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Contents at a glance:

Arbitration Watch

1. Belgian court to hear Poland's challenge to arbitrator Schwebel in Eureko case

2. Tribunal upholds jurisdiction in Suez's Santa Fe water dispute with Argentina

3. Czech hospital bill passes as President warns of investment treaty lawsuits

4. Germany seeks revisions and addition of investor-state arbitration to Pakistan BIT

5. German Farmers challenge Namibia land reform, international arbitration considered,

6. Claim threatened by Peruvian slot machine manufacturer against Colombia

Negotiation Watch

7. OECD proposes investment frameworks for governments amidst public criticism

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Arbitration Watch:
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1. Belgian court to hear Poland's challenge to arbitrator Schwebel in Eureko case,
By Luke Eric Peterson

A Belgian court will hold hearings on June 1st to hear a challenge by the Republic of Poland to the role of former International Court of Justice Judge Stephen Schwebel as arbitrator in an arbitration against the Polish Government.

As reported earlier in this newsletter, a tribunal consisting of Judge Schwebel, Prof. Jerzy Rajski, and Maitre Yves Fortier, issued a partial award in August of 2005 in an arbitration between the Dutch insurance company Eureko and the Polish Government.

By a 2-to-1 margin, arbitrators Schwebel and Fortier held Poland in breach of various provisions of the Dutch-Polish bilateral investment treaty, owing to Poland's purported

failure to live up to commitments made to Eureko in relation to the planned privatization of Poland's largest insurance company, PZU.

In November of last year, the Polish Government responded by filing two challenges in the Belgian courts - a challenge to Judge Schwebel, as well as a bid to set aside the partial award rendered in favour of Eureko.

The challenge to the partial award will be heard on October 2nd, 2006 according to an official at the Court of First Instance in Brussels.

While the move by Poland to set aside the partial award had been hinted at in the Polish press for some time, it was only in December of 2005 that it emerged that Poland had also mounted a bid to remove Judge Schwebel as arbitrator in the case.

Under the Belgian Judicial Code, arbitrators may be challenged "when circumstances arise which cause legitimate doubts regarding their impartiality or independence." Further the Code prescribes that "A party can challenge an arbitrator only for cause that emerges after his appointment."

In an interview with Gazeta Wyborcza, a Polish publication, (then) Polish Treasury Minister Andrzej Mikosz discussed the decision to challenge Judge Schwebel:

"We're playing tough, as we've also moved for the exclusion of one of the arbiters, regarding whose impartiality we have reasonable doubts. That arbiter, Stefan Schwebel, is a former long-time president of the International Court of Justice in the Hague, an icon of international arbitration. Still, I believe we had very serious reasons to move for his exclusion. This is not playing for time. I believe our objections will be heeded."

In a further comment, published in Poland, Mr. Mikosz indicated that Poland's doubts about Judge Schwebel's alleged impartiality were spurred by a report in The American Lawyer magazine that Judge Schwebel served as a member of the legal team representing US-based agricultural firm, Cargill, in a separate investment treaty arbitration mounted against the Polish Government.

Notably, however, an undated correction later appeared on the American Lawyer Magazine's "Arbitration Scorecard" website, reading: "This survey originally listed Stephen Schwebel of Washington, D.C., as a counsel for the claimants in Cargill, Inc. v. Republic of Poland. The source that supplied this information has informed The American Lawyer that it was in error, and Schwebel had no involvement in this case."

The law firm representing Cargill in its arbitration with Poland is Sidley Austin Brown and Wood, a firm with whom Judge Schwebel has collaborated in the past on different investment treaty arbitration cases. What is at issue in Poland's challenge in the Eureko case, however, is Judge Schwebel's alleged involvement in, and knowledge of, the Cargill v. Poland arbitration – a dispute under a US-Poland economic relations treaty.

