

Investment Treaty News (ITN), November 15, 2007

Published by the International Institute for Sustainable Development
<http://www.investmenttreatynews.com>

Contents at a Glance:

Arbitration Watch

1. ICSID registers arbitration claim in face of Bolivian objections
2. Belgian Appeals Court rejects Poland's challenge to Arbitrator in Eureko case
3. Venezuela mining case resumes after withdrawal of two tribunal members
4. US persists with challenge to arbitrator in Grand River Enterprises NAFTA case; arbitrator's human rights work assisting Native Americans in spotlight
5. American investors threaten NAFTA suit over Canadian taxes to income trusts

Briefly Noted

6. Eastern Sugar v. Czech Republic award now available on-line
7. Recently published articles and papers on bilateral investment treaties
8. British Institute to host seminar on State Responsibility and Investment Arbitration

Arbitration Watch:

1. ICSID registers arbitration claim in face of Bolivian objections,
By Damon Vis-Dunbar, Fernando Cabrera Diaz and Luke Eric Peterson

The Government of Bolivia appealed to the Secretariat of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) last month in an unsuccessful effort to block the registration of an arbitration lodged by Euro Telecom, a subsidiary of the Italian telecommunications firm Telecom Italia.

Euro Telecom insists that its business investments in Bolivia's telecommunications industry are the victim of a creeping expropriation. The firm points to the recent establishment of a government commission, which will set a price for the mandatory acquisition of the company's Bolivian assets, along with demands for the payment of back-taxes, as part of a government push to drive down the value of Euro Telecom assets in advance of nationalization. The company has turned to ICSID, seeking full-market-value compensation for its alleged losses.

However, in a letter to the President of the World Bank, Robert Zoellick, delivered a few days before the case was registered with ICSID on October 31, Bolivia argues that ICSID does not have jurisdiction to hear the case; a position rooted in the fact that Bolivia, in May of this year, formally notified ICSID that it was withdrawing from the ICSID Convention.

Bolivia is the first country to try to extract itself from the ICSID system, and arbitration specialists have been divided on what impact this has on foreign investors in Bolivia who wish to arbitrate at ICSID in the future. The ICSID Convention states that denunciation takes effect six months after a notice of withdrawal. But when other articles in the ICSID Convention are taken into account, together with bilateral investment treaties that provide for ICSID arbitration, the impact of the notice of withdrawal is unclear.

Some observers are of the view that so long as a bilateral investment treaty which provides for ICSID arbitration is in force, then foreign investors protected under that treaty can continue to resort to arbitration at ICSID.

However, Professor Christoph H. Schreuer, Professor of International Law at the University of Vienna, and author of a well-known academic commentary on the ICSID Convention, has argued that investors must give their consent to ICSID arbitration prior to a country's notice of withdrawal if they are to enjoy access to the Centre. Importantly, that consent needs to be explicit (i.e., in the form of a written letter), according to Prof. Schreuer.

Under this line of thinking, any foreign investor operating in Bolivia who did not explicitly consent to ICSID jurisdiction prior to Bolivia's notice of withdrawal may lose the right to arbitrate at ICSID.

In its letter to ICSID, a copy of which has been seen by ITN, Bolivia relies on the writings of Prof. Schreuer to argue that Euro Telecom did not give its consent to ICSID arbitration prior to Bolivia's announced withdrawal from the ICSID Convention. (Bolivia relies on a published commentary of Prof. Schreuer's from 2001. It should be noted that Prof. Schreuer has no direct involvement in the *Bolivia v. Euro Telecom* dispute).

BOLIVIA CHALLENGES EURO TELECOM'S "CONSENT" TO ICSID

Two letters are normally required in order to arbitrate under a bilateral investment treaty: one to put the host government on notice that a foreign investor is considering arbitration for a breach of an investment treaty (often referred to as a 'triggering letter'); and the second - after a certain period of time has passed between the issuance of the first notice - to formally request arbitration.

Bolivia holds that neither of two letters sent by Euro Telecom this year constitutes the consent required for Euro Telecom to arbitrate at ICSID.

