INVEST-SD: Investment Law and Policy News Bulletin, October 4, 2005

Published by the International Institute for Sustainable Development
(http://www.iisd.org/investment/invest-sd/)

Contents at a glance:

Editor's Note:
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1. A correction on Prof. James Crawford's role in the Eureko v. Poland arbitration

An article in the Sept. 15, 2005 edition of this newsletter distributed to email subscribers ("Divided tribunal finds Polish privatization 'reversal' violates treaty with Netherlands") indicated that Prof. James Crawford acts as counsel for the Dutch insurance firm Eureko, in its ongoing arbitration with Poland.

In fact, Prof. Crawford is outside counsel to Poland in that case. We apologize for any confusion resulting from this editorial error. A correction has been made to the version of the Sept.15 edition posted to our on-line archive.

Arbitration Watch:
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2. Tribunal accepts bid by native tribe to intervene in Glamis mining arbitration,
By Luke Eric Peterson

In a ruling issued last month an investment tribunal operating under the UNCITRAL rules of arbitration has accepted a bid by a US native group to intervene in an ongoing dispute between the US Government and Canadian mining firm Glamis Gold Ltd.

Glamis mounted its arbitration in 2003, alleging that California mining regulations are in breach of foreign investment protections contained in the North American Free Trade Agreement. The firm, which holds a Federal mining permit, opposes state-level requirements for back-filling and re-grading those mining pits which are in close proximity to Native American sacred sites.

Earlier this year, the Quechan Indian Nation, a 3000 member tribe, indigenous to Southeast California and Southwest Arizona, requested the right to intervene in the arbitration.

In an application filed in August, the tribe set forth its history and background, as well as its interest in the dispute. Glamis's proposed mine would have fell on a portion of the tribe's "ancestral lands", according to the tribe's submission, and the group is eager to ensure that the arbitration takes heed of the sacred nature of this territory.

Indeed, the Quechan supplemented their application with a so-called "non-party submission" (i.e. a legal brief submitted by a non-party to the arbitration). That submission sets out the tribe's perspective on various factual and legal matters.

The submission devotes considerable attention to national and international law related to indigenous sacred sites, and argues that the tribunal should interpret provisions of the NAFTA in light of these other legal obligations.

In deciding whether to accept the Quechan's bid to intervene in the Glamis arbitration (and its proffered legal submission) the tribunal solicited the views of the two parties to

the dispute. For its part, the US Government signaled its support for the Quechan's bid to intervene; while Glamis deferred to the tribunal's judgment as to whether the Quechan intervention would be helpful to the tribunal's deliberations in the NAFTA matter.

In a ruling issued on Sept.16th, the tribunal signaled that it would accept the Quechan submission – while noting that it was under no duty to agree or disagree with the substance of the tribe's submission.

The Glamis arbitration remains at an early stage, with a tribunal having been constituted only this year. The Canadian firm is scheduled to submit its legal Memorial (a comprehensive brief setting out its view of the relevant factual and legal issues) on November 2nd of this year.

In a notable development, the tribunal earlier announced that all hearings in the Glamis dispute will be open to the public, via closed-circuit television broadcast at the Washington-based International Centre for Settlement of Investment Disputes (ICSID)

The members of the 3-person tribunal are: Michael K. Young, David D. Caron and Donald L. Morgan.

3. NAFTA Panel merges three arbitrations between US Govt and Canadian lumber firms, By Luke Eric Peterson

A special tribunal has assumed jurisdiction over three ongoing NAFTA arbitrations brought by Canadian forestry products companies against the US Government. The decision of the so-called Consolidation Tribunal means that the separate arbitrations will be closed in the cases brought by Canfor Corporation, Tembec et. al., and Terminal Forest Products Ltd.

The three claims will be consolidated under the jurisdiction of the Consolidation Tribunal, composed of McGill University Law Professor Armand de Mestral, former US Department of State Legal Advisor Davis R. Robinson, and Professor Albert Jan van den Berg of Erasmus University in Rotterdam.

