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Arbitration Watch:

1. World Bank Facility Seeing Record Number of Investment Treaty Arbitration Claims

Eight new bilateral investment treaty (BIT) claims have been mounted at the Washington-based International Center for Settlement of Investment Disputes (ICSID) in recent weeks, bringing to a total of 15, the number of BIT claims brought to the center this year.

In the first five and a half months of 2003, the World Bank's arbitration facility has already matched the total number of BIT claims which it registered in 2002. Over the past four years, ICSID has seen its BIT caseload continue to rise as investors are dusting off bilateral investment treaties and using them to arbitrate against their host

governments.

Figures for 2000, 2001 and 2002, show that ICSID registered, 5, 12 and 15 BIT claims respectively. This year, ICSID is on pace to register more than 30 claims.

Since Camuzzi International mounted a claim in early May against the Argentine Republic (See "Camuzzi Files Second Investment Treaty Claim Against Argentina", INVEST-SD News Bulletin, May.9, 2003), the Center has seen five further claims mounted against the Argentine Republic, as well as new claims brought against Algeria, Egypt and the Democratic Republic of Congo.

Algeria faces a claim arising out of a disagreement between an Italian construction firm and the Algerian authorities in relation to the construction of a dam.

The UK-based Joy Mining Machinery company has brought a claim against Egypt under the UK-Egypt investment promotion and protection agreement; this claim arises out of a dispute between the investor and the host government over the investor's involvement in supplying equipment and services to a phosphate mining operation.

The Democratic Republic of Congo also faces a claim under the US-DRC BIT from a group of investors who had obtained a diamond mining concession, but subsequently saw this concession revoked.

Meanwhile, all of the Argentine claims have been brought against measures imposed upon foreign investors as part of the Argentine response to its financial crisis. Three new claims relate to hydrocarbon and electricity concessions, while another relates to an investment in natural gas supply and distribution, and the fifth to a US investment in the Argentine insurance industry.

Tribunals will be selected in the coming weeks.

The 8 new cases are listed below:

- Consortium Groupement L.E.S.I. - DIPENTA v. Algeria (Case No. ARB/03/8)
- Continental Casualty Company v. Argentine Republic (Case No. ARB/03/9)
- Gas Natural SDG, S.A. v. Argentine Republic (Case No. ARB/03/10)
- Joy Mining Machinery Limited v. Arab Republic of Egypt (Case No.

ARB/03/11)

- Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. and Pioneer Natural Resources (Tierra del Fuego) S.A. v. Argentine Republic (Case No. ARB/03/12)

- Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic (Case No. ARB/03/13)

- Miminco LLC and others v. Democratic Republic of the Congo (Case No. ARB/03/14)

- El Paso Energy International Company v. Argentine Republic (Case No. ARB/03/15)

Sources:

INVEST-SD Interviews

www.worldbank.org/icsid

2. BIT Cases going to Swedish Arbitration Institute; Volume and Details Remain Elusive,
By Luke Eric Peterson

An investigation by INVEST-SD Bulletin reveals that foreign investors are having greater recourse to lesser-known avenues provided in investment treaties for arbitration against host states.

While the Washington-based International Centre for Settlement of Investment Disputes (ICSID) has seen significant growth in the number of treaty cases which it sees - and publicizes all of these through an on-line case docket - some less prominent venues are also seeing increased activity.

Research has revealed details of a handful of treaty-based claims which have gone to the Arbitration Institute of the Stockholm Chamber of Commerce in recent years; an unclear number of other cases may be pending, as there are no rules which mandate public disclosure of cases being arbitrated at the Institute, even where they may involve challenges to government policies or measures in sensitive areas.

At least 4 such cases can be confirmed by INVEST-SD's recent inquiry. These BITs claims include:

A successful expropriation claim brought by a multinational oil company under the US-Kazakhstan BIT.

A dispute under a Swedish-Latvian BIT which saw the Swedish Company SwemBalt AB recover damages for a ship which was auctioned off by Latvian port authorities and then reduced to scrap metal.