An official with the International Centre for Settlement of Investment Disputes (ICSID), where the Cargill v. Poland case is being arbitrated, told ITN that Judge Schwebel is not listed as counsel of record for Cargill in the arbitration against Poland.

All parties involved in the challenge by Poland to Judge Schwebel in the Belgian courts have declined to comment on the case. However, Judge Schwebel is understood to reject Poland's charge of lack of independence or impartiality, and has retained Belgian legal counsel to defend against Poland's challenge against his service as arbitrator in the Eureko v. Poland arbitration.

The hearing of Poland's challenge is scheduled for the morning of June 1st at the Belgian Court of First Instance in Brussels; ITN will endeavour to report on the outcome of that hearing.

Sources:

ITN Interviews

"Costly Eureko Conflict", Polish News Bulletin, March 6, 2006

"First hearings on Poland's objections to PZU arbitrage", PAP Market Insider, Dec.7, 2005

"Polish Gov't Refuses to Give Up Fight against Eureko", Polish News Bulletin, December 2, 2005

2. Tribunal upholds jurisdiction in Suez's Santa Fe water dispute with Argentina,
By Luke Eric Petersion

An international arbitral tribunal has found jurisdiction to examine a claim by French and Spanish shareholders that the Argentine Government breached the terms of its investment treaties with Spain and France in its treatment of a privatized water company operating in the Santa Fe region of Argentina.

The investors, French-based Suez, and Spanish firms AGBAR and Interaguas, own more than 75% of the shares in an Argentine company, Aguas Provinciales de Santa Fe S.A. (APSF).

In 1995, APSF signed a 30 year concession contract as part of the privatization of water and waste water services in Argentina's Santa Fe province. According to the investors, they sank more than $250 Million (US) into the concession by the end of 2001.

However, by 2001, the investment had been caught up in the turmoil occasioned by the Argentine financial crisis.

The investors allege that they suffered significant losses as a result of a series of emergency measures introduced by Argentina in an effort to stem the financial crisis. Furthermore, the investors claim that Argentina's actions breached treaty commitments undertaken with Spain and France to provide investors from those countries with fair and equitable treatment and to refrain from acts of uncompensated expropriation.

The claim is one of several which Suez and its partners have brought against Argentina, in relation to different water privatizations undertaken earlier by Argentine provinces.

In a jurisdictional decision handed down on May 16th, 2006, the presiding tribunal held that it has jurisdiction to examine the Santa Fe claims by Suez, AGBAR and Interaguas.

In reaching this conclusion, the tribunal held that the decision of the local concession company APSF to withdraw its own claim (as part of ongoing settlement talks) did not prejudice the ability of the three foreign shareholders of APSF to pursue their own claims for damages under international law.

The tribunal also dismissed a handful of jurisdictional objections which have been voiced by Argentina in opposition to the string of similar arbitrations the country has faced since its financial crisis.

In particular, the tribunal rejected Argentina's assertion that the concession contract between APSF and Santa Fe Province had designated the Santa Fe courts as the proper venue for any dispute under the contract, thus ruling out any recourse by foreign investors to bilateral investment treaty arbitration. The tribunal held that the claimants were not claiming contractual breaches – but rather breach of Argentina's international treaty obligations – and, as such, the contractual dispute settlement clause did not preclude a separate treaty-based arbitration by the foreign shareholders.

Also of note, the tribunal offered its interpretation of the Most-Favoured Nation (MFN) clause found in the Spain-Argentina BIT. The two Spanish claimants had invoked the MFN clause in an effort to obtain more favourable dispute settlement provisions contained in France's BIT with Argentina. In particular, AGBAR and Interaguas sought to avoid a requirement in the Spain-Argentina BIT which obliges claimants to pursue local court remedies for 18 months before launching an international arbitration.

Ultimately, the claimants succeeded in persuading the tribunal that the MFN obligation in the Spain-Argentina BIT entitled them to the better treatment found in the France-Argentina BIT (which contained no local remedies requirement).

