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Arbitration Watch:
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1. Tribunal rejects Methanex's compensation claim in key environmental arbitration,
By Luke Eric Peterson

In a highly-anticipated ruling, a three-member arbitration tribunal convened under the North American Free Trade Agreement has rejected a controversial claim by the Canadian-based Methanex Corporation against the United States Government.

Methanex had sought some $1 Billion (US) in compensation for damages allegedly related to a decision by the Government of California to ban the fuel additive Methyl Tertiary Butyl Ether (MTBE). Methanex, a producer of an MTBE component, Methanol, alleged that the California decision was not a legitimate environmental measure, but rather a thinly-veiled effort to protect domestic ethanol producers and to harm foreign methanol producers.

In the course of a mammoth 300+ page ruling the tribunal would reject Methanex's claim, both on jurisdictional grounds and on its merits.

Notable amongst the tribunal's findings was its statement clarifying the circumstances under which non-discriminatory government regulation will be immune from investor claims that such regulation is "tantamount to expropriation".

The tribunal held that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investors or investment is not deemed expropriatory and compensable unless specific commitments has been given by the regulating government to the then putative foreign investors contemplating investment that the government would refrain from such regulation."

The tribunal added, in this vein, that the Methanex Corporation had not entered the US marketplace with any special assurances from the US or California authorities about the future stability of the regulatory environment.

What's more, the tribunal noted that the company had elected, of its own volition, to enter a country "in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level … monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons."

Methanex also failed to convince the tribunal that it had suffered violations of the NAFTA obligations to provide National Treatment and Minimum Standards of Treatment under International Law.

Indeed, the tribunal held, ultimately, that the foreign investor had failed to clear the key jurisdictional hurdle imposed by Article 1101 of NAFTA: namely, Methanex could not demonstrate that California's move to ban MTBE related to Methanex's investments. In ruling that Methanex failed to show any "illicit pretext" on the part of state officials, the tribunal would also find that there was no evidence that California's intent had been to harm foreign methanol producers or benefit domestic ethanol producers.

California officials have hailed the arbitral ruling, with state Attorney-General Bill Lockyer issuing a statement that the ruling is a "resounding victory for the rights of Californians to keep their drinking water safe and clean. This sends a message to all foreign investors who would challenge the environmental and labor laws that are the fabric of our democracy."

The International Institute for Sustainable Development (publishers of this news bulletin) had sought leave to intervene in the Methanex arbitration as amicus curiae (friends of the court) in an effort to highlight how the NAFTA's protections for foreign investors could be read in consonance with broader public interest goals.

Following the successful bid to petition the tribunal, IISD and several other interested US-based groups submitted legal briefs to the tribunal in 2004. Howard Mann, along with Don McCrae of the University of Ottawa, served as IISD Co-Counsel in that effort.

In a commentary soon to be available on the IISD website, Howard Mann praises the Methanex tribunal's recent ruling for drawing a "clear legal dividing line" between legitimate regulation and government expropriation. He also offers broader analysis of the tribunal's other key findings.

IISD President David Runnalls notes that the Institute is an independent policy research think-tank which does not specialize in advocacy work. He adds that the Institute's decision to intervene as an amicus curiae in the Methanex case was a novel move for the Institute, but one that has reaped rewards.

"We felt that we had pursued the policy aspects of investment agreements as far as we could. We concluded that one of the main obstacles to a more sensible investment regime was the determination of the parameters of governments' right to regulate. And that this could be determined only through a legal or quasi legal process."

"In our brief, we did not argue the merits of the case. Rather, we called upon the tribunal to take a position on the right to regulate issue."

In the aftermath of the tribunal ruling in the Methanex arbitration, the Methanex corporation has remained tight-lipped about its future legal strategy. Under the applicable rules of the arbitration, the company could seek to challenge the arbitral ruling in the domestic courts of the United States, albeit on narrow grounds. Several earlier NAFTA arbitrations have ended up in domestic courts, and one such case, a dispute between the Loewen Corporation and the United States, is still under review by a US District Court.