On April 30, Euro Telecom sent a letter to the Bolivian government referencing its protections under the Netherlands-Bolivia BIT. Earlier that month, President Evo

Morales had issued a decree ordering the nationalization of Entel, a subsidiary of Euro Telecom that controls much of the Bolivian phone market. Bolivia insists that the letter made no reference to ICSID, or the clause in the relevant BIT that refers to the Centre, and therefore does not constitute explicit consent to arbitrate at ICSID.

On October 12, Euro Telecom filed a second letter - its request for arbitration with ICSID; however, Bolivia argues that at this point its own consent to ICSID arbitration had already been withdrawn.

Bolivia also maintains that there is no “legal dispute” with Euro Telecom, which is one of several criteria for ICSID jurisdiction. Bolivia argues that its plans to renationalize certain sectors of its economy have been carried out legally, with the intention of gaining assets through agreement with the owners. The government has already reached agreement with a number of other foreign companies, says Bolivia.

As it is, however, Bolivia did not successfully convince the World Bank to reject Euro Telecom’s request for arbitration. Under ICSID rules, the Secretariat has an obligation to register a case unless it is “manifestly” outside the jurisdiction of the Centre.

In a written explanation to the parties, elaborating on the Centre’s reasons for registering the case, the ICSID Secretariat has explained that there is a low threshold for screening cases, in order to give tribunals the power to decide if requests should be dismissed on jurisdictional grounds.

Thus the question of whether there is a legal dispute, and whether Euro Telecom must prove consent to ICSID, now falls to an arbitral tribunal. That tribunal will be selected in the coming months.

Sources:

ITN reporting

“Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions”, By Damon Vis-Dunbar, Luke Eric Peterson and Fernando Cabrera Diaz, Investment Treaty News, May 9, 2007

2. Belgian Appeals Court rejects Poland’s challenge to Arbitrator in Eureko case,
By Damon Vis-Dunbar and Luke Eric Peterson

A second Belgian court has rejected a bid by the Republic of Poland to remove Judge Stephen Schwebel from an arbitral tribunal hearing a bilateral investment treaty claim between the Dutch insurance company Eureko and the Government of Poland. The ruling comes on the heels of an earlier ruling by a lower court which had also rejected the Polish move.

The government of Poland first turned to the Belgium courts in 2005 following a partial award on liability in the Eureko v. Poland dispute. Poland’s complaint related to the relationship between Judge Schwebel and the law firm Sidley Austin, which represents the Cargill Corporation in another, unrelated arbitration against the

government Poland. Acting as an arbitrator in the Eureko case while having ties to a law firm representing a claimant in another case against Poland, cast doubt on Judge Schwebel's impartiality as an arbitrator, argued the Polish Government.

While Judge Schwebel has worked with Sidley Austin on investment treaty cases, he countered that he had no involvement in the Cargill v. Poland case. Late last year, the Belgian Court of First Instance came to the same conclusion, and found no reason to have Judge Schwebel removed from the Eureko tribunal. (A fuller description of past developments can be found in earlier ITN reporting*)

That lower court ruling has now been affirmed by a higher court. In this latest ruling, the Brussels Court of Appeals emphasizes that working with Sidley Austin on other arbitrations would not compromise Judge Schwebel's impartiality as an arbitrator in the Eureko case.

Poland's attempt to buttress its argument by pointing to Judge Schwebel's collaboration with Sidley Austin in a second arbitration between Vivendi and the government of Argentina also failed to convince the Belgium court of appeal. In its appeals request, Poland had pointed to the fact that Judge Schwebel and lawyers with Sidley Austin put forth legal arguments in the Vivendi case which are premised in part on the arbitral award rendered in the Eureko case. Poland argued that this raised further doubts as to Judge Schwebel's impartiality. However, the court of appeal deemed this to be a new legal argument; one which had not been raised with Belgium's lower court. As such, the court of appeal held that it could not consider this argument as grounds for overturning the lower court's decision.