The tribunal laid emphasis on the fact that the relevant MFN clause referred to "all matters", and failed to exclude the dispute settlement process from the list of provisions were not subject to MFN treatment. Accordingly, the tribunal held that dispute settlement was clearly a "matter" covered by the investment treaty, and that it could find no reason to treat the dispute settlement provisions as qualitatively different from the other substantive protections (e.g. fair and equitable treatment, etc.) found in the treaty.

The tribunal added that an earlier BIT dispute (Maffezini v. Spain) had addressed the MFN clause of the very same Spain-Argentina BIT, and that the tribunal in the Maffezini case had held that the MFN guarantee extended to dispute settlement matters.

Finally, the tribunal differentiated its ruling on MFN from that in an earlier-reported arbitration between a Cypriot company and the Government of Bulgaria. In the Plama v. Bulgaria arbitration, the presiding tribunal gave a narrower reading of an MFN clause found in the Cyprus-Bulgaria BIT, and refused to extend MFN to matters of dispute settlement, so as to permit an investor from securing more favorable procedural rights located in other BITs signed by the Bulgarian government.

The Suez tribunal offered several reasons for distinguishing its own decision from the Plama v. Bulgaria case, including that the MFN clause in the Spain-Argentina BIT was couched in more generous terms than that in the Cyprus-Bulgaria BIT, and, furthermore, that there had been evidence in the Plama case that Cyprus and Bulgaria did not view the MFN clause as applying to matters of dispute settlement.

The upshot of the recent ruling in the Santa Fe case is that the three foreign investors can have their BIT claims heard on the merits by an ICSID tribunal. A timetable for the merits hearings has yet to be set. In a related development, which was reported in ITN last month, the presiding tribunal signaled that it had the authority to accept legal briefs from interested non-parties, following a bid by local NGOs, human rights and development experts to have their views heard by the tribunal.

See: “Tribunal rules on NGO’s bid to intervene in second Argentine water dispute”, Investment Treaty News, April 27, 2006, available here.

A copy of the recent jurisdictional decision in the Suez Santa Fe case is available on-line here.

3. Czech hospital bill passes as President warns of investment treaty lawsuits,
By Luke Eric Peterson

The Czech Chamber of Deputies has passed a controversial bill which would create a country-wide system of non-profit hospitals, overriding an earlier veto by President Vaclav Klaus.

President Klaus vetoed the legislation earlier this month, warning of lawsuits by foreign investors with interests in the Czech health sector.

According to local Czech media reports, Klaus has warned that the legislation "may lead to a number of international arbitration proceedings … and the emergence of problems like that with Nomura (a reference to the Japanese bank whose Dutch subsidiary has sued the Czech Republic under a bilateral investment treaty)".

The new legislation has been a political hot-potato as various Czech political parties prepare for national elections on June 2-3. Health care reform is a major issue, with left-leaning parties criticizing earlier privatization initiatives, and looking to shift many for-profit hospitals to not-for-profit status. Meanwhile, President Klaus, and his allies in the the Civic Democratic party (ODS) have lashed out at the proposed legislation, which would curtail the ability of private for-profit hospitals to receive payments under popular health insurance schemes. Proponents say that the new legislation will improve accessibility to hospitals, while critics decry the effective "nationalization" of the hospital sector.

Despite President Klaus having raised the spectre of international arbitrations by foreign investors, it remains unclear how much foreign investment is present in the Czech hospitals and health insurance sectors.

Bohuslav Frelich, of Czechinvest, a Czech Government agency which assists and advises foreign investors doing business in the Czech Republic, told ITN that foreign investment in the Czech health sector was not sizable.

A written query submitted to the press spokesperson for President Vaclav Klaus last week was not answered at press time.

An economic secretary with the US Embassy in the Czech Republic told ITN that there are no significant US investments in the Czech hospital or health insurance sector.