The Consolidation Order comes following a request by the US Government in March of this year for the consolidation of the three investor-state arbitrations.

In its Order issued on September 7, 2005, the tribunal found that there were many questions of fact and law in common between the three separate arbitrations, and that, pursuant to Article 1126 of NAFTA, it was "in the interests of the fair and efficient resolution of those claims" to bring them all under the purview of a single tribunal.

The tribunal gave weight to three considerations in reaching this decision. First, it noted that none of the three separate arbitrations had yet to give rise to a decision on jurisdiction, much less on liability or damages. As such, the tribunal held that there would

be no undue delay for the various claimants if the three proceedings were to be brought under the same umbrella.

Second, the tribunal held that it would be less expensive for the United States to face one consolidated arbitration, rather than three separate proceedings. At the same time, the tribunal held that such consolidation would not impose excessive new costs for the claimants; noting, in particular, that earlier legal arguments and pleadings might be recycled for use again in the consolidated hearings.

Third, the tribunal acknowledged that there was a risk of inconsistency if the three arbitral tribunals were left to hand down separate rulings in the three parallel cases. In this respect, the tribunal gave credence to concerns pleaded by US Government lawyers. In legal arguments submitted to the tribunal, the US Government warned that "inconsistent decisions would undermine the legitimacy of the NAFTA dispute settlement mechanism by creating confusion as to the interpretation of various provisions of the NAFTA."

For its part, the Consolidation tribunal acknowledged the spectre cast by two conflicting rulings in a pair of high-profile investment treaty arbitrations against the Czech Republic. In the cases of Ronald Lauder v. Czech Republic and CME v. Czech Republic, two tribunals operating in parallel reached widely divergent findings as to the Czech Republic's liability for breach of investment treaty obligations. The two cases have become a testament to the perils of permitting similar international arbitration claims to run along parallel avenues.

In its Order of Sept.7th, the NAFTA Consolidation Tribunal observed that the "conflicting outcomes" in the two Czech cases were all the more "regrettable", given that "for all practical purposes, the parties and the claims were the same". Partly in an effort to avert any possibility of conflicting rulings being handed down in the various softwood lumber cases under the NAFTA, the Consolidation Tribunal elected to merge the three claims.

The Consolidation Order is notable in that it is only the second such ruling to be handed down by a Consolidation Tribunal under NAFTA, and is the first to order consolidation of parallel NAFTA investor-state arbitrations.

In an earlier Order handed down in another case on May 30 of this year, a different three-person Consolidation Tribunal rejected a request by Mexico to merge two arbitral claims brought by three US-based agricultural firms under NAFTA. That Consolidation Tribunal gave considerable weight to concerns expressed by the claimants – Archer Daniels Midland, Tate & Lyle Ingredients America Ltd., and Corn Products International – that a single consolidated proceeding would be procedurally inefficient given the competitive position of the claimants in the sweetener industry, and the attendant need to shield commercially sensitive information from one another.

In reaching a different finding in the softwood lumber cases, the Consolidation Tribunal in that case, went to some effort to distinguish its findings from those of the

Consolidation Tribunal in the Mexican sweetener cases. Indeed, the softwood lumber Consolidation tribunal professed disagreement with the finding of the tribunal in the Mexican cases, with respect to the supposed level of inefficiency occasioned by consolidating a group of claims brought by commercial competitors.

The Consolidation Tribunal in the lumber cases was of the view that certain confidentiality safeguards could be built into the process, without rendering that process especially inefficient.

Following the Sept.7th Order of the Consolidation Tribunal, the separate arbitrations in the Canfor, Tembec and Terminal are terminated and the claims are to be heard by the Consolidation Tribunal.

4. Turkish telecoms firms turn to BIT in dispute with Kazakhstan,
By Luke Eric Peterson

Two Turkish telecoms firms, Rumeli Telekom and Telsim, have turned to investment treaty arbitration in an effort to recoup losses allegedly sustained at the hands of the Kazakh Government.