When contacted by INVEST-SD about its plans, Methanex's Director of Public Affairs Diana Barkley indicated that the firm had no statement at this time beyond one issued on August 16th, expressing disappointment with the tribunal's ruling.

(Editor's Note: INVEST-SD: Investment Law and Policy News Bulletin is an independent news publication dedicated to investigative reporting on developments in the area of foreign investment law and policy. The News Bulletin's editorial work is separate from the IISD's policy and legal work on investment agreements.)

Sources:

Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005, available on-line at: http://www.state.gov/documents/organization/51052.pdf

Commentary on Methanex decision by Howard Mann, This commentary is expected to be posted at 5 PM (EST) on August 22, 2005 at this address: http://www.iisd.org/publications/pub.aspx?id=717

Methanex Corporation, "Methanex's Comments re: The Aug.3, 2005 NAFTA Tribunal Decision Against Methanex's Claim", press release, August 16, 2005, available on-line at: http://www.methanex.com/newsroom/statement081605.html

"Trade: U.S. Ban on Gas Additive upheld in surprising NAFTA ruling", By Emad Mekay, IPS-Inter Press Service, Aug.12, 2005

2. US television production company challenges subsidies given to Canadian firms, By Luke Eric Peterson

A US television production company has filed a claim against Canada under NAFTA Chapter 11 alleging that it has been "illegally prevented from operating in Canada".

The claim is the first-known incidence of an investment treaty arbitration having been mounted against domestic cultural policies.

The claimants, Contractual Obligation Productions, LLC, Charles Robert Underwood and Carl Phillip Paolino, take issue with Canada's immigration laws, as well as the practices of the Canadian Audio Visual Certification Office (CAVCO)

According to a statement of claim filed in June of this year, the claimants are alleging that Canadian subsidies for TV content production, as well as employment restrictions on US citizens' involvement in such productions, amount to violations of the investment protections found in the NAFTA.

The claimants say that they were discriminated against by virtue of not being eligible to receive subsidies comparable to those of Canadian production companies working on a made for TV series called "The Wrong Coast". They also allege that they were unable to work in Canada due to Canadian immigration rules.

Apart from their discrimination claim, the claimants allege that Canadian cultural subsidies violate a NAFTA stricture against requiring investors to utilize local content, as well as a requirement that governments offer compensation in instances where investments have been expropriated.

A sum of $20 million (US) is being sought by the US-based claimants.

While many investment protection treaties do not provide safeguards for cultural policies, the NAFTA is notable for doing so. Canada's 'cultural industries' were largely carved out of the 1988 US-Canada Free Trade Agreement, at Canada's insistence, and this exception was grandfathered in the subsequent North American Free Trade Agreement between Canada, the US and Mexico.

One lawyer who serves as an advisor to the Government of Canada on several NAFTA Chapter 11 claims told INVEST-SD that the viability of the US claimants' case would seem to be "slim to nil".

Jon R. Johnson, a Partner with the Toronto law firm Goodmans LLP, says that the claim faces a number of significant hurdles, not least that investments in the 'cultural industries' are grandfathered back to the earlier US-Canada Free Trade Agreement – a treaty which affords no right to bring investor-state arbitrations.

Johnson adds that, even if a tribunal were to find some jurisdiction to hear the claim, it remains unclear whether the claimants have made any investment in Canada, as their Amended Statement of Claim seems only to suggest that they sought subsidies, and the right to work in Canada, but were turned down. He adds that the claims for alleged breach of various NAFTA provisions (National Treatment, Minimum Standards of Treatment, etc.) would seem to be hobbled by the carve-out of cultural industries – of which television programming would be one – from the NAFTA.

Efforts to contact counsel for the claimants, in order to clarify their arguments, were unsuccessful at press time.