While it remains unclear how credible the threat of foreign investor lawsuits are in the Czech context, the prospect of such international arbitrations affecting policy in the health sector has engendered debate in other countries. A Canadian Government-launched Commission warned in 2004 that certain changes to health care policy could trigger claims from affected foreign investors under the terms of the investment chapter of the North American Free Trade Agreement, and under other bilateral investment treaties.

Sources:

"Klaus vetoes bill on non-profit hospitals", CTK News Agency, May 5, 2006

"Czech lawmakers vote for non-profit hospitals", Agence France Presse May 23, 2006

"Chamber passes law on non-profit hospitals", CTK News Agency, May 23, 2006

"How Will International Trade Agreements Affect Canadian Health Care", John R. Johnston, Discussion Paper for the Romanow Commission on the Future of Health Care in Canada, Sept, 2002, available here.

4. Germany seeks revisions and addition of investor-state arbitration to Pakistan BIT,
By Damon Vis-Dunbar

German investors are eager to see Pakistan sign a revised bilateral investment treaty (BIT), as part of an ongoing effort by Germany to modernize many of its aging investment agreements.

In April, Jorgen Thumann, president of the Federation of German Industries, asked the visiting Pakistan Minister for Industries, Jehangir Khan Tareen, to press his government to sign an updated investment agreement, which has been worked on over the last couple of years.

“This treaty is supposed to replace the presently used treaty, which is very old indeed and does not reflect newer developments and international standards,” said Robert Dölger, Regional Director for Africa and the Middle East at the Federation of German Industries.

Chief among the revisions sought by German investors is the inclusion of an investor-state dispute resolution clause, Mr. Dölger told ITN. Unlike most modern international investment agreements, the German-Pakistan BIT does not allow foreign investors to sue their host state for a breach of the treaty; rather, only state-state dispute resolution mechanisms are provided.

Contacted by ITN, Minister Tareen said Pakistan was currently “analyzing” the revised treaty, but had not yet come to an agreement with Germany. “We should have more news in a couple weeks,” he said.

Yet one German source said that Pakistan might drag its feet so long as talks with the United States on a proposed bilateral investment treaty are ongoing. As ITN reported in March, the US and Pakistan have struggled for several years to bridge differences on a bilateral investment treaty. A recent surge in efforts to come to an agreement in the weeks prior to a visit by US president George W. Bush ended in a stalemate.

The 46 year-old treaty between Pakistan and Germany is considered to be the first modern bilateral investment treaty. As these agreements proliferated in the subsequent decades, Germany would conclude at least 119 BITs with a wide range of developing countries.

In recent years, Germany has been focusing on revising the older treaties. Germany recently wrapped up negotiations with Egypt, replacing a BIT signed in 1975. Last year China and German agreed to an updated treaty, replacing one signed in 1983.

A spokesperson at the Ministry of Economy said that Germany was also working on bilateral investment agreements with Oman and Madagascar. Oman has an investment agreement in force that was signed in 1979, while Madagascar has an agreement that

dates back to 1962.

Sources:

ITN interviews

“Pakistan to revise bilateral trade with Germany”, Asia Pulse, April 27, 2006

“US and Pakistan struggle to settle difference on an investment treaty”, by Damon Vis-Dunbar, Investment Treaty News, March 29, 2006, available here.

“China pursues new-style BIT commitments with Germany, replaces 1980s BIT”, by Luke Eric Peterson, Investment Treaty News, February 17, 2006, available here.

5. German Farmers challenge Namibia land reform, international arbitration considered, By Damon Vis-Dunbar and Luke Eric Peterson

Three German nationals have filed an application with the High Court of Namibia in response to a land-reform initiative that threatens to expropriate their farms.

The move sets in motion review proceedings under Namibia’s administrative law, in which counsel for the three Germans will argue that the government breached certain provisions in the Land Act of Nambia, as well as the protections offered under the Germany-Namibia bilateral investment treaty.

