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Contents at a glance:

Editor's Note:
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1. Re-branding this newsletter

When this news service began in 2001, it was designed as a list-serve – an electronic forum for sharing information related to international investment treaty disputes with implications for sustainable development. The name INVEST-SD – shorthand for investment and sustainable development - was adopted at that time.

Regularized mailings by the list-serve's moderator – INVEST-SD News Bulletins - redistributed reports which had been published elsewhere, and which were of interest to list-serve subscribers.

Eventually, these News Bulletins would become the focal point of the list-serve, and more and more resources began to be devoted to enhancing their news value, through original reporting and research.

Today, our bi-weekly newsletters reach almost 1500 subscribers and are redistributed to a wider audience through the World Wide Web. We pride ourselves on investigating and reporting on the universe of investment treaty arbitrations and negotiations, and covering developments in a neutral and informed manner. As our mandate has evolved from that of a discussion forum to a specialist reporting service, we've long considered adopting a new name.

After some internal deliberation, we've finally settled on one which strikes us as simple and straightforward: "Investment Treaty News".

2. Correction: Glamis Gold and mining permits

An article in the Oct. 4, 2005 edition of this newsletter ("Tribunal accepts bid by native tribe to intervene in Glamis arbitration") erred in suggesting that Canadian mining firm Glamis Gold Ltd. is in possession of a US federal mining permit. While Glamis does possess mining claims in the state of California, it does not possess federal or state mining permits.

Arbitration Watch:
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3. Romania prevails in BIT arbitration with US investors over privatized steelworks, By Luke Eric Peterson

An ICSID tribunal has ruled that Romania is not liable for alleged breaches of the US-Romania bilateral investment treaty, in an arbitration mounted against the Eastern European republic by US-based Noble Ventures.

The US firm invested in a privatized steel mill, Combinatul Siderurgic Resita (CSR), located in Resita, Romania. Following the conclusion of privatization agreements in August of 2000, Noble quickly fell out with Romanian privatization authorities.

The firm alleged that Romania failed to provide full protection and security, fair and equitable treatment, and treatment in accordance with international law, contrary to its treaty commitments. The US investors also accused Romania of expropriating their

investment without compensation, and of failing to live up to obligations undertaken towards the firm.

Among its specific charges, Noble accused authorities of misrepresentations during the privatization process; of failing to protect Noble officials from labour unrest; and of using bankruptcy laws to deprive Noble of its investment.

All of these allegations were contested by Romania.

In a ruling dated Oct.12, an ICSID tribunal consisting of Prof. Karl-Heinz Bockstiegel, Sir Jeremy Lever, and Prof. Pierre-Marie Dupuy would reject all allegations of treaty violation on the part of Romania. Before so doing, the tribunal addressed two preliminary legal questions.

The first related to a provision of the US-Romania BIT which notes that, “Each Party shall observe any obligation it may have entered into with regard to investments.”

Noble claimed that this provision was a so-called Umbrella Clause, which operated so as to bring contractual obligations under the treaty umbrella. Accordingly, a breach of an investment contract could be construed as a breach of the treaty, and, hence, of international law.

The tribunal agreed with the investor’s reading of the clause, noting that any other interpretation would deprive the particular treaty provision of its obvious meaning.

While acknowledging that such a reading was obviously to the benefit of foreign investors, the tribunal hastened to add that such an interpretation flowed from the “object and purpose” of the investment protection treaty – not from some default investor-friendly position. Indeed, the tribunal added, “While it is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified”.

The tribunal did not elaborate further on this remark. As such, it was unclear if this was a reference to particular rulings by other arbitration tribunals. However, it is a matter of record that certain tribunal rulings have taken the view that uncertainties in interpretation of treaty provisions should be resolved so as to give the benefit of the doubt to foreign investors, rather than states.

In a 2004 jurisdictional ruling in an ICSID arbitration between Swiss-based firm SGS and the Republic of the Philippines, the tribunal ruled that “It is legitimate to resolve uncertainties in (the investment treaty’s) interpretation so as to favour the protection of covered investments.”

