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Arbitration Watch:
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1. ICSID Tribunals diverge over independence of arbitrator to hear Argentine claims,
By Luke Eric Peterson

Two members of an ICSID tribunal, presiding over an investment treaty dispute between the US-based Azurix Corporation and Argentina, have rejected an effort by Argentina to remove the third member of that tribunal for an alleged lack of independence.

However, a parallel challenge to the same individual in a second ICSID arbitration,

Siemens v. Argentina, has split the remaining two members of that tribunal, and the challenge has now been handed to the President of the World Bank for resolution.

In a decision handed down on March 11, 2005, in the Azurix v. Argentina arbitration, the two party-appointed arbitrators, Marc Lalonde and Daniel Martins, have rejected Argentina's effort to have the Tribunal's President, Dr. Andres Rigo Sureda, disqualified.

At the same time, the party-appointed arbitrators in the Siemens v. Argentina dispute - Messers Domingo Bello Janeiro and Charles N. Brower - were unable to reach a consensus on the merits of Argentina's challenge to Dr. Rigo, and have referred the matter to the Chairman of ICSID's Administrative Council (World Bank President James Wolfensohn).

The Azurix and Siemens cases both relate to contracts concluded with Argentine authorities, in the areas of water & sewage and informatic services respectively. The cases have landed in arbitration at the ICSID facility following disputes over the performance of those contracts, as well as Argentina's obligations under international investment treaties signed with the home countries of the two investors. In the Azurix matter, the investor and the Buenos Aires authorities fell out over a number of issues including responsibility for infrastructural improvements and water quality issues. The Siemens dispute arises out of measures taken during Argentina's financial crisis.

Proceedings in the two ICSID arbitrations were suspended in December of 2004, while the respective tribunals dealt with Argentina's challenge to Dr. Rigo.

The Argentine government's decision to challenge Dr. Rigo had been reported in the Argentine press, and has occurred against the backdrop of broader criticisms leveled by the Republic's Attorney-General Osvaldo Guglielmino against the process of international investment arbitration.

In an opinion piece published in the newspaper La Nacion last month, the Attorney General denounced the practice - common to investment treaty arbitration - of lawyers playing quasi-judicial roles as arbitrators, while also serving as legal counsel in other investment treaty claims.

However, the basis for Argentina's recent challenges to Dr. Rigo involved a less straightforward argument.

Argentina did not raise concerns about Dr. Rigo's service on behalf of other investors, but rather about Dr. Rigo's relationship with a Houston law firm which is working on behalf of other investors.

In April of 2001, Dr. Rigo joined the Houston-based firm of Fulbright & Jaworski as a Senior Advisor. That firm subsequently became involved as counsel for a US-based investor in a separate ICSID arbitration, Duke Energy v. Peru.

In the Duke case, Mr. Guido Tawil, an Argentine lawyer was invited by Fulbright to serve as Duke's party-appointed arbitrator.

At the root of Argentina's recent challenge to Dr. Rigo was the fact that he was presiding as arbitrator over two matters where Mr. Tawil was representing the investors - namely the Azurix and Siemens claims against Argentina - at the same time that Dr. Rigo's firm, Fulbright & Jaworksi, was pleading a claim before a tribunal which included Mr. Tawil.

Thus, in December of 2004, Argentina lodged a challenge to Dr. Rigo under an ICSID Convention rule requiring that arbitrators be able to "exercise independent judgment".

In the Azurix case, this move came particularly late in the proceedings: after the tribunal had issued its jurisdictional ruling, and had held hearings on the merits of the claim.

Dr. Rigo, an international lawyer who served with the World Bank for many years, including a stint as Acting Secretary General of the ICSID facility, declined a request for an interview with INVEST-SD and gave no comment, citing the sensitivity of the matter and the confidentiality obligations of an ICSID arbitrator.

A telephone message left with Mr. Mark Baker, co-head of Fulbright's arbitration practice, was not returned.

In February of 2004 - while the Azurix and Siemens tribunals were still weighing Argentina's challenge applications - INVEST-SD learned that Dr. Rigo had severed his ties with the firm of Fulbright & Jaworksi.

INVEST-SD has also become aware that Mr. Guido Tawil took steps to disclose in March, 2004, to the then Argentine Attorney General, Mr. Horacio Rosatti, that he had been offered an arbitral appointment by Fulbright & Jaworksi in the Duke v. Peru matter at ICSID.