A lawyer for the two firms, Hamid Gharavi, of the Paris-based law firm Salans says that his clients invested in what became Kazakhstan's first, and ultimately largest, mobile telecommunications company, Kar-tel.

The Turkish firms allege that they've suffered expropriation of their shares in the enterprise, and are seeking some $500 Million in compensation under the Turkish-Kazakh bilateral investment treaty.

An arbitration request was recently registered by the International Centre for Settlement of Investment Disputes (ICSID) in Washington.

This marks the fourth known investment treaty arbitration against Kazakhstan, although others may well have been brought without public disclosure.

In 2003, an ICSID tribunal awarded an undisclosed amount of compensation to US-based insurance company AIG, after finding that the Government had violated the terms of the US-Kazakh bilateral investment treaty.

As earlier reported in this news publication, Kazakhstan lost an earlier arbitration under the US-Kazakh bilateral investment treaty in 1999. That case had been brought by California-based Biedermann International in relation to a 25 year joint venture agreement to explore the Kenbai oilfields in Kazakhstan.

Another investment treaty arbitration between US-based oil company CCL Oil was reportedly launched against Kazakhstan under the US-Kazakh bilateral investment treaty

in 2001. However, the disposition of the CCL case has not become a matter of public record.

5. Challenge to arbitrator still pending in Argentina dispute with UK investor,
By Luke Eric Peterson

According to Argentine government lawyers, a challenge to the President of the tribunal in an international arbitration between UK-based National Grid and The Argentine Republic remains pending.

As earlier reported, Argentina filed challenges in three ongoing investment treaty arbitrations in an effort to have Prof. Andres Rigo Sureda removed as President of the arbitral tribunals presiding in those cases. The cases involve German, US and UK investors respectively: Siemens, Azurix and National Grid. Each of these arbitrations arises out of alleged violations by Argentina of investment protection treaties concluded with the home countries of these investors.

The Siemens and Azurix cases are being arbitrated at the International Centre for Settlement of Investment Disputes (ICSID), while the National Grid case is being arbitrated in an ad-hoc manner using the UNCITRAL rules of arbitration.

Given the complexities of the challenge to Dr. Rigo Sureda, readers are advised to refer to two earlier reports by this news publication which set out the particulars of that challenge in full. These are available at:

http://www.iisd.org/pdf/2005/investment_investsd_mar24_2005.pdf

http://www.iisd.org/pdf/2005/investment_investsd_april27_2005.pdf

The nub of Argentina's objection to Dr. Rigo Sureda had been that he was associated with a law firm, Fulbright & Jaworski, which was acting in another investment treaty arbitration between US-based Duke Energy and Peru. An arbitrator in that latter dispute, Mr. Guido Tawil, also acts as counsel for Siemens and Azurix in their arbitrations with Argentina – arbitrations over which Dr. Rigo Sureda presides as a tribunal member.

The concern expressed publicly by Argentina – and in its challenge filings - had been that Dr. Rigo Sureda might lack "independent judgment" to arbitrate over a matter brought by Mr. Tawil - at the same time that Mr. Tawil was sitting in a decision-making capacity (as arbitrator) in a matter which Dr. Rigo Sureda's colleagues at Fulbright & Jaworski were arguing.

Both Dr. Tawil and Prof. Rigo Sureda – although bound by varying requirements of confidentiality – are understood to have objected to Argentina's challenge.

Subsequent to the filing of those challenges, Dr. Rigo Sureda, in February of this year, resigned his position with the Fulbright & Jaworski law firm. He retained his position as President of the three arbitration tribunals in question.

In the period since, Argentina's challenge to Dr. Rigo Sureda has since been rejected in the two ICSID cases.

In the Azurix case, the two remaining tribunal members rejected Argentina's challenge, while in the Siemens case, the remaining tribunal members split, and the decision was handed to the Chairman of ICSID's Administrative Council. In a subsequent ruling of the Council, the challenge in the Siemens case was ultimately rejected.