In the event of an unfavourable decision, the farmers will consider turning to international arbitration under the investment treaty, said Windhoek-based lawyer Ulrich Etzold, in an interview with ITN. But at this stage he said that looked “unlikely.”

The case promises to be closely watched in Namibia, where public pressure has pushed the government to speed up the land reform process. Namibia gained its independence from South Africa in 1990, and a land reform process was launched at that time on the “willing buyer, willing seller basis”. Agitation for more equitable land-ownership occurs against a backdrop where land ownership is highly stratified, with significant holdings held by nationals of the former colonial overseer, Germany.

According to analyses undertaken for the development agency Oxfam, the first decade of Namibia’s land reform programme has been marked by slow progress. Pressure for bolder land redistribution measures has grown in Namibia, particularly after forced seizures or land invasions in Zimbabwe in 2000.

In 2004, the Namibian government initiated a regime of compulsory expropriations, replacing the previous policy of purchasing land from willing sellers.

A promise to pay full compensation for the expropriated farms has done little to calm white-landowners, who currently own about half of the agricultural land in Nambia.

The government of Namibia has said they will look to the High Court for guidance on how to proceed with land reform.

“Their lawsuits represent the first real legal test of the expropriation framework created in terms of the Land Reform Act in a commercial agricultural region,” said the Minister of Justice Pendukeni Iivula-Ithana in a speech to the Namibian National Assembly, as reported in the Namibian newspaper.

“As such, the court ruling will to a great extent justify the process, or will provide us with guidelines regarding the correct approach that must be adopted in the redistribution process, which is an issue of intense public interest.”

Mr. Etzold said both sides were currently preparing their case, and hearings would like begin at the end of this year.

Sources:

ITN interviews

“Sloppy work by Ministry of Lands Costs the State”, The Namibian, April 21, 2006

Public Figures & Associates – Country Profile, Factiva, February 23, 2006

“Landlords take on government over farm expropriation plans”, The Namibian, December 2, 2006

Oxfam resources on Land Reform in Namibia, available here.

6. Claim threatened by Peruvian slot machine manufacturer against Colombia,
By Luke Eric Peterson

The Peruvian shareholder of a Panama-registered gaming enterprise has threatened the Colombian Government with an international arbitration under the Peru-Colombia investment protection treaty.

According to a notice of dispute seen by ITN, Mr. Leonardo Zevallos Coll, a Peruvian national, notified Colombian officials of his grievance in December of last year. In so doing, Mr. Coll set in motion a three month period of amicable negotiations which must precede any investor-state arbitration under the Peru-Colombia BIT.

Mr. Coll’s firm, Interactive Game Trading Inc., manufactures slot machines in Colombia.

He maintains that his firm should be protected under Colombian law from the importation of used slot machines by other investors into Colombia. However, Mr. Coll alleges that the Colombia Ministry of Foreign Trade has approved import licenses for used slot machines, contrary to the law, thereby causing damage to Mr. Coll and his firm.

Barring a settlement, a decision is expected to be taken in the coming weeks as to whether to take the claim to international arbitration at the International Centre for Settlement of Investment Disputes (ICSID).

To date, Colombia has not been involved in an international investment treaty arbitration.

The country has concluded a relatively small number of investment agreements. Until last year, only 2 investment treaties were in force between Colombia and other nations, the BIT with Peru and an investment chapter in a free trade agreement between Colombia, Mexico and Venezuela. Other treaties which had been negotiated had never entered into force due to their not being in full compliance with the terms of the Colombian Constitution.

Until recently, it had been permissible under Colombian law for the state to expropriate property without payment of compensation, albeit in rare circumstances. By contrast, a number of investment treaties negotiated with foreign partners had required the payment of compensation in all cases of expropriation. For years, these treaties did not enter into force, due to their lack of conformity with Colombia's Constitution. However, following a recent amendment to the Colombian Constitution, the path has been cleared for such treaties to be ratified, as well as for new agreements to be concluded.