Following the October 29th ruling by the Brussels Court of Appeal, the Eureko v. Poland arbitration proceedings are slated to resume. In 2005, the tribunal found Poland liable for certain breaches of the Netherlands-Poland bilateral investment treaty, as a result of a Polish move to reverse an unpopular privatization of a leading national insurance company. It now remains for the tribunal to consider the question of damages.

ITN understands that any further appeal by Poland to a higher court in Belgium would not serve to postpone the arbitration proceedings.

Sources:

Eureko press release of October 31, 2007, available here:
<http://www.eureko.net/press/eureko/index.asp>

* "Challenge to arbitrator Schwebel rejected by Belgian court, Poland seeks appeal",
By Luke Eric Peterson, Investment Treaty News, January 17, 2007, available on-line
at: http://www.iisd.org/pdf/2007/itn_jan17_2007.pdf

3. Venezuela mining case resumes after withdrawal of two tribunal members,
By Luke Eric Peterson

Two new arbitrators have been appointed in a dispute between the Government of Venezuela and a Canadian mining company which had been on hold since May of this year following the withdrawal of two of the three original tribunal members.

Vannessa Ventures filed a claim at ICSID in 2004, alleging that its rights to the Las Cristinas gold mining concession in Venezuela were expropriated without compensation, contrary to the terms of the Canada-Venezuela bilateral investment treaty.

Recently, Robert Briner, a Swiss-based arbitrator, and Brigitte Stern, a French law Professor, were appointed to the tribunal As Chair and claimant-appointed arbitrator respectively. Judge Charles N. Brower continues to sit in the proceeding as the third member of the tribunal.

In an unusual sequence of events leading up to a jurisdictional hearing held on May 7, 2007, two members of the original tribunal resigned in rapid succession, leading to a temporary suspension of the arbitration proceedings.

Immediately prior to the hearing in question, ITN understands that tribunal president VV Veeder was confronted with the appearance of a potential conflict due to the involvement of a lawyer, on the claimants' side, with whom he has professional ties as co-counsel in another (unrelated) arbitration. Mr. Veeder elected to resign from the tribunal.

Shortly thereafter, and taking note of the need to suspend the proceedings so as to appoint a new tribunal president, arbitrator Jan Paulsson asked the parties to the arbitration to release him from his own mandate.

The reasons for Mr. Paulsson's decision to withdraw remain unknown, as the proceedings are conducted in-camera. The parties to the case have declined to offer any public comment on the developments. There is no evidence to suggest that any challenge was filed against Mr. Paulsson.

Mr. Paulsson, chair of the law firm Freshfields Bruckhaus Deringer's international arbitration practice, had sat on the tribunal as the nominee of the Venezuelan Government, having been appointed to that position in late 2004. It is not a matter of public record what disclosures Mr. Paulsson would have made at the time of taking up his arbitral mandate – nor any response these would have elicited from the parties.

However, Mr. Paulsson's law firm has been counsel of record for a growing number of foreign investors suing Venezuela at ICSID over the last two years. In 2006, an ICSID claim was registered against Venezuela on behalf of Vestey Group Ltd. In 2007, claims were registered at ICSID on behalf of Eni Dacion, an Italian energy company, and Mobil, a subsidiary of the US-energy giant Exxon-Mobil. Last month, the oil giant Conoco-Phillips, another Freshfields client, signaled that it would also sue Venezuela at ICSID.

4. US persists with challenge to arbitrator in Grand River Enterprises NAFTA case; arbitrator's human rights work assisting Native Americans in spotlight,

By Luke Eric Peterson

In a letter lodged recently with the International Centre for Settlement of Investment Disputes (ICSID), the US Government has reiterated a request for a ruling on a challenge to an arbitrator in an ongoing NAFTA Chapter 11 arbitration, *Grand River Enterprises (GRE) v. USA*.

The US moved in April of 2007 to challenge Prof. James Anaya, noting that it had “justifiable doubts as to [his] impartiality or independence” to preside in the NAFTA proceeding. Prof. Anaya, a Professor at the University of Arizona College of Law, was appointed by the claimants to the tribunal in 2005.

