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Arbitration Watch:

1. Suez Water Company Mounts Three ICSID arbitrations Against Argentina,
By Luke Eric Peterson

French utility giant Suez has followed through on a promise to mount investment treaty arbitrations against the Argentine Republic in relation to 3 separate water service contracts in which Suez is the majority shareholder.

This month, the Washington-based International Center for Settlement of Investment Disputes (ICSID) has registered three claims brought by Suez under the terms of the French-Argentine Bilateral Investment Treaty.

The claims relate to separate water concessions in Santa Fe, Cordoba and Buenos Aires.

A lawyer for the firm representing Suez at ICSID, Stewart Shackleton of Eversheds law firm in London, confirmed that the claims allege various violations of the bilateral investment treaty, but declined to comment on specifics of the legal claims - citing the privacy of the arbitration process.

Along with many other utility firms operating in Argentina, Suez has been squeezed by the devaluation of the Argentine Peso and strictures against raising tariffs and rates in order to compensate for revenues paid in the declining Peso. A number of foreign investors in Argentine public services have relied upon foreign borrowing to finance their operations - and have run into serious difficulties as declining Peso revenues have jeopardized payments on US-dollar denominated debts.

When Argentine authorities approved a moderate increase in water tariffs earlier this year, Suez clashed with officials, over the appropriate use for increased revenues. The government has called upon the company to finance improvements in infrastructure and service, while the investor has sought to channel new revenues towards debt-repayment.

Earlier this year, Suez wrote-off some \$550 million US in Argentina as part of a broader business strategy to reduce its exposure to emerging markets. The firm now appears poised to use ICSID arbitration in an effort to recoup some of these losses.

In addition to the 3 Suez claims, ICSID has also 2 other registered bilateral investment treaty claims: one by a Canadian investor in a Hungarian airport development scheme, and another brought by the Spanish firm Telefonica against Argentina.

Together these 5 BIT claims bring to a total of 20, the number registered by ICISD this year - a figure well exceeding the total of 15 BIT claims registered at ICSID in 2002.

Moreover, the Argentine Republic continues to attract the lion's share of these claims, accounting for 12 of 20 BIT claims registered this year.

Sources:

INVEST-SD Interviews

"That Sinking Feeling at Suez", By John Rossant, Business Week, March 17, 2003

"Suez Pietine Toujours En Argentine", La Tribune, March 27, 2003

"Suez in Argentine Price Rise Row", Utility Week, April 25, 2003

"Suez's Mestrallet to Seek Arbitration to Settle Argentina Water Dispute", AFX European Focus, March 6, 2003

Negotiations Watch:

2. EU Criticizes WTO Declaration on Investment; Links Ag Sacrifices to Investment Gains, By Luke Eric Peterson

A draft declaration prepared by the chairman of the WTO's governing General Council has come in for criticism from the European Union, because of wiggle room left on the thorny topic of investment.

The vaguely-worded Declaration issued last week represents a first attempt at building consensus towards a ministerial Declaration to be agreed at the WTO's Cancun Ministerial Conference in September. However, the EU has criticized the document for providing two potential scenarios. The draft declaration allows that members might "adopt by explicit consensus" the so-called modalities for negotiations on investment or that they may choose some other (unspecified) course.

EU officials insist that no such flexibility is available in Cancun, and that a decision must be adopted on the negotiating modalities so that investment talks may ensue. Meanwhile, some developing countries, led by India, continue to insist that negotiations on investment are not a given.

According to UK press reports, the EU intends to ratchet up the pressure on the investment issue, by formally linking any reduction in EU agricultural subsidies - a key demand of many developing countries - to a clear mandate to launch investment negotiations.

Meanwhile in Geneva, WTO member-governments remain far apart. Following the inability of the Working Group on Trade and Investment to put forward recommendations on the so-called modalities for any possible negotiations, the chairman of the General Council has taken over the brief and is now consulting with member governments and the chair of the Working Group on Trade and Investment.

