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Arbitration Watch:

1. Stockholm arbitrators expected to rule soon on Energy Charter Treaty arbitration,
By Luke Eric Peterson

An arbitration brought by a Swedish energy firm against the Government of Latvia is expected to yield an award on December 19 according to sources familiar with the case.

The case alleges breaches of contract and of the Energy Charter Treaty, a plurilateral trade and investment agreement covering the energy sector, and which contains rule similar to those found in many bilateral investment treaties.

The arbitration sees Swedish-based Nykomb challenging a decision by the state-run Lavenergo power company to refuse to pay double tariffs for electricity purchased from Nykomb's Latvian subsidiary, the Windau energy company.

A number of small and alternative energy providers do receive double tariffs for electricity purchased by Latvenergo, under a law which was designed to encourage new investments in cleaner, more efficient energy technologies.

However, according to local news reports, "The double tariffs were not paid to Windau, as the legislative regulation was temporarily cancelled in 1997, when Windau signed its power-purchasing agreement with Latvenergo."

Windau rejects these suggestions and accuses the Latvian government of not honoring its obligations to pay the higher tariff-rate, and alleges that the government has treated them in a discriminatory manner by paying some local firms for electricity at the higher rate.

A lawyer with the Swedish firm Setterwalls confirms that his firm has been hired to defend the Republic of Latvia, but could not offer specifics other than to verify that the case revolves, in part, upon alleged violations of the non-discrimination provisions contained in the Energy Charter Treaty.

Meanwhile, Latvenergo, Latvia's state-run company, has warned that the costs of defending against the arbitration may force the company to dip into funds earmarked for new investments, in order to pay its mounting legal bills. However, Latvenergo president Karlis Mikelsons has been quoted in the local press as insisting that this "would not affect projects vital for the company such as renovation of thermal power plants."

Investor-state arbitrations mounted under the Energy Charter Treaty (ECT) are notoriously difficult to monitor. As with many bilateral investment treaties, foreign investors enjoy the right to sue host governments under international law, but there is no single body which handles such disputes.

According to one former official with the secretariat of the Energy Charter Conference, the secretariat itself is frequently in the dark about investor usage of the Energy Charter Treaty.

At least one other ECT arbitration is known to be pending, at the Washington-based International Center for Settlement of Investment Disputes (ICSID) facility. That case was brought by the Plama consortium and the Government of Bulgaria.

An earlier ECT case, between the AES Corporation and Hungary, was settled before any decisions were reached by an ICSID tribunal.

Once an award is handed down in the Windau-Latvia arbitration, further information about the case may circulate. INVEST-SD will continue to monitor the situation.

Sources:

INVEST-SD Interviews

Information about the Energy Charter Treaty, www.encharter.org

"Arbitration court preparing verdict in case between Sweden's Nycomb (sic) and state of Latvia over power tariffs", Oct 2, 2003, Baltic News Service

"Latvia will win energy tariff case against Sweden's Nycomb (sic) - Econ Min", May 20, 2003, Baltic News Service

"Latvia Picks Counsellor for Proceedings initiated by Sweden's Nykomb over energy tariff", February 12 2002, Baltic News Service

Negotiation Watch:

2. EU confirms new position on investment at WTO,
By Luke Eric Peterson

The European Union has made official that it will accept the un-bundling of the 4 so-called Singapore Issues - so-named because they were first tabled at a WTO Conference in Singapore - and propose negotiations on each individual issue.

Moreover, the EU has said that it would accept negotiations which proceed on a plurilateral basis - meaning that only countries which were comfortable negotiating on a given issue, such as investment, would do so.

However, some development groups have criticized the new EU position, suggesting that plurilateral talks will not serve the interests of many developing countries.

A briefing note* released by two UK-based development agencies warns that smaller countries will feel pressured to participate in plurilateral negotiations in any event, or risk being pushed to participate, at a later date, in an agreement which they would have had no hand in drafting. And in particular, the agencies warn that new countries which join the WTO could be pressured to sign on to such plurilateral agreements as a condition for accession to the WTO.

While critics continue to voice their concerns, recent developments at the WTO and in the ongoing negotiations on a Free Trade Area of the Americas appear to underscore a lack of political will to carry forward ambitious and inclusive negotiations on investment at the multilateral or regional level.

In the coming weeks, INVEST-SD will re-double its focus on negotiations at the bilateral level, beginning next week with an examination of Japan's recent bilateral investment negotiations.

*"Four Arguments Against a Plurilateral Investment Agreement in the WTO", Christian Aid and CAFOD, November, 2003, available at:

www.cafod.org.uk/policy/pia200311.shtml

Sources:

"European Commission proposes to put Doha Round of trade talks back on track", News Release, Nov. 26, 2003, available at:
http://europa.eu.int/comm/trade/issues/newround/pr261103_en.htm

"Brussels softens stance on WTO talks", by Andrew Osborn, The Guardian, Nov. 27, 2003

3. US and Australian Ministers meet to discuss toughest issues in FTA talks,
By Luke Eric Peterson

US Trade Representative Robert Zoellick will meet his Australian counterpart Mark Vaile next week in Washington in an effort to resolve some of the final hurdles standing in the way of a US-Australia Free Trade Agreement.