With the case now heading for arbitration, one thing appears clear: while many other governments have been loath to address this issue in their investment treaty negotiations – and might be more vulnerable to damages claims as a result – Canada has long pushed for special safeguards for cultural policies in international economic negotiations. As such, the US claimants have brought the first known investment treaty arbitration seeking to challenge a domestic cultural policy, against a government which can be expected to defend against such claims in an extremely robust manner.

Sources:

Contractual Obligation Productions, LLC, Charles Robert Underwood and Carl Phillip Paolino v. Canada, Amended Statement of Claim, June 16, 2005, available on-line at: http://www.dfait-maeci.gc.ca/tna-nac/documents/UNInternationalTradeLawandNAFTA.pdf

"The Wrong Coast" TV series, http://www.themovienetwork.ca/thewrongcoast/index.php

3. OECD Investment Committee signals support for more transparency in arbitration,

By Luke Eric Peterson

A Committee with government representation from countries accounting for some 90% of global FDI flows has come out in support of greater transparency in investor-state arbitration.

In a statement published earlier this summer, the OECD Investment Committee signaled that there was a "general understanding" amongst its members as to the desirability of greater transparency in investor-state arbitration, particularly with respect to the publication of arbitral awards.

Expressing the view that greater transparency would improve both the effectiveness and public acceptance of this burgeoning form of international dispute settlement, the committee added that safeguards would be needed to protect confidential business and government information.

General support was also expressed by committee members for the concept of third party participation in such arbitrations, particularly where matters of public interest are at stake in the proceedings.

This statement comes on the heels of a report prepared for the committee by the OECD legal secretariat on the process of investor-state arbitration. In that report, the Secretariat surveyed the current state of affairs which governs investment treaty arbitration between foreign investors and sovereign governments.

Currently, there are no uniform rules requiring that the existence of an arbitration be disclosed to the public. Nor, are there uniform requirements for the publication of arbitral awards rendered by investment tribunals.

In essaying various arguments for greater transparency, the OECD Secretariat noted that "Investment arbitral awards may have a significant impact on the State's future conduct, the national budget and the welfare of the people, so the public interest in investment disputes is understandable."

Emphasis was laid upon the fact that different actors may have differing levels of information about past and ongoing arbitrations. As such, a uniform requirement for publication of such arbitral awards would level the playing field and "contribute to the further development of a public body of jurisprudence which would allow investors and host states to understand how investment agreements are interpreted and applied".

The path to greater transparency is not straightforward, however. Given that investment treaties commonly incorporate several different sets of arbitral rules, there may be a need to alter those rules – or to alter each individual investment treaty so as to override provisions of the arbitral rules which block or hinder openness.

As is discussed in a separate article in this News Bulletin, there are proposals afoot at the International Centre for Settlement of Investment Disputes (ICSID) to revise its arbitral rules so as to bring about greater transparency.

However, no comparable efforts are under way to adapt the UNCITRAL rules or those of institutions such as the Stockholm Chamber of Commerce or International Chamber of Commerce. Indeed, the latter Chambers of Commerce specialize in private commercial arbitration (i.e. business-to-business disputes), which explains their long-standing affinity for confidentiality.

Sources:

"Transparency and third-Party Participation in Investor-State Dispute Settlement Procedures", Statement of the OECD Investment Committee, June 2005 and "Transparency and third-Party Participation in Investor-State Dispute Settlement Procedures, Working Papers on International Investment, April 2005, both available on-line at: http://www.oecd.org/dataoecd/25/3/34786913.pdf

4. South Centre weighs in again on proposed reforms to ICSID arbitration facility,
By Damon Vis-Dunbar

The South Centre, an inter-governmental research and advocacy organization based in Geneva, has issued a second commentary on proposed reforms to the investor-state arbitration processes of the International Centre for Settlement of Investment Disputes (ICSID).

As reported in earlier editions of INVEST-SD, an ICSID draft paper released in October put forth a handful of proposed changes to the investor-state arbitration process for consideration by interested parties. The South Centre, which claims the membership of some 48 developing countries, was among those groups and individuals who replied with a detailed list of concerns.