As noted last week, member governments are far apart in terms of the signification of the phrase modalities. Some developed countries argue that they should merely set out the general process - number of meetings and timeframe - for proposed talks, whereas some developing countries contend that modalities must also represent consensus on the substantive issues to be negotiated under any prospective talks (See "Countries Still Split Over WTO Investment Talks; Rumbblings of Discontent in UK Gov't", By Trineesh Biswas and Luke Eric Peterson, INVEST-SD News Bulletin, July 18, 2003)

Sources:

"EU Criticizes WTO Chair for Presenting Options on Singapore Issues for Cancun", By Daniel Pruzin, International Trade Daily, July 23, 2003

"Europe Adopts Hardline Stance on CAP Cuts", By Charlotte Denny, The Guardian, July 21, 2003

3. World Bank Releases Research Note on Proposed WTO Investment Talks, By Luke Eric Peterson

A research note prepared by World Bank economist Richard Newfarmer casts doubt on the direct benefits for developing countries of a proposed WTO Investment Agreement, while viewing such a pact as a potential lever for other desired gains in other areas.

Newfarmer notes that many of the remaining barriers to investment in the developing world are in the services sector - an area already covered by a multilateral agreement, the General Agreement on Trade in Services (GATS). As such, the market access provisions of any new WTO investment agreement would not appear likely to yield significant new inflows of investment.

At the same time, Newfarmer casts doubt on the ability of investor protection provisions of any proposed multilateral agreement to reduce risk in a manner which leads to new investment flows. Pointing to a recent study by Mary-Hallward Dremeier of bilateral investment treaties (BIT), Newfarmer notes that "countries signing a BIT were no more likely to received additional FDI than countries without such a pact."

Despite the negligible direct gains to be expected from a multilateral investment agreement, Newfarmer does identify one way in which such a

pact might deliver significant benefits to developing countries: a willingness on the part of developing countries to go along with negotiations on investment might yield political trade-offs from developed countries, for e.g. improved market access for key developing country exports such as textiles and agricultural goods.

As noted in the previous story, the European Union's willingness to reduce agricultural subsidies to its farmers - and to offer greater market openings to developing countries- is now being tied to progress on the investment file in Cancun.

Sources:

"From Singapore to Cancun: Investment", By Richard Newfarmer, World Bank Trade Note, May 29, 2003, available online at:

<http://siteresources.worldbank.org/INTRANETTRADE/Resources/TradeNote2.pdf>

4. UNCITRAL Session Discusses Rules for Private Infrastructure Projects

The United Nations Commission on International Trade Law (UNCITRAL) - a body convened to promote the harmonization of standards related to international commerce - recently concluded its 36th regular session in Vienna. Among other business, the Commission has adopted a set of model legislative provisions on privately financed infrastructure projects.

The provisions are designed to create a legal framework conducive to privately financed infrastructure projects. These guidelines build upon an earlier Legislative Guide on Privately Financed Infrastructure Projects, which was adopted by UNCITRAL in 2000.

According to an UNCITRAL news release the new guidelines will offer governments guidance on issues such as the "authority and procedures for awarding infrastructure concessions, financial and contractual arrangements for infrastructure development and operation, termination of contracts and dispute settlement."

UNCITRAL expects that the model provisions will "assist in enhancing legal clarity and accountability to curb legislative grey areas that provide opportunities for arbitrariness or corruption in the relationship between private investors and public authorities."

The work of UNCITRAL has come under increased scrutiny, as its rules on

commercial arbitration have been included in numerous international investment treaties, and have permitted foreign investors to pursue arbitrations against host governments outside the aegis of any arbitration forum.

Because UNCITRAL's Vienna-based Secretariat does not monitor the usage of its arbitration rules, there are no hard and fast figures available on this form of investor-state arbitration. However, it is acknowledged by a number of international arbitration practitioners that the UNCITRAL arbitration rules have seen increased uptake in recent years.

Sources:

www.uncitral.org

News Release, UN Information Service, July 14, 2003

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