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Contents at a Glance:

Editor's Note

1. ITN Year in Review for 2006 finds non-ICSID treaty arbitrations eclipse ICSID cases

Arbitration Watch

2. US investors prevail in High Fructose Corn Syrup dispute with Mexico

3. ICSID rejects US challenge to arbitrator in Grand River NAFTA case

4. UK court declines to overturn jurisdiction in Czech TV broadcasting arbitration

5. Fraport to annul ICSID award which held its investments in Philippines to be illegal

6. U.S. oil companies challenge Canada's demands for R&D spending under NAFTA

7. Tribunal orders Ecuador to cease legal action against foreign oil company

Briefly Noted

8. Lecture on "state corruption in international arbitration" at Cambridge University

Editor's Note:

1. ITN Year in Review for 2006 finds non-ICSID treaty arbitrations eclipse ICSID cases

A recently-published review of notable developments in the field of investment treaty arbitration in 2006 finds that the number of arbitrations taking place under commercial arbitration rules (UNCITRAL, International Chamber of Commerce, Stockholm Chamber of Commerce) appears to have eclipsed the volume of such cases taking place at well-known International Centre for Settlement of Investment Disputes (ICSID).

As part of the Investment Treaty News: Year In Review 2006, ITN undertook interviews with a wide range of practitioners and arbitral institutions in an effort to identify new investment treaty arbitrations initiated in 2006. The process proved to be far more time-consuming than was originally anticipated, however the fruits of this inquiry suggest that at least 21 new investment treaty arbitrations were initiated outside of ICSID in 2006, as compared with 15 such cases having been registered by ICSID in that same period.

A journalistic survey of this kind is unlikely to unearth all investment treaty cases initiated, particularly given the reluctance of some interviewees to disclose statistical information about cases in which they are involved, and the finite number of such interviews undertaken. As such, the actual number of non-ICSID cases is quite possibly higher than the number documented by our review; at the same time, it should be stressed that the number of ICSID cases for 2006 is fixed, as all such cases are disclosed as a matter of course on ICSID's website. In other words, the actual proportion of non-ICSID cases to ICSID cases is likely greater than could be documented by this exercise.

In addition to offering some sense of the volume of investment treaty arbitrations initiated in 2006, the Investment Treaty News: Year In Review 2006 also offers an overview of notable developments in the field, including key rulings, and certain issues and themes arising in treaty disputes between foreign investors and their host governments. Funding permitting, IISD hopes to undertake a similar exercise for the 2007 year.

To download a copy of the publication visit this address:
http://www.iisd.org/pdf/2007/itn_year_review_2006.pdf

Arbitration Watch:

2. US investors prevail in High Fructose Corn Syrup dispute with Mexico, By Luke Eric Peterson

A pair of US agriculture firms, Archer Daniels Midland and Tate & Lyle Ingredients America Inc. have prevailed in a NAFTA Chapter 11 arbitration with Mexico. The presiding tribunal held that a Mexican tax imposed on High Fructose Corn Syrup (a sweetener used in a wide array of foods, including soft drinks) violated two separate NAFTA Chapter 11 protections owed to the US claimants.

The claimants had argued that the tax was designed to benefit the Mexican sugar industry, which competes with High Fructose Corn Syrup producers. For its part, Mexico had insisted that Mexican sugar producers faced unlawful obstacles to sugar exports to the US market.

An award was issued by the tribunal in the NAFTA arbitration on November 21, 2007, along with a separate concurring opinion by one arbitrator. The award has yet to be released to the public, however it is understood that it will be released in the coming weeks.

The outcome of the proceeding will be of particular interest, as there is another NAFTA Chapter 11 arbitration still pending against Mexico in relation to the same measures. In 2003, US-based Corn Products International mounted its own suit against Mexico.

Indeed, the Mexican Government had sought to consolidate the two parallel arbitrations under the purview of a single tribunal. However, in a 2005 ruling, a so-called NAFTA consolidation tribunal rejected that bid. While that body credited Mexico's concerns that separate arbitration proceedings, before different groups of arbitrators, could lead to divergent or even conflicting outcomes, the consolidation tribunal ultimately concluded that it would be too onerous and inefficient for the various claimants to participate in a single proceeding. In particular, it was noted that Corn Products International was in serious competition with ADM and Tate & Lyle, which would have necessitated extensive procedural inefficiencies so as to safeguard each claimants' confidential business information.