Colombia inked a new BIT with Spain in 2005. This year, the country has concluded a bilateral investment pact with Switzerland and a free trade agreement with the United States.

Sources:

ITN Interviews

Negotiation Watch:
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7. OECD proposes investment frameworks for governments amidst public criticism,
By Damon Vis-Dunbar

The Organization for Economic Cooperation and Development (OECD), an intergovernmental think tank comprised of 30 developed economies, has released a set of policy recommendations aimed at encouraging foreign direct investment, after heated criticism from environmental, human rights and sustainable development groups on an

earlier draft.

The Policy Framework for Investment (PFI), released this month, offers advice to governments on how to make their countries friendlier to foreign investors. A draft of the report was released last January. Some 22 organisations provided comments to the OECD, including the International Institute for Sustainable Development (the organization under whose auspices Investment Treaty News is published).

That feedback revealed a sharp divide between industry groups and those advocating human rights, the environment and sustainable development, on the merits of the PFI.

Organisations representing business interests were generally supportive of the draft document. The Emergency Committee for American Trade (ECAT), which represents US international business enterprises, applauded the "the breadth of issues covered in this blueprint" and found it to be "extremely useful." Those voices not aligned with business called the report "unbalanced," "skewed," and "flawed."

"One of our main concerns regarding the Framework is the inequality between the promotion of investors' rights and the specification of investors' responsibilities and obligations," said a sign-on letter from a group of non-governmental organizations.

While the PFI does contain a chapter on promoting responsible business practices, the stress lies too heavily on governments' responsibilities, according to many NGOs. These organizations argued that developing countries may lack the capacity to effectively enforce regulations and standards governing environmental, labour or human rights standards.

Similarly, the joint letter by NGOs says that demands placed on governments to provide universal access to essential services such as water may be unaffordable if not matched by duties placed on foreign investors.

Steps taken by the OECD to address these criticisms appear rather stinting. Those paragraphs in the final text which emphasis government responsibilities to ensure services universal access to essential services remain largely the same, placing no more emphasis on the role investors might play.

NGOs had also called for the removal of any recommendations which overlap with ongoing World Trade Organization negotiations. These groups took the view that proposals such as the adoption of uniform tariffs (for example, one import tariff rate on all industrial products) or the unilateral liberalization of trade in services would undermine the bargaining power of developing countries in the ongoing Doha Round of trade talks. In addition, they noted that countries taking such unilateral measures "have no guarantee that their companies will receive the same treatment and advantages from other countries".

Here, too, the substantive thrust of the OECD's recommendations on trade liberalization

remains unchanged.

Business interests also recommended a number of changes to the draft framework released earlier this year, although for the most part these were less broad in scope.

The Business and Industry Advisory Committee to the OECD (BIAC) brought special attention to the chapter on investment policy. Among its recommendations were changes to the language describing indirect expropriation. The draft PFI pointed out that "some recent (investment) agreements provide that except in rare circumstances, non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, are not considered to constitute expropriations."

The BIAC asked that a new sentence be added, stating that "there is no generally accepted and clear definition of the concept of indirect expropriation and what distinguishes it from non-compensable regulation." This proposal was not adopted in the OECD's final text.

The OECD is no stranger to criticism when it comes to its work on foreign investment law and policy. Best known, perhaps, for its proposed Multilateral Agreement on Investment (MAI), this would-be investment promotion and protection agreement among OECD member-countries crumbled in the mid-nineties when France withdrew its support amidst intense public criticism. In the aftermath governments have turned their full attention to the ongoing – and less scrutinized - work of negotiating bilateral and regional investment agreements.

Sources:

"OECD submits policy recommendations for attracting investment, seeks public input", by Damon Vis-Dunbar and Luke Eric Peterson, Investment Treaty News, January 31, 2006, available here.

The OECD Policy Framework for Investment, available here.

The OECD Policy Framework for Investment, Responses received from public consultation, February 22, 2006, available here.

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