However, the challenge in the National Grid case remains outstanding. Argentine officials indicate that the two remaining tribunal members, Messers Eli Whitney Debevoise and Alejandro Garro, referred the challenge to the so-called appointing authority for the arbitration: the Dutch-based Permanent Court of Arbitration. (An appointing authority is the body designated by agreement of the parties to appoint arbitrators in the event that the parties fail to do so, as well as to handle challenges to arbitrators lodged by one of the parties). In turn, the Permanent Court of Arbitration has asked the Paris-based ICC International Court of Arbitration to resolve Argentina's challenge request.

For its part, Argentina has requested that the ICC Court hold a hearing on the matter, rather than simply issue a ruling. Argentine Government lawyers also express a fear that the ICC Court will hand down a decision on the challenge – either rejecting it or accepting it - without a full articulation of the legal reasons for the ruling.

According to these same Argentine officials, the two remaining arbitrators in the National Grid case have requested the ICC to rule on the challenge by October 31st – something which Argentina says it supports. A jurisdictional hearing in the National Grid case had been slated for November 7th, and would likely proceed as scheduled were the ICC to reject the challenge to Prof. Rigo Sureda.

Negotiation Watch:
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6. UNCTAD World Investment Report offers new info on investment treaties,
By Damon Vis-Dunbar

The number of new bilateral investment treaties (BITs) penned in 2004 slowed slightly compared to the previous few years, but these agreements continue to expand in scope and sophistication, according to the United Nations Conference on Trade and Development's (UNCTAD) 2005 World Investment Report.

Some 73 BITs were concluded last year, a slim majority of which were signed between developing countries, although the largest share of bilateral investment agreements remains between developing and developed countries.

Notably, 10 of the BITs signed in 2004 were renegotiated treaties that supersede existing investment agreements.

Lessons learned from implementing the North American Free Trade Agreement (NAFTA) are clearly molding the new generation of investment treaties, according to UNCTAD. Among the revisions evident in recent BITs - such as the U.S. and Canada's model investment treaties - are clarifications of the provisions dealing with minimum standards of protection and the concept of indirect expropriation. By making clear that both obligations should reflect the level of protection granted under customary international law, these newer BITs strive for more conservative interpretations by tribunals.

The report also remarks on the increasingly complex nature of international investment rules, due in large part to the fact that investment agreements are often bundled with trade agreements containing wide-ranging commitments in territory such as services, capital flows and movement of labour. Agreements covering both trade and investment numbered 212 as of April of this year, and 87 per cent of these were concluded since the 1990s.

While these trade and investment agreements originated as intraregional processes between countries at similar levels of development, the report notes that these agreements are now common between developing and developed countries, and between developing countries.

UNCTAD predicts international investment rule-making will only intensify in the coming years, given the large number of trade and investment agreements currently under negotiation.

Many investment treaties allow for investor-state arbitration, and these disputes continue to proliferate. However, knowledge is murky, both in terms of the number of claims and the resulting settlements, since most treaties do not mandate that these cases be made public.

Sources:

UNCTAD World Investment Report 2005
http://www.unctad.org/en/docs/wir2005_en.pdf

7. Pakistan moving toward investment treaty with United States,
By Damon Vis-Dunbar

Pakistan is moving closer to signing a bilateral investment treaty (BIT) with the U.S. after some hesitation, according to sources close to the negotiations.

Talks on a BIT officially kicked off in August, 2004, but slowed following warnings from members of the Pakistani government and interested observers who questioned the wisdom of signing a BIT with the U.S. However, a source familiar with the negotiations now says that "the mood has changed. A firm negotiating position put forward by the U.S. has given rise to a belief that "concluding the BIT is inevitable."

According to this source, there is a certain sense of resignation to the fact that the basic provisions of the U.S. model investment agreement are non-negotiable.

The inclusion of intellectual property (IP) under the definition of investment in the U.S.'s model investment agreement was widely aired in the Pakistan media as posing a particular concern to the government. Piracy is rampant in the country, leading some to predict that the U.S. BIT would open the door to investor-to-state arbitration if U.S. investors believe their IP rights have been breached.