At that time, it is understood that Argentina had no objection. Some months later, however, a new Attorney General, Osvaldo Guglielmino came into office in Argentina; in December of 2004, Mr. Guglielmino elected to mount the present challenges to Dr. Rigo.

In the latest development, on March 11, 2005, the remaining members of the Azurix tribunal have rejected Argentina's effort to disqualify Dr. Rigo on the grounds of his alleged lack of independence.

Under the ICSID rules, the Washington-based facility may not publish the Azurix tribunal's decision unless both parties consent to publication. In response to a query from INVEST-SD, counsel for Azurix indicated that the firm was not inclined to release a copy of the decision. A similar request of counsel for Argentina had not been processed at press time.

Meanwhile, a decision is still pending in the Siemens arbitration, with the matter now

under review by the Chairman of ICSID's Administrative Council.

At the same time, sources tell INVEST-SD that a challenge to Dr. Rigo is proceeding in a third arbitration between UK-based National Grid and Argentina. That case is being heard pursuant to the UNCITRAL rules of arbitration and alleges violations of National Grid's rights under the UK-Argentina bilateral investment treaty. It is understood that Mr. Guido Tawil does not act for the investor in that case.

The National Grid challenge will be reported more fully in a future edition of INVEST-SD News Bulletin

Sources:

INVEST-SD Interviews

"Analista señala arbitrariedad del sistema judicial; Demandas inverosímiles", By Osvaldo Guglielmino, La Nación (Argentina), January 17, 2005

"Azurix water company registers second Argentine claim, as first claim clears jurisdictional hurdle", INVEST-SD News Bulletin, Dec.19, 2003, available on-line at: http://www.iisd.org/pdf/2003/investment_investsd_dec19_2003.pdf

2. Tribunal constituted in Glamis Gold v. US NAFTA case, hearings to be open,
By Luke Eric Peterson

At a procedural hearing held last month, the two parties to a NAFTA Chapter 11 arbitration between Canadian firm Glamis Gold Ltd. and the United States of America, agreed that the hearings may be made available to the public through closed-circuit television broadcast.

The parties also confirmed that they had appointed the tribunal which will preside over the dispute; the tribunal will consist of Prof. David D. Caron, the US's party-appointed arbitrator; Donald L. Morgan, the investor's nominee; and Michael K. Young as Chairman.

Although the dispute is proceeding under the UNCITRAL rules of arbitration, it is being administered by the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID). The place of arbitration, Washington D.C. was also affirmed by the two parties; the place of arbitration dictates where either party might elect to challenge decisions taken by the tribunal, for example seeking to vacate any eventual arbitral award.

The Glamis dispute has been controversial, as the Canadian firm is seeking compensation for alleged damages incurred due to the regulatory actions of California state mining

authorities. In particular, Glamis objects to new regulations which would oblige the firm to back-fill and re-grade mining pits in close proximity to Native American sacred sites.

Sources:

Glamis Gold Corp Ltd v. The United States of America, Procedural Order No.1, March 3, 2005

3. Ecuador's challenge to arbitral award being weighed in UK High Court,
By Luke Eric Peterson

The UK High Court has heard arguments in a bid by the Republic of Ecuador to set aside an arbitral award stemming from an investment treaty dispute between Ecuador and US-based oil company Occidental.

In July of 2004 a tribunal operating under the UNCITRAL rules of procedure held Ecuador liable for violations of the US-Ecuador bilateral investment treaty and ordered the government to pay Occidental some $75 million US in compensation.

The arbitration was mounted by Occidental in 2002 in relation to a dispute over refunds of Value-Added Tax (VAT) which Ecuadorian tax authorities were refusing to remit to Occidental.

A fuller report of the Occidental-Ecuador arbitration was published in an earlier edition of INVEST-SD News Bulletin (See "Occidental wins investment arbitration against Ecuador; Ecuador vows 'appeal'", July 16, 2004, available on-line at: http://www.iisd.org/pdf/2004/investment_investsd_july16_2004.pdf)

Following its loss before an international arbitral tribunal, Ecuador moved to challenge the tribunal's award under the laws of the country where the arbitration was legally sited: in this case the United Kingdom.