In May of this year, ICSID followed-up with a second discussion paper; some proposals were amended, while others scrapped.

In a new seven-page "analytical note" released this month, the South Centre continues to object not only to the process by which ICSID reform has been proposed, but also to the scope of the ICSID's proposals.

As in its first discussion paper on this issue, the South Centre charges the ICSID with overstepping its bounds by taking initiatives that should be led by ICSID member governments.

More specifically, developing countries need to be better included in the process of ICSID reform, it argues, pointing out that, while consultation with experts did occur leading up to the ICSID discussion papers, there were no forums designed to gather comments from experts and officials from developing countries.

The South Centre also revisits two proposed reforms that it had criticized previously: allowing third party submissions and the creation of a centralized appeals facility. Third party submissions are biased against developing countries, according to the South Centre, and although no specific alternatives are recommended, it asks for further examination by developing countries on better ways to promote the public interest.

A centralized appeals mechanism could have a significant impact upon to developing countries, it suggests, and considerations such as the scope and function of the facility, its cost, and its effectiveness in working for the public interest all require more study before moving forward.

Finally, the South Centre calls for increased participation by developing countries in the upcoming meeting of the ICSID Administrative Council this September. They hope to see the ICSID launch studies that address the concerns of developing countries, while at the same time providing clear policy parameters for the role of the Secretariat.

Sources:

Proposed Amendments of ICSID Rules: Process Related and Substantive Issues on ICSID Reform for Developing Countries
http://www.southcentre.org

Suggested Changes to the ICSID Rules and Regulations
http://www.worldbank.org/icsid/052405-sgmanual.pdf

"South Centre quarrels with ICSID Secretariat's reform proposals", By Luke Eric Peterson, INVEST-SD News Bulletin, March 10, 2005

"Detailed ICSID amendments tabled, openness pondered, appeals facility nixed", By Bonnie R. Penfold, INVEST-SD News Bulletin, June 10, 1995

Negotiation Watch:
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5. Uruguayan Senate debates US BIT, looks for common Mercosur posture on BITs, By Damon Vis-Dunbar

The Uruguayan Senate remains deeply divided on whether to move forward with the ratification of a US-Uruguayan Bilateral Investment Treaty (BIT) following a heated three-hour senate session requested by the opposition National Party (PN).

It was thought that ratification of the investment treaty would be one of the new government's first major tests in parliament. But there has been little movement on the treaty since the Progressive Encounter-Broad Front (EP-FA), a left-leaning coalition government, took power in March. A vote on the treaty, which was negotiated last year, now appears unlikely before 2006.

Fractions of the EP-FA are fiercely opposed to the investment treaty which was concluded under the previous administration of Partido Colorado (PC) leader Jorge Batlle.

During the senate debate on August 4, 2005, the governing EP-FA said they were “analyzing” the treaty and proposed creating a working group made up of Mercosur member countries in order to form a joint stance on BITs.

Strengthening relations with Mercosur, the Southern Cone customs union, is one of the administration’s top foreign policy objectives, as they find themselves ideologically aligned with the centre-left governments of Brazil and Argentina.

So far Argentina is the only Mercosur member to have entered into a bilateral investment treaty with the United States, a decision unpopular with the present Argentine administration which has seen the 1990s-era treaty used by foreign investors in order to skirt around local courts in the aftermath of the Argentine financial crisis.

But the decision to consult Mercosur is interpreted by some as a delay tactic, says Francesco Panizza, a professor of Latin American Politics at the London School of Economics. The government encompasses a wide range of political groups, from the far left to more centrist factions, and this treaty is stressing the coalition.

“This is less a matter of foreign relations than it is a matter of internal division within the ruling coalition,” says Panizza.

While the coalition government quarrels, the opposition is growing increasingly impatient. Senator Julio Sanguinetti (PC), a two-term president who held office for a decade, said failure to ratify the US investment treaty would be a “major political mistake”, according to Uruguayan media reports.