Pakistan has long been a member of the U.S.'s Special 301 Watch List, a report prepared by U.S. trade officials to expose intellectual property right infractions in foreign countries. The 2005 report states that "Pakistan remains one of the world's leading overproducers and exporters of pirated optical discs," and says ten known facilities produced some 230 million discs in 2004, creating a loss of $143 Million (US) to U.S. copyright industries.

Despite the fact that protection of intellectual property is a common staple in modern investment treaties, investor-to-state arbitration resulting from a breach of IPR is virtually unknown. Nonetheless, some commentators have warned that IPR protections in investment treaties could prove costly if host countries are unable to police the illicit production of copyrighted materials in an effective manner.
(See "NGOs warn on spread of IPRs in investment pacts but disputes slow to arise", Investment Law and Policy News Bulletin, at:
http://www.iisd.org/pdf/2005/investment_investsd_june10_2005.pdf)

Also colouring the Pakistani view of the ongoing BIT negotiations are a number of well-publicized foreign investment disputes that have taken place in Pakistan, particularly in the energy sector.

The most notorious of these, Hubco v. WAPDA, was a drawn out and messy affair that arose from a large private sector investment in thermal power plants in 1985. Under the terms of the agreement, the Pakistani Water and Power Development Authority (WAPDA) agreed to a 30-year power purchase agreement with so called "take or pay" arrangements. When WAPDA found its payments to be unsustainably high, the Nawaz Sharif Government attempted to renege on the agreement - a move which led investors to seek a settlement in international arbitration. A compromise was eventually reached in 2000, following General Pervez Musharraf's military coup.

Since then, Pakistan has faced a number of other disputes with Independent Power Producers (IPPs), which the government has tried to keep within its domestic courts. The country has also faced a handful of major investment treaty arbitrations in recent years.

The Board of Investment, the government agency responsible for promoting investment in Pakistan, has taken a lead role in the negotiations with the U.S. The Board hopes a BIT will help restore investor confidence in the country in light of what is perceived as a tainted past.

However, the greatest incentive to signing an investment treaty with the United States may be the belief that such a treaty is a stepping stone towards a broader Free Trade Agreement (FTA). One Pakistani government official who spoke on condition of anonymity called the BIT "ceremonial" and said the prospect of a FTA was the more coveted end for Pakistan.

Meanwhile, Muhammad Jehangir Bashar, Secretary of the Pakistani Board of Investment, told this news bulletin that the parties are making good progress in the negotiations following their third meeting with the U.S. in mid-September, and a fourth meeting would likely take place in December. However, he would provide no further information on the state of the negotiations, citing an agreement between the two governments to keep the negotiations confidential.

Events:
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8. Dutch seminar to honor IISD Senior Fellow Konrad Von Moltke

A Seminar on "Sustainable Investment and Global Environmental Governance" is to be held on January 23, 2006 in honour of the late Konrad von Moltke, Senior Fellow of the International Institute for Sustainable Development (publishers of this news publication). The Seminar will take place in Amsterdam and is sponsored by the Royal Netherlands Academy of Arts and Science (KNAW), the Institute for Environmental Studies at the Vrije Universiteit Amsterdam and the UNESCO-IHE Institute for Water Education in Delft.

Keynote addresses will be presented by Dr. M. Sornarajah of the National University of Singapore and Dr. Howard Mann of the International Institute for Sustainable Development (IISD). The seminar will address the issue of how multilateral agreements can be designed to foster sustainable development while also promoting and providing protection for foreign investment.

The organizers are soliciting submission of abstracts (no longer than 300 words) complete with a short biography and contact information, from scholars, policy makers

and jurists interested in presenting papers at the Seminar. Submissions should be made to Kyla Tienhaara (kyla.tienhaara@ivm.falw.vu.nl) no later than October 31, 2005. Decisions regarding the acceptance of abstracts will be made by November 15th. If selected, full papers will be required by January 1, 2006.

Those not wishing to present a paper, but who are interested in attending the seminar may contact Kyla Tienhaara at the above-mentioned email address prior to December 1, 2005. There is no registration fee.

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