Following its analysis of the so-called umbrella clause provision, the tribunal in the Noble Ventures arbitration turned to a second preliminary matter: whether the actions of

state privatization agencies could be attributed to the Romanian state, for purposes of assessing potential liability under the US-Romania BIT.

The tribunal then held that the acts by Romanian state institutions were indeed "attributable to the Respondent for purposes of assessment under the BIT."

Upon turning to examine the merits of those allegations, however, the tribunal would reject all alleged violations of the investment treaty by Romania. Indeed, at more than one juncture the tribunal noted that the entire investment was on a precarious financial footing as a result of the decision of the investors not to invest any of their own funds in the project.

The tribunal questioned whether the investors were capable of meeting promises made, including to the workforce of the CSR steel mill, and held that there was nothing arbitrary about a judicial restructuring of the company initiated at the behest of its creditors. Indeed, the tribunal suggested that the restructuring proceedings "were at that time the only short term solution of the 'social crisis' that had engulfed Resita as a result of the Claimant's inability to pay CSR's workforce".

A copy of the arbitral award has been released to the public and is available on-line at: http://ita.law.uvic.ca/documents/Noble.pdf and at http://www.investmentclaims.com/decisions/Noble-Ventures-Final-Award.pdf

4. Argentina moves to annul award in dispute with CMS Company over financial crisis,

The Argentine Government has moved to annul a recent ICSID ruling which held the Government liable for breach of its bilateral investment treaty (BIT) with the United States.

In May of this year, an ICSID tribunal issued its award in the arbitration mounted by US-based CMS Gas Transmission Company, a 29% shareholder in Argentine natural gas transporter TGN.

The tribunal found Argentina liable for violations of the Argentina-US BIT, as well as of its contractual commitments, as a result of measures taken by the Argentine Government in response to that country's financial crisis. The tribunal ordered the Government to pay CMS $133.2 Million (US) plus interest as compensation for the US firm's losses.

Argentina faces several dozen investment treaty arbitrations from aggrieved foreign investors who suffered losses, allegedly at the hands of the Argentine Government. Cumulatively, these cases see claims for some $17 Billion (US) in damages. To date, only the CMS arbitration has seen a final award handed down by a tribunal.

On Sept. 8, an application co-authored by Chicago-based law firm Mayer Brown and the Argentine Procurador del Tesoro de La Nacion, was filed with the ICSID facility. The

move by Argentina to annul the CMS award had been widely expected by observers. At a minimum, the annulment process may buy the country time before which it would have to pay out damages to CMS.

More important for Argentina, however, the process may afford some opportunity to have the award overturned. Under the ICSID system, an annulment application typically sees the creation of a so-called ad-hoc annulment committee. This committee is comprised of three members who are appointed by the ICSID's secretariat (the Centre's permanent legal staff).

In the annulment application, a copy of which has been seen by this newsletter, Argentina seeks annulment on two basic grounds: that the tribunal manifestly exceeded its powers and that it failed to state the reasons for its decision.

The 36 page filing paints a dystopic picture of the social effects of Argentina's financial crisis, as a prelude to an argument that the arbitral tribunal failed to give effect to a treaty provision which permitted the parties to take measures "necessary for the maintenance of public order … or the protection of its own essential security interests."

A central plank of Argentina's annulment argument is that the tribunal exceeded its powers by arrogating to itself the authority to decide what constituted "necessity". For its part, Argentina argues that such a determination lay with the government itself, and should have been subject only to a deferential review by the tribunal to assess whether the government had exercised its discretion in good faith.

The Argentine filing also takes issue with the tribunal's ruling that compensation must be paid to affected foreign investors, even where it has been established that government actions were necessary for the maintenance of public order. Argentina says that such a requirement would effectively preclude states from taking action in economic emergencies or situations of political and social crisis, because they could not afford to "compensate all asset holders harmed by such necessary measures."

This requirement, they argue, disregards the plain and mandatory language of the US-Argentina BIT, whose Article XI states that "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order".