Determined to push the process forward, the PN has proposed another senate session for September 22 to once again discuss the US-Uruguay BIT.

Sources:

Text of US-Uruguay BIT is available at:
http://www.ustr.gov/assts/World_Regions/Americas/South_America/asset_upload_file440_6728.pdf

“US Launches BIT negotiation with Uruguay; Pakistan Next in Queue?”, By Luke Eric Peterson, INVEST-SD News Bulletin, May 24, 2004

"US-Uruguay BIT text released; new Uruguayan govt may review text", By Luke Eric Peterson, INVEST-SD News Bulletin, November 18, 2004

"Uraguay buscara modelo similar de tratados de inversion en el Mercosur", La Republica, August 5, 2005

Gobierno Uruguayo no define posicion sobre tratado de inversiones con EEUU", El Pais, August 5, 2005

Briefly noted:
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6. ICSID round-up: five new arbitrations registered in July and August,
By Luke Eric Peterson

Five new arbitration claims were registered by the International Centre for Settlement of Investment Disputes (ICSID) on July 29th, four of which arise out of consents to arbitration found in international investment treaties.

The first of these claims, Bayview Irrigation Disctrict and Others v. United Mexican States, was first profiled in this newsletter last autumn (see "US water rights-holders sue Mexico under NAFTA", INVEST-SD: Investment Law and Policy News Bulletin, Sept.8, 2004, http://www.iisd.org/pdf/2004/investment_investsd_sept8_2004.pdf).

In the claim registered by ICSID on July 1 of this year, the US-based claimants are challenging Mexico's diversion of waters from the Rio Grande River. The claimants allege that they qualify as investors under the North American Free Trade Agreement, and that the diversion of waters destined for the United States violates their investment rights contained in the NAFTA.

In another recent claim registered by ICSID US-based Noble Energy Inc., and its Ecuadorian subsidiary Machala Power Cia Ltd., are alleging violations of the US-Ecuador bilateral investment treaty.

As earlier reported in this News Bulletin, Noble has objected to subsidies offered to consumers of electricity produced from residual fuel (a by-product of refining gasoline and diesel).

The US firm alleges that these subsidies put its gas-fired Machala power plant at a competitive disadvantage, and constitute discrimination under the US-Ecuador BIT. A Noble spokesperson who spoke to INVEST-SD late last year also noted that the firm disagrees with the government's system for paying invoices.

Meanwhile, EDF Services (which is of no relation to the French Electricity company), has seen its arbitration claim against Romania registered by ICSID. At one time, EDF held a 20-year contract to provide duty-free retail services to Romania's airports and state-owned airline. A source familiar with the arbitration tells INVEST-SD that the case involves alleged violations of the UK-Romania bilateral investment treaty.

According to a report in April of this year published in the Financial Times newspaper, EDF's American owner, Rick Weil, says that he was asked to pay a $2.5 Million bribe by a high-ranking government official in order to maintain his contract with the state. Weil reportedly refused to pay the bribe, and alleges that his company soon confronted a ban on its duty-free operations.

In a fourth recent case registered by ICSID, RSM Production Corporation is pursuing a contract-based arbitration against Grenada related to a disputed oil exploration contract.

Finally, Egypt has been taken to arbitration pursuant to the Italy-Egypt bilateral investment treaty by two individual claimants, Waguih Elie George Siag and Clorinda Vecci, in relation to a contested resort development in Egypt.

Sources:

INVEST-SD Interviews

"Ecuador faces another claim, Attorney-General reportedly decries 'abuse' of US BIT", INVEST-SD: Investment Law and Policy News Bulletin, October 1, 2004

http://www.iisd.org/pdf/2004/investment_investsd_oct1_2004.pdf
"Spectre of lawsuit losses hangs over Bucharest", By Chrisopher Condon, The Financial Times, April 18, 2005