Items on the agenda will include Australia's cultural content rules for broadcasting, US agricultural barriers, Australia's price-controls imposed on prescription drugs, and the future of the state agency which screens inward investment into Australia.

Last month in Australia, the US's chief negotiator confessed that "the highly sensitive issues on both sides can probably only be resolved at the political level." However, US officials have been extremely coy about their specific demands in several of these areas.

The US is known to have voiced concerns about Australia's Pharmaceutical Benefits Scheme (PBS) which - in line with the practice in most developed countries - imposes price controls on prescription drugs. Earlier this autumn, Trade Representative Zoellick described the PBS as a "protection system".

However, the US has insisted in its public statements that it has no formal proposal in writing - which makes it difficult to assess whether the US is looking to address its concerns through the intellectual property rights provisions of the proposed agreement, or through language which would be inserted into the investment chapter of the agreement (and which could be invoked directly by US firms investing in the Australian market).

For his part, Australian trade minister Vaile continues to insist in public comments that he will not weaken the PBS in order to secure a trade deal with the US.

Other US concerns are known to relate to Australia's Foreign Investment Review Board which screens inward investment, and Australia's broadcasting rules which impose various content requirements - for example, that 55% of TV programming between the hours of 6pm and midnight must be of Australian origin.

Fears that broadcasting content quotas might be relaxed as part of a trade-off to secure greater access for Australian farm produce into US markets, have led to considerable public debate in Australia - with agricultural producers pitted against the cultural community.

Lindsay Tanner, the Parliamentary communications critic for the opposition Labour Party has warned against any "sellout" of the Australian film and television sector. In comments reported in the Australian press, Tanner defended minimum content standards in the cultural sector:

"We need a minimum level of local activity to ensure that we don't end up purely as an exporter of talented people. We've a lot of talented people in Australia but without some guarantee of the existence of an industry in Australia we will simply export those talented people, rather than exporting the products that they ultimately produce."

Meanwhile, the chairman of an Australian dairy company has criticised local film and television industries for clinging to such quotas.

Noel Campbell, Chairman of Bonlac Foods, told the Melbourne Age newspaper that "it was disappointing to hear Australia's actors talking about not trading culture 'for a few lamb chops.'" He insisted that improved access to US agricultural markets for Australian exporters would improve the livelihoods of "whole communities."

INVEST-SD will report next week on any developments in the US-Australia talks.

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"Zoellick, Vaile to meet as some suggest FTAA talks could be extended ", Inside US Trade, Nov.21, 2003

"Drug subsidies not a bargaining chip: Vaile", The Australian, Nov. 28, 2003

"Actors Plead: Do Not Rewrite Script On Local Content", The Melbourne Age, Nov. 22, 2003

"Aust will export talent but no shows to Hollywood: ALP", AAP Newsfeed, Nov.25, 2003

"Dairy Boss Takes Shot at TV, Film Industry", The Melbourne Age, Nov.27, 2003

4. Pipeline project continues to attract funding and controversy,
By Trineesh Biswas

Two inter-government lending agencies have approved funding for a controversial pipeline project designed to bring landlocked Caspian oil to the Mediterranean Sea and world markets.

This month, the International Finance Corporation (IFC), an arm of the

World Bank, announced that it will contribute \$250 million investment to the Baku-Tbilisi-Ceyhan (BTC) pipeline - half from its own funds and half to be raised by commercial banks under the IFC's auspices.

As well, the European Bank for Reconstruction and Development (EBRD) also announced a similar support package for the 1760-kilometre pipeline which is expected to need some 3.6 Billion dollars in project funding.

While the funding picture brightens, political uncertainty continues to overshadow the region through which the pipeline will travel. A disputed election has roiled tempers in Azerbaijan, while another contentious election has led to the removal of Georgian President Edward Schevernadze.

Meanwhile, civil society groups continue to criticize the British Petroleum (BP)-led pipeline scheme for failing to adequately safeguard human rights and environmental concerns.

Amnesty International has raised the spectre of so-called 'regulatory chill' whereby the pipeline-related contracts might inhibit governments from enforcing basic human rights obligations, particularly with respect to the conduct of security personnel and company officials working on the ground.

In response to these concerns, all parties to the BTC pipeline consortium signed a Deed Poll - a one-sided legally binding contract - in September of this year. Under the terms of this contract, the parties promise to protect the right of host governments to regulate in the public interest, as well as the right of injured third parties to seek remedy in domestic courts. Amnesty has welcomed this move, but cautions that the Deed Poll is not legally binding on the governments of Turkey, Georgia, and Azerbaijan - and that the effectiveness of the contract will only become apparent over time.

In its recent decision to fund the BTC project, the International Finance Corporation has hailed the consortium for the unprecedented levels of transparency; commitment to environmental and social safeguards; community consultation and involvement; and civil society involvement.

However, some campaign groups have denounced the IFC's evaluation of the pipeline project.

In an interview with INVEST-SD, Anders Lustgarten, coordinator of the UK-based Baku Ceyhan Campaign, questions whether IFC staff have adequately informed the IFC's decision-making board about the project's potential human impacts.