In its application for annulment, Argentina sets forth various other grounds for annulment of the award, including that the tribunal read treaty obligations to provide "fair and equitable treatment" and to "observe any obligation it may have entered into with regard to investments" as imposing strict liability on the country. Such a reading, argues Argentina, flies in the face of the rules of treaty interpretation, which should require due consideration of context and circumstances – in Argentina's view, a "severe economic crisis".

"This is not a mere disagreement with the Tribunal's approach. It is beyond dispute, for instance, that the standards for appropriate behavior by an airline crew when the plane is

about to crash are necessarily different from those on a routine flight. A tribunal holding otherwise would manifestly exceed its authority."

After enumerating several other grounds for annulment, Argentina summarizes its case by warning that the CMS ruling places Argentina (and other states facing economic crises) in a Catch-22 situation, whereby they must choose between (i) not taking necessary action and risking heightened public disorder and the undermining of essential security interests, or (ii) taking necessary action and being forced into insolvency by claims for damages from every affected investor."

Noting that the damages claimed in the various arbitrations against the country approach the total of its annual national budget, the application warns that states should not face bankruptcy "for doing what was required to prevent a total economic, social and security collapse and to preserve an economy in which investment can thrive." They add that the tribunal's interpretation of the US-Argentina investment treaty cannot be squared with this "common-sense principle, which is incorporated in Treaty Article XI, and which the Tribunal had no authority to disregard."

In addition to its request for annulment of the award, Argentina has requested the committee to stay enforcement of the tribunal's award pending the result of the annulment proceeding.

The annulment proceeding, like those of ICSID arbitrations, are not open to the public, absent the consent of the two parties.

Sources:

Application for Annulment and Request for Stay of Enforcement of Arbitral Award, in the proceeding between CMS Gas Transmission Company and the Argentine Republic, ICSID Case No. ARB/01/8, September 8, 2005

5. Belize dodges water suit with UK firm, but arbitration still an option in Tanzania,
By Damon Vis-Dunbar

The government of Belize has repurchased a majority share in the country's water services company this month after an experiment in privatizing the utility landed the Central American country in international arbitration.

In a statement, the government said that the repurchasing agreement will "bring to an end the current dispute" with Cascal, a holding company created by the UK-based water service company, Biwater, and the Dutch energy group Nuon.

An informed source indicates that this reference to a "dispute" refers to an arbitration instigated by Cascal in 2004 under the terms of the UK-Belize Investment Promotion and Protection Agreement (IPPA).

By virtue of its recent purchase, Belize has bought back 82% of the issued share capital in the water company at a cost of $24.8 million US, the same price the shares were sold for in 2001. That 2001 deal soon turned sour when Belize Water Services - the investment vehicle – sought permission to raise tariffs to compensate for the poor financial health of the company.

BWS requested a 32% increase in tariffs for the 2004-2009 period, alleging during a public hearings in 2003, that the company suffered from "a massive debt burden, poor cash flow and large losses."

BWS's request was rejected by the Belize Public Utilities Commission (PUC), which countered with an offer of a 15% hike. An independent review later settled on a 17% rate increase in February of 2004, a figure which was acceptable to the PUC. (In rejecting BWS's demands, the author of the independent review report voiced concerns about the ability of low income customers to afford significant rate hikes.) Informed sources note that BWS was unwilling to accept the independent review's 17% tariff hike recommendation.

For its part, Cascal declined to comment on its reasons for divesting in BWS or in pursuing, and later abandoning, arbitration proceedings. A company spokesperson said the government press release on the sale should be read as a joint statement. "It was mutually agreed between the two parties that only the press release would be issued," explained the spokesperson.

The Government has thanked the company for agreeing to resell its shareholdings in Belize Water Services at the original price of US$24.8 million and for accepting payment by installments. The government has taken an international loan to facilitate its repurchase of the BWS shares.

While the repurchase agreement ends Belize's legal travails, it does not end those of UK firm Biwater, which partially control Cascal. Biwater is embroiled in a separate dispute with the government of Tanzania over an investment in water services in that Southern African nation.