A source close to the dispute tells INVEST-SD that hearings were recently held in the UK High Court. Under UK law, challenges to arbitral awards are ordinarily heard in private; neither the hearings nor the written pleadings of the parties are made public. However, the Court's ultimate decision is expected to be made public.

INVEST-SD will continue to monitor legal developments in this dispute.

4. US want three NAFTA softwood lumber arbitrations consolidated under one panel,
By Luke Eric Peterson

Following the resignation of an arbitrator in the pending NAFTA Chapter 11 arbitration Canfor v. United States, the US Government has applied to the International Centre for

Settlement of Investment Disputes (ICSID) for a special tribunal to review the possibility of bringing three separate NAFTA investment arbitrations under the purview of a single panel.

Presently, the US faces three separate arbitrations by Canadian firms seeking compensation for alleged losses arising out of the US imposition of countervailing duties and anti-dumping duties upon certain Canadian softwood lumber exports into the United States. In addition to the claim by Canfor, the US also faces arbitral claims by Tembec and Terminal Forest Products Ltd.

The US Government, in a letter to ICSID Secretary General Robert Danino dated March 7, 2005, has cited the potential for delay in the Canfor process arising out of the recent resignation of arbitrator Conrad Harper, as well as the need for "fair and effective dispute resolution", as grounds for seeking a consolidation order for the three ongoing NAFTA softwood lumber investor-state arbitrations.

If successful, such an order would bring all, or parts, of the three claims under the jurisdiction of a single tribunal. This might be expected to reduce or eliminate the potential that separate tribunals would reach differing, or even contradictory, rulings in relation to the three pending claims.

All three claims are being arbitrated under the UNCITRAL rules of arbitration, however NAFTA Article 1126 sets forth a process by which the Secretary General of the Washington-based ICSID facility will entertain any requests for consolidation of NAFTA Chapter 11 investor-state arbitrations (regardless of whether such arbitrations are proceeding under UNCITRAL or ICSID auspices).

The Secretary-General will then appoint three individuals to serve as arbitrators on a special consolidation tribunal that operates under the UNCITRAL rules of procedure.

A copy of the United States' consolidation request is available here:
http://www.state.gov/s/l/c14432.htm

5. Wolfowitz could become new ICSID Administrative Council head

The US Administration announced last week that it intended to nominate US Deputy Secretary of Defense Paul Wolfowitz to the Presidency of the World Bank.

If Dr. Wolfowitz's appointment is successful, he would also become the ex-officio Chairman of the Administrative Council of the International Centre for Settlement of Investment Disputes ICSID), the foremost venue for arbitration of international investment treaty disputes.

The Washington-based ICSID facility is a part of the World Bank Group, which also comprises the International Finance Corporation (IFC), the Multilateral Investment

Guarantee Agency (MIGA), and the International Development Association (IDA).

ICSID's Administrative Council consists of representatives from each World Bank member-state who oversee the operations of the ICSID facility. Among its tasks, the Council sets the rules of procedure used for investment conciliation and arbitration proceedings.

The Chairman of the Administrative Council has the authority to appoint up to 10 individuals to standing rosters of conciliators and arbitrators maintained by the Centre. In addition, each ICSID member-state may appoint up to 4 individuals to these rosters.

In the case of investment arbitrations brought to the Centre, the arbitrators are not drawn exclusively from these standing rosters. However, where the parties to an investment dispute fail to appoint arbitrators within the prescribed time period, the authority to appoint the remaining arbitrators will fall to the Chairman of the Administrative Council - who will draw candidates exclusively from the standing roster maintained by ICSID.

As also noted in an earlier story (see "ICSID Tribunals at odds over independence of arbitrator to hear Argentine claims" above), the Chairman may be called upon to resolve challenges to arbitrators where the remaining arbitrators fail to reach consensus.

Negotiation Watch:
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6. Blair Commission for Africa puts focus on good governance

A report released by a high-level commission convened by British Prime Minister Tony Blair has urged a multitude of reforms and initiatives targeted at African development.

Among the recommendations of the report released on Thursday March 11, is to tackle the problem of good governance in the region. The report observes that the development benefits of foreign direct investment (FDI) may be lost, or diluted, where a lack of transparency and accountability create the conditions for corruption and misappropriation of public resources.

Pointing to the lack of transparency in a range of sectors - from construction to fisheries to mineral resources - the report stresses the need for more open negotiations of concessions and royalty agreements so that the public may be apprised of the payments made to governments, and to hold those governments to account in the use of those funds.