At the root of the US challenge is a series of instances in which Prof. Anaya has represented or assisted parties in human rights matters which the US State Department deems to be “adversarial” to the United States. Further, the US has argued that Prof. Anaya’s prior failure to disclose his work on such matters serves to amplify these justifiable doubts. These matters include international proceedings before the UN Commission on the Elimination of Racial Discrimination (CERD), and the Inter-American Commission on Human Rights, where the compliance of the United States with its international legal obligations vis a vis Native Americans is under review.

For his part, Prof. Anaya has noted that his failure to disclose such human rights work stemmed from a belief that such legal matters were wholly unrelated in subject-matter; involved U.S. government agencies which have nothing to do with U.S. international trade policy, and were before bodies whose rulings are non-binding in the view of U.S. authorities. Seen in this light, Prof. Anaya has observed in recent correspondence that he did not disclose his human rights work, until requested to do so in March of this year by the US State Department, “because, under the totality of circumstances, that work could not be reasonably be construed (sic) give rise to justifiable doubts about my impartiality.”

The US has countered that the GRE arbitration – in common with some of Prof. Anaya’s personal legal work – are not wholly unrelated, with both involving “allegations of Native American rights under international law.” (For a description of the issues at stake in the *GRE v. USA* arbitration see the article referenced below*). Moreover, the US adds that it need not demonstrate that the matters are related; instead the US argues that “ongoing adverse representation in unrelated matters are generally disqualifying.”

Recently, ICSID Deputy Secretary General Nassib A. Ziade wrote to Prof. Anaya to signal that the US challenge is viewed by ICSID as having been made within the relevant time-window for such challenges under the governing UNCITRAL rules. In addition, Mr. Ziade noted that the ICSID was reserving a ruling on the challenge until it could further clarify whether Prof. Anaya would continue to represent or assist parties in proceedings before the CERD and the Inter-American Commission on Human Rights during his service as arbitrator in the GRE arbitration.

Of particular note, Mr. Ziade indicated that the ICSID took the view that “representing or assisting parties in the first set of procedures would be incompatible with simultaneous service as arbitrator in the NAFTA proceeding.” Indeed, he added

that ICSID had, in an earlier arbitration, concluded “that a challenged arbitrator’s lobbying of the respondent State would be incompatible with his simultaneous service as arbitrator in the proceeding.” Prior to issuing a decision on the challenge in that other matter, the ICSID wrote to the arbitrator to inquire as to whether he would continue to act as a lobbyist whilst serving as arbitrator.

Following the recent communication from ICSID, Prof. Anaya, in a letter dated October 25, 2007 indicated to ICSID that “for reasons unrelated to the present matter, I am in the process of withdrawing as counsel to the petitioners in the Inter-American Commission proceedings.” This withdrawal was attributed to his having been nominated as a UN Rapporteur on certain human rights issues – a position which “requires impartiality as to any UN member state that may come under scrutiny by the Special Rapporteur for its conduct relevant to human rights.”

As for the CERD proceedings, Prof. Anaya noted that his involvement has not been in the form of direct representation of the parties to those proceedings, but rather in assisting with the drafting of written submissions in those proceedings:

“My only involvement in the CERD proceedings in the last few months has been to supervise students and staff in a clinical course at the University of Arizona College of law who are assisting Western Shoshone organizations and their attorneys. That assistance now is aimed at providing CERD with pertinent information as it prepares to consider the United States’ periodic report under the relevant treaty in March of 2008. I am not myself engaged in advocacy on behalf of the Western Shoshone or any other party before CERD in relation to the United States’ international obligations, although naturally in the course of my work as instructor for the clinical course I provide orientation to students that is relevant to their work in connection with the Western Shoshone, other indigenous peoples, and CERD.”