In May of this year, Tanzania cancelled an agreement with Biwater to install new pipes to bring water to Dar es Salaam and the surrounding area, claiming the project was far behind schedule.

"The company has failed to produce the goods," Tanzania's water minister, Edward Lowassa, told the London Guardian in May. In June, Tanzania deported three Biwater executives, in what Biwater declared to be "disgraceful and unlawful actions" in a company statement.

Biwater says it is currently “evaluating” its legal options regarding its investment in Tanzania. Company’s spokesperson, Steve Marinker says that international arbitration - an option under a UK-Tanzania investment treaty - is being considered by the company.

Sources:

ITN Interviews

A full transcript of the “Public Hearing on a Full Tariff Review Proceeding involving the Belize Water Services Limited (BWS) and the Public Utilities Commission”, is available at:
http://www.puc.bz/publications/Magistrate%20Fairweather%20Report%20on%20Public%20Consultation%20Meeting.pdf

“Independent Expert Report Under the First Full Tariff Review Proceedings”, By Dr. Richard Bern, February 26, 2005
http://www.puc.bz/publications/bwsfinalsent260204.pdf#search='belize%20water%20services%20BWS

“Government and Cascal finalize BWS re-purchasing agreement”, Government of Belize Press Office, October 3, 2005

“Agreement reached for the repurchase of BWS”, Government of Belize Press Office, August 12, 2005

“City Water and the Government of Tanzania”, Biwater Press Release, June 1, 2005

“Aid to Africa: Flagship water privatization fails in Tanzania: UK firm’s contract cancelled amid row over supply”, By John Vidal, The London Guardian, May 25, 2005

Negotiation Watch:
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6. Euro Commission takes three states to Euro Court of Justice over BITs,
By Luke Eric Peterson

The executive arm of the European Union has announced that it will commence proceedings against Austria, Sweden and Finland at the European Court of Justice in relation to bilateral investment treaties concluded by those countries with non-EU countries.

The European Commission (EC) alleges that certain treaties, concluded by the three countries in the period before they joined the EU, may not be compatible with EU law.

In particular, the EC has singled out BIT provisions on the free transfer of investment-related funds, which fail to provide for limits on such transfers in case of economic emergency. Under EU law, by contrast, limits on the free movement of capital are provided where serious financial difficulties arise.

Earlier this year, the EC had served four member-states, Austria, Sweden, Finland and Denmark with so-called reasoned opinions, alleging incompatibilities between certain of their BITs and EU law. The Commission identified problems with a total of seventeen Swedish BITs, eight Finnish BITs, six Austrian BITs and one Danish BIT.

These member-states were given two months to respond to the Commission's legal opinion, after which legal action might be launched under Article 307 of the EU Treaty, which obliges member-states to eliminate incompatibilities between their treaty commitments and EU law.

On October 17th, the Commission announced that it would take such legal action against three of the four noted countries.

As earlier reported, the European Commission has also taken issue with a series of BITs concluded by a number of Eastern and Central European nations. The European Commission raised concerns about these BITs prior to those countries joining the EU in 2004. A series of re-negotiations were pursued between the EU candidates and their long-standing treaty partners (which included the United States, Canada and Japan). While certain of the concerns voiced by the European Commission were addressed in these renegotiations, the United States balked at proposed amendments to treaty provisions on the free transfer of funds.

At the time, US officials were understood to have objected to amendments on the grounds that certain other BITs - concluded by longer-standing EU members with various countries - might be considered, on the European Commission's view, to be in conflict with EU law.

The present legal action before the European Court of Justice might be interpreted as a response to that US position, insofar as it seeks to remove certain European-based obstacles to the resolution of the underlying US-EU disagreement.

7. UNESCO adopts cultural diversity treaty as legal and policy implications are debated, By Luke Eric Peterson

In a resounding vote, member-governments of the United Nations Educational, Scientific and Cultural Organization (UNESCO) have adopted a new international convention for the promotion and protection of cultural diversity.

This past Thursday, UNESCO's governing body voted 148 to 2 to adopt the Convention, which had been the subject of negotiations over a period of several years. Only Israel joined the United States in opposition to the new treaty, while four countries, Australia, Nicarauga, Honduras and Liberia, abstained from the vote.

