelling out which portions of the treaty would be inapplicable in disputes involving taxation measures.

While Encana had attempted to hold Ecuador liable for violating obligations such as National Treatment or Fair and Equitable Treatment, it was unable to do so because Article XII of the Canada-Ecuador treaty explicitly stated that "Except as set out in this Article, nothing in this Agreement (i.e. the Canada-Ecuador BIT shall apply to taxation measures". That Article offered foreign investors two avenues: to argue that a tax measure violated an investment agreement (e.g. a contract) or violated the BIT's clause on expropriation.

By contrast, in the Occidental case, the US-Ecuador BIT contained a less clear-cut clause relating to matters of taxation, and the parties would expend a great deal of energy, both in the original arbitration, and as part of Ecuador's subsequent challenge to the arbitral award in UK courts, in parsing the language of Article X of the BIT.

At the most elementary level, Ecuador's experience reminds that tax matters may fall under the arbitration provisions of foreign investment treaties – a point which may be obvious to international lawyers, but less so to local politicians or public officials.

Governments wishing to limit the applicability of investment treaties to sensitive matters such as taxation would be advised to take note of the different language employed in Ecuador's treaties with Canada and the United States, and to recognize that the subtle variations between the two treaties proved to be of great consequence when similar multi-million Dollar disputes were brought pursuant to each agreement.

4. UK gold mining company moves towards arbitration in dispute with Kyrgyzstan,
By Damon Vis-Dunbar and Luke Eric Peterson

A much-publicized row between London-based Oxus Gold PLC and the Government of Kyrgyzstan over a mining concession that was annulled in 2004, was ratcheted up last month when the UK firm served the Kyrgyz government with notices of dispute under the UK-Kyrgyz and US-Kyrgyz bilateral investment treaties.

The dispute notices are intended to encourage consultation, "failing which the Oxus Group intends to pursue claims in international arbitration," according to a public statement by the company.

Oxus entered into a joint-venture agreement with the state-owned Kyrgyzaltyn mining company in 1998, forming the Talas Gold Mining Company, in which Oxus held a majority stake. However, Talas' operating license for the Jerooy mining concession was revoked in the summer of 2004, when the government accused the company of not fulfilling its contractual obligations.

A Kyrgyz source familiar with the government's handling of foreign investment disputes, says that Oxus breached its contract on several occasions by failing to meet deadlines prescribed in the licensing agreement. On two occasions the company was provided with an extension, but when a third extension was requested, Kyrgyzstan rescinded the operating license.

This person also explained that, once rescinded, the licensing agreement cannot simply be reinstated, as Oxus is demanding. Under Kyrgyz law, the license must go to tender.

Oxus has been receiving advice on its dispute from the international law firm Clifford Chance. A background briefing note released by that firm states that "regardless of the formalities of Kyrgyz law, Oxus' reliance in good faith on the promises and representations of the Kyrgyz Government creates an enforceable right and that the Kyrgyz Government's tender of the Jerooy license would be an expropriation in violation of Kyrgyz and international law."

In company statements, Oxus has said that Kyrgyzstan Prime Minister Felix Kulov offered to reimburse the company for the expenses incurred in the Jerooy project, following an international audit.

However, the amount Oxus has spent remains in dispute. In January, Oxus estimated that it had poured some $46 Million US into the Jerooy project – a figure challenged by Kyrgyzstan.

While the two sides wrestle, Oxus says it is keen to resume its work in Kyrgyzstan.

The Kyrgyz Government has at least some familiarity with treaty-based arbitration claims. In 2005, a Stockholm-based arbitral tribunal held the Government in breach of the provisions of the Energy Charter Treaty, a multilateral trade and investment agreement governing the energy sector. In its award, the tribunal held that the Republic had failed to provide fair and equitable treatment to the UK-based firm Petrobart. The tribunal also ruled that the Republic had failed to provide the UK firm with effective domestic avenues for enforcement of its rights.

Petrobart's dispute with Kyrgyzstan was not a traditional investment relationship in that it centred on a sales contract agreed between Petrobart and KGM, a Kyrgyz state joint stock company which provides energy to Kyrgyz consumers. Indeed, the UK firm failed in a first attempt to sue Kyrgyzstan under that country's Foreign Investment Law, with the presiding tribunal ruling that there had been no "investment" as defined in the Foreign Investment Law. However, the UK firm succeeded in a second claim when it convinced a separate tribunal that its activities in Kyrgyzstan qualified as an "investment" as defined under the Energy Charter Treaty. (See: Tribunal renders award in Energy Charter dispute against Kyrgyzstan, ITN, July 12, 2005, available on-line by clicking here)

Sources:

ITN interviews

"Kyrgyzstan to pull out of JV with Oxus", Interfax: Daily Business Report, February 28, 2006

5. Chilean chemical firm launches ICSID suit against Bolivia,
By Damon Vis-Dunbar and Luke Eric Peterson

A Chilean chemical firm has initiated arbitration proceedings at the International Centre for the Settlement of Investment Disputes (ICSID), claiming that its Bolivian mining company was expropriated, in breach of a Bolivia-Chile bilateral investment treaty.