This letter prompted a further missive from the US Government reiterating that “existing facts continue to give rise to justifiable doubts as to Professor Anaya’s impartiality or independence in this matter”. Accordingly, the US requests ICSID to rule on its challenge. The US argued, in its letter, that Prof. Anaya “effectively rejected the conclusion in the ICSID letter, as he had done in his prior letters to ICSID, and did not pledge to terminate all representations or assistance to parties in matters adverse to the United States during the course of the arbitration.”

Rather, the US contends that, “while stating that his adverse representations in some matters would for other reasons be coming to an end, Professor Anaya indicated that, with respect to assisting Western Shoshone groups before the CERD, his work would be ongoing.”

Meanwhile, the claimants have professed their “steadfast” support for Prof. Anaya’s continued service as arbitrator in the dispute.

It now falls to ICSID to make a ruling on the challenge.

* “Despite time-bar ruling in NAFTA arbitration, Grand River claim will proceed in part”, By Fiona Marshall, Investment Treaty News, August 10, 2006, available here:

http://www.iisd.org/pdf/2006/itn_aug10_2006.pdf

Sources:

Documents related to the challenge are available on a website managed by co-counsel for the claimants: http://www.naftaclaims.com/disputes_us_grand_river.htm

5. American investors threaten NAFTA suit over Canadian taxes to income trusts,
By Damon Vis-Dunbar and Luke Eric Peterson

An American couple has notified the Canadian government that it intends to sue for breach of the investment chapter of the North American Free Trade Agreement (NAFTA) in response to a decision to phase out the tax-free status enjoyed by income trusts.

Like many American investors, Marvin and Elaine Gottlieb say they suffered losses when Stephen Harper's Conservative government back-tracked on a campaign promise not to alter the special tax treatment granted to income trusts.

Trust ownership structures - which were favoured by Canadian energy companies and popular with American investors – allow businesses to shift some of their tax burden to individual owners. These investment instruments flourished in Canada until the government abruptly introduced a new tax structure in October 2006.

The claimants allege that promises made by Stephen Harper on the campaign trail, in which he stated that he would not impose new taxes on income trusts, misled them and other investors into false security.

“Following the election of the Conservative Government, many investors, including the Gottlieb Investors Group, made additional investments in energy trusts, in reliance upon these most reasonable of expectations,” write the claimants in their Notice of Intent.

Given that income trusts were popular among foreign portfolio investors, the Gottliebs claim that the income trust reform unfairly discriminated against the many US investors who placed money in these vehicles.

The Notice of Intent holds that Canada breached NAFTA provisions on Most-Favoured-Nation Treatment; Minimum Standard of Treatment; and Expropriation and Compensation.

The Gottliebs are seeking some US\$6.5 million in damages. They are represented by Canadian lawyer Todd Grierson Weiler, who has acted as counsel or co-counsel in a substantial number of NAFTA Chapter 11 claims.

The claim is a sensitive one, targeting, as it does taxation measures. Indeed some governments have gone to great lengths in recent years to ensure that taxation measures do not lead to international arbitration claims by disgruntled foreign investors.

Some recent international investment agreements, such as those negotiated by Japan, including the Japan-Vietnam BIT, offer detailed guidance to arbitrators in relation to tax and expropriation matters. The Japan-Vietnam BIT notes that “a taxation measure will not be considered to constitute expropriation where it is generally within the bounds of internationally recognized tax policies and practices.”

More apposite, the NAFTA includes a lengthy annex that clarifies under what circumstances, foreign investors may invoke the NAFTA’s investor protections in an effort to challenge government tax measures.

In particular, the NAFTA provides that foreign investors must first consult the relevant tax authorities in the home and host countries before bringing a claim for expropriation due to taxation measures. The authorities have six months in which to review the case. If they agree that the measure does not constitute expropriation, then that particular claim would not be arbitrable; if the parties hold the measure to be an expropriation, or reach different views, the claim could proceed to arbitration.

The Gottliebs’ Notice of Intent sets in motion a 90 day waiting period before a request for arbitration can be filed. (As noted above, the claim for expropriation targeting taxation measures could be subject to a full six month waiting period.)