As lead sponsors of the instrument, Canada and France had portrayed the agreement as a useful bulwark against the subordination of cultural policy to economic globalization. While Canada makes it a policy to exclude cultural industries from its trade and investment agreements, a sectoral advisory committee tasked with advising the Government on trade and culture issues in the late 1990s, had called for a more ambitious approach, including the drafting of a separate international treaty dedicated to cultural diversity and preservation.

The UNESCO Convention will enter into force upon the ratification of 30 UNESCO member-states. The agreement enshrines the sovereign right of states to implement and maintain policies geared towards diversity of cultural expressions.

The United States Government, for whom export of cultural goods and services, such as movies and music, are a multi-billion dollar industry, have criticized the instrument – raising fears that it will give rise to protectionism in favor of local cultural expressions or the "censorship" of foreign expressions.

The relationship of the Convention to existing and future trade and investment agreements – which may open film, media or other cultural industries to greater competition - has been a matter of some conjecture. Article 20 of the Convention dictates that parties to the Convention should take the document into account when interpreting and applying other treaties to which they might be parties. However, the same Article also stresses that "Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties."

This latter language has been criticized by some civil society groups which had hoped to make further inroads against trade and investment agreements which might foreclose the use of certain domestic policy measures (subsidies, domestic content rules, etc) in the cultural sphere.

For its part, the International Network for Cultural Diversity (INCD), a network of artists and cultural groups, has welcomed the adoption of the new Convention, but cautions in a press release that "the Convention is only one step in a long campaign to achieve cultural diversity, and to prevent trade and investment agreements from further eroding the right of States to support their own artists and cultural producers."

Sources:

INCD press release on adoption of new UNESCO Convention, available on-line at: http://www.incd.net/docs/INCD%20Press%20Release%20-%20Oct%2020.doc

8. Canadian Govt responds to demands for human rights monitoring of companies,
By Damon Vis-Dunbar

A report tabled this month by the Government of Canada promises to explore ways to strengthen corporate social responsibility for Canadian resource firms operating in developing countries. However, civil society groups have criticized the government for not pledging concrete action.

Among the promises in the Government report, which comes in response to recommendations issued last June by an all-party legislative committee on human rights and international development, are a series of roundtables with stakeholders to further examine issues of corporate social responsibility.

In terms of clearer legal norms to hold firms accountable when there is evidence of environmental or human rights violations, the Government has not endorsed new such commitments - noting that respect for state autonomy limits its options when dealing with business activities in foreign territories.

One Canadian company in particular, TVI Pacific Inc., was singled out by last year's legislative committee report for alleged human rights and environmental violations in its mining operations in the Philippines. The committee recommended that the Government conduct an investigation into the firm's conduct in the Philippines, and cease all government support pending the outcome of that investigation.

Notably, the Canadian Government rejected both recommendations, indicating that it would accept complaints against TVI Pacific Inc. through normal channels, but would not initiate any special action.

"The case of Canadian company TVI Pacific Inc.'s operations in the Philippines is illustrative of the difficulties Canadian companies can face when operating in foreign jurisdictions," said the Government, noting that the company operated in an area of contested Aboriginal land claims "where anti-government groups are armed and active."

The Government's report has been criticized by Canadian human rights and environmental organizations, who were hoping that Canada would commit itself to new legislation, holding companies more accountable for their actions abroad.

"The Canadian government has missed an opportunity to establish itself as a global leader," said Karyn Keenan of Friends of the Earth Canada, in a prepared statement. "It took the easy way out, with more talk and no action."

Sources:

"Mining in Developing Countries – Corporate Social Responsibility", Department of Foreign Affairs and International Trade, October 18, 2005

Fourteenth Report, Standing Committee on Foreign Affairs and International Trade, June 23, 2005, available on-line at: http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=122765

"Canadian Parliamentary Committee wants human rights norms for resource firms" By Luke Eric Peterson, INVEST-SD, June 30, 2005

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