Sources:

"NAFTA consolidation tribunal rejects Mexico's request to merge sweetener disputes", By Luke Eric Peterson, INVEST-SD News Bulletin, June 30, 2005, available on-line at: http://www.iisd.org/pdf/2005/investment_investsd_june30_2005.pdf

3. ICSID rejects US challenge to arbitrator in Grand River NAFTA case,
By Damon Vis-Dunbar and Luke Eric Peterson

In a ruling dated November 28, 2007, the International Centre for Settlement of Investment Disputes (ICSID) has indicated that it will not sustain a challenge filed by the US Government against an arbitrator in an ongoing arbitration under NAFTA Chapter 11.

As earlier reported in ITN, the US had objected to various instances where Prof. James Anaya's represented or assisted parties in human rights matters deemed, by US State Department lawyers, to be "adversarial" to the US Government.

Prof. Anaya, a Professor of Law at the University of Arizona College of Law, was appointed in 2005 by the Canadian claimants Grand River Enterprises to serve as an arbitrator in a NAFTA Chapter 11 arbitration filed against the United States.

However, upon learning of his involvement in various human rights matters, including proceedings before UN and regional human rights bodies, the US Government filed a

challenge to Prof. Anaya, alleging that these facts raised justifiable doubts as to his independence or impartiality to preside as a tribunal member in the NAFTA case.

The ICSID Secretariat refrained from ruling on the challenge until Prof. Anaya clarified whether he would continue his involvement in the UN proceedings.

Prof. Anaya subsequently informed ICSID that, while he views his human rights work as unrelated to the subject matter of the NAFTA arbitration, he was withdrawing from his involvement in an ongoing matter before the Inter-American human rights institutions, albeit for reasons unrelated to the GRE arbitration. However, Prof. Anaya said he would continue to counsel students at the University Of Arizona College Of Law, where he teaches, on matters related to indigenous peoples. As part of this legal clinic work, Prof. Anaya noted that he supervised students in preparing legal materials and arguments to be presented to the UN's Commission on Elimination of Racial Discrimination (CERD).

The US Government viewed these developments as insufficient, and reiterated its request for ICSID to rule on its challenge to Prof. Anaya.

Ultimately, the ICSID would draw a distinction between Prof. Anaya's earlier human rights work and his current role of advising students: "the former requires advocacy of a position; the latter involves instruction and mentoring," writes Ana Palacio, the ICSID Secretary-General, in a letter to Prof. Anaya dated November 28, 2007.

"Therefore, the continued provision or orientation to students, as described in your letter of October 25, 2007 does not, in my view, amount to representing or assisting parties in procedures before the CERD such as to give rise to justifiable doubts as to the impartiality or independence for purposes of Article 10(1) of the UNCITRAL Rules," writes Ms Palacio.

For the time being, the US cannot challenge the ICSID's ruling on the matter; such a challenge would need to come at the end of the arbitration.

A U.S. Government source, speaking to ITN, expressed disappointment with the ICSID holding: "Allowing an arbitrator who is concurrently acting in other matters adverse to one of the parties to the arbitration to continue sitting as an arbitrator is improper and contrary to established practice regarding challenges to arbitrators." This source also expressed disagreement with the decision by ICSID to permit the challenged individual to "cure" the alleged conflict by discontinuing certain outside activities, rather than ceasing to serve as arbitrator.

For details on the GRE v. USA arbitration, see ITN's earlier coverage.*

A copy of the ICSID Nov.28, 2007 letter is available here:

http://www.naftaclaims.com/Disputes/USA/GrandRiver/GRE-USA-Anaya_Challenge-28-11-07.pdf

Sources:

*Despite time-bar ruling in NAFTA arbitration, Grand River claim will proceed in part,”
By Fiona Marshall, Investment Treaty News, August 10, 2006.

4. UK court declines to overturn jurisdiction in Czech TV broadcasting arbitration,
By Luke Eric Peterson

The UK High Court of Justice has upheld a jurisdictional decision rendered by an arbitral tribunal in an ongoing investment treaty arbitration between Luxembourg-based European Media Ventures and the Czech Republic.

The Czech Government had turned to the courts following a May 2007 jurisdictional ruling which held that an international tribunal had jurisdiction to examine whether the Czech Republic had expropriated EMV's investments in a Czech television company, TV3.

That jurisdictional decision has never entered the public domain. Indeed, anecdotal evidence suggests that the Czech Republic is taking a much less open posture with respect to the various investment treaty disputes that country faces. Whereas arbitral rulings in earlier cases were made available - including on Czech Government websites – ITN understands that several jurisdictional decisions or awards have been rendered in Czech arbitrations without any corresponding publication of those rulings.

As such, the move by the Czech Republic to the UK courts served to shed somewhat more light on an arbitration proceeding in the EMV case which has been taking place with scant publicity.