The report's authors - who include several African heads of state, as well as various business and development experts - also note that the overwhelming amount of African FDI is domestic, and therefore advise that more emphasis should be laid upon improving

the domestic investment climate, (which, they add, could have salutary knock-on effects for foreign investors as well).

In this vein, the report urges that more effort be made to protect property rights of local small enterprises and entrepreneurs, so that such businesses might have collateral for commercial credit. As well, the report suggests that the World Bank's Multilateral Investment Guarantee Agency (MIGA) might be adapted so that it provides political risk insurance not only to foreign investors, but also to domestic investors who seek greater security (for example, in conflict or post-conflict environments).

Notably, the report is largely silent on the topic of further rights and protections for foreign investors and investments (for example as embodied in international investment protection treaties). However, the report does lay emphasis upon the need for various domestic reforms which will create a more enabling environment for foreign investment.

One particular recommendation is to devote greater resources to the improvement of administrative and bureaucratic agencies. Indeed, the report identifies yawning deficiencies in the basic capacity of many countries: "Basic equipment, such as the tools of keeping records, files, accounting and personnel systems, is essential for public servants to do their work properly and efficiently. Provision is at present very variable. Many do not even have functioning telephone systems."

Although the report does not say so, these shortcomings might be of particular concern for those countries which have committed to quite high levels of administrative and bureaucratic performance under international investment treaties - for example to provide fair and equitable treatment or to commit to expeditious processing of licenses and permits - without much capacity to live up to such obligations.

Indeed, on the broader question of international trade commitments, the report urges a "proper sequencing of reforms", with primary emphasis laid upon domestic reform, rather than efforts which simply "dictate" policy change through trade agreements, without sufficient attention paid to how such trade commitments can be met in practice.

The full report, as well as further information about the Commission is available here: http://www.commissionforafrica.org/english/home/newsstories.html

7. UK Departments urge EU not to force investment talks on Africa, Caribbean and Pacific,
By Luke Eric Peterson

The UK Department of Trade and Industry (DTI) and the UK Department for International Development (DFID) have called for EU-led Economic Partnership Agreements currently under negotiation with developing countries in the Africa, Caribbean and Pacific regions to refrain from forcing trade liberalization, including in the area of investment.

The Departments call on the EU's executive branch, the European Commission, to ensure that negotiations lead to agreements which promote long-term development, economic growth and poverty-reduction. More specifically, the Departments urge that liberalization be sequenced properly, and that the EU not pursue an "offensive" or "mercantilist" negotiating policy. They suggest that, "Each ACP regional group should make its own decisions on the timing, pace, sequencing, and product coverage of market opening in line with individual countries' national development plans and poverty reduction strategies."

Additionally, the UK Departments call for the EU to provide financial assistance to countries which will "support them in building the infrastructure and economic capacity they need to benefit from trade with the EU and the rest of the world, and put in place the institutions to help manage change and protect vulnerable people ...."

Notably, the UK Departments also urge the EU to refrain from forcing negotiations on the contentious issue of investment, arguing that "Investment, competition and government procurement should be removed from the negotiations, unless specifically requested by an ACP regional negotiating group. It is for ACP regional groups to judge the development benefits of any agreements on these issues and the EU should not push for them to be discussed."

At present, the UK already has some 100 bilateral investment treaties in place with a host of developing countries, many of them in the ACP regions. These treaties do not mandate investment liberalization, however they do provide international legal protection for investments which are made in those countries in accordance with the local rules of entry.

Source:

Economic Partnership Agreements: Making EPAs deliver for Development, Statement of the Department of Trade and Industry and Department for International Development, available on-line at:
http://www.dti.gov.uk/ewt/epas.pdf

8. Soros urges governments to join Extractives Industry Transparency Initiative

Financier and Philanthropist, George Soros, writing in the Financial Times, calls for governments to sign on to the Extractives Industries Transparency Initiative, a program intended to cast light upon payments made by foreign natural resources companies to host governments.

Soros characterizes the drive for transparency as essential to ensuring that the citizens of host countries see the benefits of foreign direct investments in resource sectors.

A full copy of the op-ed piece is available here:

http://www.soros.org/resources/articles_publications/articles/transparency_20050317

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