A website has been set-up by the claimants to provide documents and statements related to the case: <http://www.naftatrustclaims.com/>

Briefly Noted:

6. Eastern Sugar v. Czech Republic award now available on-line

Investment Treaty News has posted on-line a copy of the arbitration award in the Eastern Sugar v. Czech Republic case – wherein Czech regulation of the sugar industry, in the lead-up to accession to the European Union, was held to have discriminated against a Dutch sugar producer.

ITN reported on the outcome of this case in April of this year. (“Czech Republic loses BIT arbitration to sugar firm challenging quota allocation”, By Luke Eric Peterson, Investment Treaty News, April 13, 2007, available on-line here: http://www.iisd.org/pdf/2007/itn_apr13_2007.pdf

The award is available here: <http://www.iisd.org/investment/itn/documents.asp>

7. Recently published articles and papers on bilateral investment treaties

William W. Burke-White and Andreas Staden, “Investment Protection in Extraordinary Times: the Interpretation and Application of Non-Precluded Measures

Provisions in Bilateral Investment Treaties”, University of Pennsylvania Working Paper, available at:

<http://lsr.nellco.org/cgi/viewcontent.cgi?article=1156&context=upenn/wps>

Christer Soderlund, “Intra-EU BIT Investment Protection and the EC Treaty”, Journal of International Arbitration, Vol.24, No.5, Abstract available at:

<http://www.kluwerlawonline.com/toc.php?pubcode=JOIA>

Stephan W. Schill, “Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?”, Journal of International Arbitration, Vol.24, No.5, Abstract available at: <http://www.kluwerlawonline.com/toc.php?pubcode=JOIA>

Mabel I. Egonu, “Investor-State Arbitration Under ICSID: A Case for Presumption Against Confidentiality”, Journal of International Arbitration, Vol.24, No.5, Abstract available at: <http://www.kluwerlawonline.com/toc.php?pubcode=JOIA>

Kim M. Rooney, “ICSID and BIT Arbitrations and China”, Journal of International Arbitration, Vol.24, No.6, Abstract available at:

<http://www.kluwerlawonline.com/toc.php?pubcode=JOIA>

John Savage, “Investment Treaty Arbitration and Asia: Review of Developments in 2005 and 2006”, Asian International Arbitration Journal, Vol.3, No.1, abstract available at:

<http://www.kluwerlawonline.com/toc.php?area=Journals&mode=bypub&level=4&values=Journals~~Asian+International+Arbitration+Journal>

Abba Kolo, “Investor Protection vs. Host State Regulatory Autonomy During Economic Crisis: Treatment of Capital Transfers and Restrictions under Modern Investment Treaties”, Journal of World Investment and Trade, Vol.8, No.4, August 2007, Abstract available at: http://www.wernerpubl.com/frame_inves.htm

Valentina Vadi, “Access to Essential Medicines & International Investment Law: the Road Ahead”, Journal of World Investment and Trade, Vol.8, No.4, August 2007, Abstract available at: http://www.wernerpubl.com/frame_inves.htm

Won Mog-Choi, The Present and Future of the Investor-State Dispute Settlement Paradigm, Journal of International Economic Law, Vol.10. No.3, September 2007, Abstract available at: <http://jiel.oxfordjournals.org/>

8. British Institute to host seminar on State Responsibility and Investment Arbitration

The British Institute for Comparative and International Law will host on December 12th, 2007 in London a seminar on the Articles of State Responsibility and Investment Arbitration. The event will take place at Charles Clore House, 17 Russell Square, from 17:00 to 19:00 hours, with a reception to follow.

Chairing the seminar will be Cambridge University Professor James Crawford. Speakers will be Zachary Douglas and Simon Olleson; Simon Nesbitt will serve as commentator.

To subscribe to ITN, email the editor: lpeterson@iisd.ca

Past editions dating to October 2002 are available on-line at:
<http://www.investmenttreatynews.com>

The views expressed in Investment Treaty News are factual and analytical in nature; they do not necessarily reflect the views of the International Institute for Sustainable Development, its partners, or its funders. Nor does the service purport to offer legal advice of any kind.