Quimica e Industrial del Borax Limitada (Quiborax), which has a 50.99 per cent stake in the Bolivian mining company Non Metallic Minerals (NMM), saw its mining concession rescinded in the summer of 2004. NMM exploits the mineral ulexite in Salar de Uyuni, in the southern region of Bolivia.

Explaining the decision to rescind the mining concession, a Bolivian spokesperson was quoted in the trade publication Industrial Minerals as saying:

"The company has systematically withheld information from the national customs

regarding taxes and for the purpose of auditing. Additionally, it was verified that the exports of ulexite declared by the company do not coincide with the cargo volumes transported. Due to this, there is evidence of economic damage to the Bolivian state."

NMM was given 30 days to hand over all "physical property" to the local governing department.

The Claimants deny these allegations and insist that their license was rescinded due to anti-Chilean sentiments which swelled in 2003, says Andres Jana Linetzky of the Chilean firm Alvarez, Hinzpeter, Jana & Valle, who has been retained as counsel for Quiborax.

This particular series of Bolivian protests in 2003 was sparked by a plan to export natural gas to the US through a pipeline that ran through Chile. Bolivia and Chile have long been uneasy neighbours, notes Linetzky, stretching back to 1879 when Chile blocked Bolivia's access to the Pacific.

Quiborox claims that public hostility was also directed towards its mining operations during this time, and that the administration of then President Carlos Mesa helped fan public opposition to Chilean businesses, leading eventually to a rescinding of NMM's operating license in 2004.

The arbitration was registered by the ICSID facility on February 6.

Recently, Bolivia reached a settlement with Aguas del Tunari in a much-publicized ICSID arbitration arising out of a failed water privatization in the city of Cochabamba. The settlement came on the heels of a ruling by the presiding tribunal which had upheld jurisdiction to hear the investor's claims under the Netherlands-Bolivia bilateral investment treaty. (See: "Bolivian water dispute settled, Bechtel forgoes compensation", ITN, January 20, 2006, available on-line by clicking here)

The threat of other arbitrations has hung over Bolivia for more than a year, as a number of foreign energy firms have warned that changes to existing hydrocarbons contracts could trigger violations of bilateral investment treaties concluded by Bolivia. (See: "Lawyers keep powder dry as Bolivian election looms", ITN, Dec.14, 2005, available on-line by clicking here)

Sources:

ITN interviews

"Bolivian borates dispute", Industrial Minerals, August 2004

6. WTO rules against Mexican taxes at center of NAFTA Chapter 11 cases,
Damon Vis-Dunbar and Luke Eric Peterson

The World Trade Organization (WTO) Appellate Body has rejected an appeal by Mexico of an earlier dispute panel ruling which held Mexico in breach of WTO law for a series of taxes imposed by Mexico on soft drink beverages sweetened with anything but Mexican cane sugar.

These same taxes had led four US companies to launch arbitrations against Mexico for breach of the protections contained in the investment chapter of the North American Free Trade Agreement (NAFTA).

If Mexico follows through on hints that it will scrap the controversial taxes, such a move could have an impact on the NAFTA Chapter 11 suits which are currently pending against Mexico. However, one source familiar with those claims tells ITN that Mexico could still be held liable for damages sustained by foreign investors during the period in which the taxes were in force. Indeed, foreign investors might seek to argue that the WTO finding that Mexico's soft drink taxes were in breach of its National Treatment obligations under WTO law should be relevant in determining whether there had been a breach by Mexico of its separate National Treatment undertakings towards foreign investors under the NAFTA.

The four US investors which have launched NAFTA Chapter 11 suits are Cargill Incorporated, Archer Daniels Midland, Tate & Lyle Ingredients and Corn Products International.

Despite the recent ruling by the WTO's highest judicial body, the larger dispute between Mexico and the US over sweeteners shows little sign of coming to a close.

Mexico has long-argued that the US illegally restricts imports of Mexican sugar, in violation of the NAFTA's trade rules. After failing to settle the matter under NAFTA's trade dispute resolution mechanism, Mexico put its taxes on soft drinks which use foreign sweeteners.