A dispute brought by UK investors in relation to the Russian Government's restructuring of its domestic bond obligations after its 1998 default. This claim was settled before the Tribunal was asked to make a ruling in the dispute.

A pending claim brought by UK investor William Nagel against the Czech Republic in relation to an unsuccessful bid for a mobile phone network license

At press time, officials with the Stockholm Institute had not replied to telephone and email requests for more precise figures on the number of BIT claims being handled by the Institute. Information about the cases noted above, was compiled through interviews with arbitration practitioners and regular monitoring of the foreign press.

It is clear that the Institute - which is named in a small, but significant number of BITs - is handling some treaty-based arbitrations. This marks an increase from the mid 1990s, when the Institute had yet to see any such treaty-based claims.

For decades, the Stockholm Institute has long been a favored forum for arbitration of contractual disputes which implicate East-West relations. Notably, the forum was named as one of several potential venue for disputes arising under the Energy Charter Treaty - a comprehensive trade and investment agreement - governing the energy sector, and which binds several dozen nations in Europe and the former Soviet Union.

Although it is impossible to ascertain the precise number of treaty claims which the Stockholm Institute handles, it is thought by practitioners to be considerably fewer than that of the Washington-based ICSID (which saw 15 BIT claims in 2002 alone).

In the absence of any mandatory rules on disclosure of claims, however, the Stockholm option remains an attractive one for parties seeking to pursue arbitral claims against host governments with a minimum of publicity.

Negotiations Watch:

3. US Resists EU Demands that Investment Treaties be Altered,
By Luke Eric Peterson

As the deadline for the accession of new central and eastern European nations to the European Union creeps closer, so too does the prospect that the EU may pressure prospective new members to abrogate their bilateral investment treaties with the United States.

Negotiations have been under way for more than a year between the US, the EU and several nations including Slovakia, the Czech Republic and Poland, in an effort to resolve several EU concerns.

In particular, the European Commission has expressed misgivings about US BIT provisions which offer protections to US investors in sectors (such as audiovisual services, broadcasting, air and road transport services, and the marketing of air transport services) which have been the subject of reservations by the EU under the World Trade Organization's General Agreement on Trade in Services (GATS).

The EC is also ill at ease with BIT provisions which prohibit the imposition of certain performance requirements upon foreign investors, as well as the lack of safeguards to permit host governments to impose restrictions on capital transfers in times of financial emergency.

The EU had rejected an earlier US proposal to negotiate an interpretive understanding which would have clarified the reach of certain provisions in the BITs. Instead, the two parties set a deadline of May 1, 2003 to work towards possible amendments to the agreements.

This deadline was selected because it would leave a one year window - the minimum time frame required under the relevant BITs if the treaties were to be abrogated - prior to the May. 1, 2004 target date for accession by the candidate countries to the EU. This deadline has now passed without any signs of agreement, and Czech media report that government officials are still at odds.

Czech Deputy Finance Minister Ladislav Zelinka has warned that the United States has opposed amendments to the US-Czech BIT, and that this might occasion the need for the Czech Republic to "terminate the

treaty."

A decision by the US to amend these treaties would require the approval of the US Senate, and would be deeply unpopular with business groups which have praised the US BITs for the extensive protections which they provide for US businesses operating abroad.

Capitulation by the US to EU demands would also set a precedent for renegotiating the terms of these BITs, and could be expected to lead to other demands for clarifications and amendments, as the treaties raise new areas of concern for signatories to them.

Sources:

"EU-US Discuss Changes to BITs Negotiated Between US and WU Accession Candidates", By Luke Eric Peterson and Trineesh Biswas, INVEST-SD News Bulletin, Jan.31, 2003

Petra Pasternak, "EU, US Treaty Issues Unresolved", The Prague Post, May 29, 2003

4. WTO Working Group's Final Session on Investment Stalemated on Launch of MAI,
By Trineesh Biswas and Luke Eric Peterson

The WTO Working Group on Trade and Investment (WGTI) met this week for the final time before the WTO's Cancun Ministerial Conference in September. Members remain deeply divided - broadly along rich-poor lines - on the question of whether to authorize negotiations on a multilateral agreement on investment (MAI) in Cancun.