Lustgarten was highly skeptical of the IFC's wholesale rejection of 173 potential violations claims of World Bank social and environmental standards which were flagged by campaign groups. Noting that all 173 allegations were dismissed in a two week period, Lustgarten says that it would be impossible to investigate every claim in such a short window of time.

He also rejected IFC assertions* that, of the 750,000 people living in villages and towns within the vicinity of the 1,760 km pipeline, "there is not one instance of physical relocation." Lustgarten dismissed the claim as "preposterous," noting that his organization has affidavits from people in the pipeline zone saying that the supposed consultations did not always happen, and that compensation provided for relocation was inadequate (for example, the compensatory land received was of poorer quality).

However, Yasmin Tayyab, a civil society coordinator with the Washington-based IFC counters that many of the claims made by Lustgarten's group have been made over the previous year and a half, and had already been investigated by the 15-member IFC project team. Furthermore, she says that most of the 173 claims were based on conditions, such as the 'Indigenous Peoples' Policy,' that do not apply to the IFC or the World Bank for purposes the pipeline project.

Meanwhile, a spokesperson for British Petroleum told Invest-SD that since the pipeline will be buried along its entire length, "absolutely no one is losing land," and that people were only compensated for the temporary loss of use of the land.

Although the consortium does not claim to have spoken to all of the 750,000 people in the affected region, she insists that "every one of the 35,000 land-owners and land-users" was interviewed," defending the two-year consultation process as unprecedented in that region.

*IFC Report available at:

[http://www.ifc.org/ifcext/btc.nsf/AttachmentsByTitle/ESIAPublicCommentsResponse/\\$FILE/BTC+-+IFC+Reply+to+comments.pdf](http://www.ifc.org/ifcext/btc.nsf/AttachmentsByTitle/ESIAPublicCommentsResponse/$FILE/BTC+-+IFC+Reply+to+comments.pdf)),

Sources:

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"World Bank arm may add human rights to its criteria," by Demetri Sevastopulo, Financial Times, November 4, 2003

"IFC backs oil pipeline project," by Alan Beattie, Financial Times, November 9, 2003

"EBRD approves cash to build controversial Caspian Sea oil pipeline," Agence France Presse, November 11, 2003

"Amnesty International Calling for Chances to Turkish Pipeline Agreement," Invest-SD, May 23, 2003

"BTC Human Rights Understanding," The Baku-Tbilisi-Ceyhan Pipeline Company, September 22, 2003;
<http://www.caspiandevlopmentandexport.com/Downloads/Human%20Rights%20Undertaking.pdf> (N.B.: the text of the Host Government Agreements can be found on the same website)

"Human Rights On The Line: The Baku-Tbilisi-Ceyhan Pipeline Project,

Update as of October 8, 2003," Amnesty International,
<http://www.amnesty.org.uk/business/btc/index.shtml#airesponse>

"BTC Pipeline and ACG Phase 1 Projects Environmental and Social Documentation: IFC Response to submissions received during the 120-day Public Comment Period," International Finance Corporation, October 27, 2003;
[http://www.ifc.org/ifcext/btc.nsf/AttachmentsByTitle/ESIAPublicCommentsResponse/\\$FILE/BTC+-+IFC+Reply+to+comments.pdf](http://www.ifc.org/ifcext/btc.nsf/AttachmentsByTitle/ESIAPublicCommentsResponse/$FILE/BTC+-+IFC+Reply+to+comments.pdf)

Briefly noted:

5. US Ambassador calls for Korea to abandon film quota; PM promises to keep talking,
By Luke Eric Peterson

This week the US Ambassador to the Republic of Korea once again called upon Korea to curtail its quota system for domestic films. Describing the policy as "media protectionism", Ambassador Thomas Hubbard said that the policy inhibits the ability of US film corporations to distribute their products in Korea.

The dispute over the film-quota system - which dictates that 40% of films shown in Korean cinemas must be local productions - has derailed long-standing discussions over a bilateral investment treaty between the US and Korea.

Although aides to President Roh Moo-hyun have signaled that "There could be an adjustment of the quota to an appropriate level," (See "Korea signals it may abandon cultural policy in order to obtain US investment treaty", INVEST-SD News Bulletin, Nov.7, 2003), the Korea Times reported this week that the President has assured a group of actors, directors and producers that he will not alter the quota before further discussions take place with concerned groups.

Sources:

"Roh will keep film industry in loop", The Korea Times, Nov.22, 2003

"All US Soldiers should move to areas south of Seoul - US Ambassador to S Korea", BBC Monitoring International Reports, Nov.26, 2003 (This article contains comments on the US-SK bilateral investment treaty)

6. Author criticizes inclusion of investment in international trade negotiations

In a recent letter to the Financial Times newspaper, Author and journalist William Greider, argues that talks at the WTO and in the Americas could be "jump-started" if they were to jettison the controversial issue of investment.

The full letter by Greider, the National Affairs Correspondent for The Nation magazine, can be viewed at:

http://search.ft.com/search/article.html?id=031126001011&query=greider&vsc_applId=totalSearch&state=Form

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