Although the Mexican taxes applied to all soft drinks using foreign sweeteners, in effect it was most damaging to American producers of high-fructose corn syrup (HFCS).

Now that that tax has been struck down by the WTO, Mexico appears to be considering other options. In published reports, Mexico has suggested that it may replace the tax with a duty on high fructose corn syrup.

Such a move might bring Mexico into line with its WTO obligations, but could risk violating other of its NAFTA trade obligations to the United States.

Meanwhile, individual companies which say that they were affected by the Mexican taxes continue to pursue their NAFTA arbitrations, seeking compensation for their alleged losses.

The companies successfully resisted a bid by Mexico which would have consolidated the various claims under the jurisdiction of a single tribunal. A special NAFTA consolidation tribunal convened to rule on Mexico's request issued a ruling in May of 2005, rejecting Mexico's demand for a single overarching tribunal.

The first of the NAFTA Chapter 11 arbitrations to be launched - that involving Corn Products International – is slated for oral hearing this summer. A tribunal consisting of Prof. Christopher Greenwood QC, Prof. Andreas Lowenfeld, and Mr. Jesus Serrano de la Vega are presiding over that dispute.

7. Tribunal affirms jurisdiction in Continental Casualty v. Argentina case at ICSID,
By Damon Vis-Dunbar

An ICSID tribunal has upheld jurisdiction to hear a claim by Continental Casualty, an insurance company headquartered in Illinois, under the terms of the US-Argentina bilateral investment treaty.

US-based Continental owns CNA ART, one of Argentina's largest workers compensation services. As in the multitude of other recent arbitration claims against Argentina, CNA's investment was badly damaged during the Argentine financial crisis, and the company alleges that steps taken by the government to stabilize the dramatic recession were in breach of its investment treaty obligations to foreign investors.

According to Continental, assets held in CNA's investment portfolio plummeted in value when the crisis hit Argentina in December 2001. As the Argentine peso nose-dived, measures taken by the government froze CNA's ability to transfer its Argentine assets into US-denominated ones. The company claims a loss of some $45 Million US, although it has not yet quantified the total compensation it seeks from Argentina.

Argentina raised a handful of objections to the tribunal's jurisdiction.

Similar to other treaty cases involving the financial crisis, Argentina argued that Continental's claim is a matter public policy, and should not be characterized as a legal conflict. In response, the tribunal maintained that the claim was indeed a legal conflict, in that it referred to the impact of those public policies on the legal framework which Continental had relied when making its investment.

Argentina also argued that the claimant lacked standing, a reference to the fact that this is an "indirect" claim, in that Continental is a shareholder in the Argentinean company. This, according to Argentina, limited the scope of the protection offered to the investor by the BIT. The tribunal followed previous jurisdictional rulings in Argentine cases at ICSID, in holding that this was an unduly restrictive reading of the relevant treaty.

The tribunal also rejected Argentina's suggestion that the claim was premature, or "not ripe," as a result of the losses in the dispute still being in a state of flux. Argentina had submitted that the alleged damages fluctuate constantly because Argentina's negotiations with foreign creditors are still ongoing.

However, the tribunal rejected this objection, observing that "This situation does not undermine the jurisdiction of those judicial or arbitral bodies, except if the parties jointly decide to suspend proceedings …".

The Continental claim is being heard by a three member tribunal consisting of Prof. Giorgio Sacerdoti, Mr. V.V. Veeder, and Lic. Michell Nader. The case now proceeds to a hearing on the merits.

Job opportunity:
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8. Investment Treaty News seeks intern to work as reporter-researcher in Geneva office
The International Institute for Sustainable Development (IISD) is seeking an intern to work out of IISD's Geneva, Switzerland office for a 6 month period commencing August 2006.

The successful candidate will serve as a reporter-researcher for Investment Treaty News (ITN). ITN tracks the negotiation of international treaties governing foreign direct investment, as well as lawsuits between businesses and governments arising under such treaties.

The position is a paid internship, and the prospects for post-internship work and consulting opportunities are significant. Applicants must be Canadian citizens or permanent residents and under 30 years of age at the time of taking up the internship. Candidates should have strong language skills, encompassing not only English, but additional languages as well. A background in journalism, law, or international affairs, while not essential, is strongly desired.

Further information about the internship, along with application information, will be posted on-line shortly at: http://www.iisd.org/interns/apply_positions.asp . Specific queries about the position can also be directed to Luke Eric Peterson at lpeterson@iisd.ca

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