This week, participants in the Working Group discussed a paper submitted by Canada, Costa Rica and Korea, which argued that the Group's work on clarifying the relationship between trade and investment is now complete, and that "the negotiation of comprehensive investment rules in the WTO is overdue".

Although the paper's authors conceded that such a framework "would not guarantee greater investment flows," the authors of the paper suggested that an agreement would "tidy up loose ends within the WTO family of agreements" and "complement" the existing network of bilateral and regional agreements with their highly variable scope and coverage.

According to sources, the United States delegation hailed a multilateral agreement as a useful vehicle for "translating" the protections contained in existing bilateral investment treaties into a broader framework.

These calls for negotiations on a multilateral agreement were met with marked skepticism from many developing country members of the WTO Working Group, including the governments of India, Indonesia, Malaysia, Kenya, and China. Several openly questioned the usefulness of negotiating any multilateral agreement on investment - particularly in the context of a so-called "development round" of trade talks - which could not be guaranteed to stimulate greater investment to those developing nations which need such investment.

Members of the Working Group have been given until month's end to offer final comments on a report of the Working Group's progress; This report will be forwarded to the WTO's General Council, the governing body comprised of ambassadors from all WTO member states.

However, there was skepticism this week about a parallel diplomatic move in Geneva, which will see the Chair of the WTO's General Council engage in informal consultations with the chair of the Working Group on Trade and Investment, as well as the Chairs of the discussions on the other three so-called "Singapore Issues" (competition, government procurement and trade facilitation).

These consultations will assist the General Council in determining whether it can recommend to Trade Ministers based in national capitals, to launch negotiations on all four "Singapore Issues". Concerns have been expressed by some developing countries that these informal consultations may simply seek to steer around the ongoing stalemate within the Working Group on Trade and Investment.

This week's meeting of the Working Group in Geneva was also met by a concerted campaign of opposition from a coalition of development campaigning groups who argue that a WTO investment agreement could harm the development prospects of poorer countries.

At a media briefing in Geneva, held to coincide with the WTO sessions, these groups made clear their opposition to an MAI. According to Goh Chien Yen, a senior researcher for Third World Network "NGOs are calling for (investment) to be dropped from the WTO's agenda," he said, "it is not clear that an investment agreement will attract foreign direct investment (FDI) to developing countries, nor is it clear that the WTO is the appropriate forum (for such an agreement)."

Participants also cautioned that the WTO debate should be better informed by the lessons drawn from the plethora of bilateral and regional investment agreements which may circumscribe the ability of governments to regulate foreign investors in the public interest.

A succession of briefing papers have been issued in recent weeks by groups on different sides of the WTO debate on investment. This week saw a new report by British charity ActionAid which points to some of the dangers of what it deems "misguided liberalization". That report, "Unlimited companies: The developmental impacts of an investment agreement at the WTO" is available online at www.actionaid.org

Meanwhile, the Geneva-based WTO is opening its doors next week to play host to a Civil Society Symposium slated for June 16th through 18th. This event will see workshops on a host of issues which are part of the Doha Round of negotiations, including two panel discussions on investment rules. A draft agenda for the WTO Symposium is available online at the web address below.

Sources:

Invest-SD interviews

WTO Civil Society Symposium, Draft Agenda available at:
http://www.wto.org/english/tratop_e/dda_e/draft_prog_public_june03.doc

"Geneva battle resumes on WTO accord," Financial Times, Frances Williams, June 10, 2003

"Unlimited companies: The developmental impacts of an investment agreement at the WTO," ActionAid, www.actionaid.org

"Many Developing Countries Don't Want to Start Investment Negotiations",
By Cecilia Oh, Third World Network, June 11 2003, www.twinside.org.sg

"Negotiating a Multilateral Framework on Investment in the WTO",
Communication from Canada, Costa Rica, and Korea, WT/WGTI/W/162, June 5, 2003, WTO documents are searchable online at:
http://docsonline.wto.org/gen_home.asp?language=1&_1

INVEST-SD Bulletin is edited in Boston, Massachusetts by Luke Eric Peterson for IISD.

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