At the heart of the Czech Government's appeal to the UK courts was a view that the arbitral tribunal presiding in the EMV case lacked jurisdiction over disputes related to liability for expropriation.

The Czech side insisted that the terms of Article 8 of the Luxembourg-Czech Republic BIT - which permit investor-state arbitration in case of disputes “concerning compensation due by virtue of Article 3 Paragraphs (1) and (3)” – provided for arbitration only in case of dispute over the amount of compensation owing in the event of expropriation. Thus, on this view, a tribunal lacked jurisdiction to examine whether the Czech Republic was liable for breach of Article 3 of the BIT, the expropriation clause.

However, the arbitral tribunal chaired by Lord Mustill, and also comprised of Prof. Christopher Greenwood QC and Julian Lew QC, had held that it had jurisdiction to go further, and to examine whether the Czech Republic had breached the BIT's expropriation clause.

As such, the Czech Republic hoped to convince the UK High Court of Justice to set aside this decision on the grounds that the tribunal, in fact, lacked substantive jurisdiction over claims for breach of Article 3 of the BIT.

Ultimately, however, the UK Court would uphold the tribunal's decision. The Court noted that many BITs concluded by socialist countries prior to the collapse of the USSR had included restrictive investor-state arbitration clauses, however, it was further noted that these clauses varied in wording.

In particular, EMV presented evidence to show that some BITs used expressly delimiting language so as to make clear that investor-state arbitration was limited to disputes over "the amount" or "method" of compensation due in cases of expropriation. By contrast, EMV emphasized, the Luxembourg-Czech BIT did not use such restrictive language; rather, that treaty, referred to disputes "concerning compensation due by virtue of Article 3 Paragraphs (1) and (3)".

After reviewing a voluminous file of evidence, including several 1990s academic works which took a narrower view of Article 8 of the BIT in question, the UK Court would hold that Article 8 encompassed not merely disputes over the amount of compensation, but also whether an investor is entitled to compensation at all (i.e. for breach of Article 3 of the BIT).

At press time, it was unknown whether the Czech Republic will move to appeal the UK High Court of Justice ruling.

A copy of the ruling is available at:

<http://www.bailii.org/ew/cases/EWHC/Comm/2007/2851.html>

5. Fraport to annul ICSID award which held its investments in Philippines to be illegal,
By Luke Eric Peterson

A German airport operator has moved to annul an unfavourable ICSID award rendered in a dispute over the construction and operation of an airport terminal in the Philippines.

In that award, a divided ICSID tribunal had ruled that it lacked jurisdiction over Fraport's claim because the company was held to have violated Philippines law by virtue of a "secret scheme" to exert managerial control over a Philippines corporation, PIATCO.

By dint of this illegality, the majority held that Fraport's investments did not enjoy protection under the Germany-Philippines bilateral investment treaty.

For a full account of the August 16, 2007 ICSID ruling, see ITN's earlier reporting (http://www.iisd.org/pdf/2007/itn_aug30_2007.pdf)

After digesting the tribunal's award, as well as a dissenting opinion which had sided with the investor on the jurisdictional question, Fraport issued a press release which signaled that the company's Executive Board would debate whether to seek annulment of the arbitral ruling.

In that press release, Fraport took issue with the majority's finding that the company had violated Philippines law.

"After carefully evaluating the more than 200-page long decision," Fraport noted that it, "currently believes that essential documents presented at the proceedings, as well as argumentations and other aspects submitted by Fraport, were not or insufficiently taken into consideration by the court."

The company noted that if the jurisdictional ruling could be annulled, Fraport would enjoy the ability to proceed anew with its \$400 Million dollar claim related to the expropriation of Terminal 3 of the Manila airport terminal.

Recently, Fraport's Executive Board voted to pursue annulment of the ICSID ruling. In a press release dated December 7, 2007, the company announced that it had filed its application with ICSID. That request is now being considered by the ICSID Secretariat.

6. U.S. oil companies challenge Canada's demands for R&D spending under NAFTA, By Damon Vis-Dunbar

Two US oil companies have requested arbitration under NAFTA's investment chapter, alleging that provincial government demands for research and development spending are in breach of Canada's obligations to refrain from the imposition of so-called performance requirements.

Mobil Investments and Murphy Oil Corporation, which operate projects in two of Canada's largest oil fields, object to guidelines adopted by the province of Newfoundland in 2004, requiring that operators spend a fixed percentage of revenue on research and development within the province.

Although billed as "guidelines", the claimants say that the board charged with regulating off-shore oil projects has made clear that these are, in fact, requirements.

According to the claimants, such demands amount to "performance requirements", defined under NAFTA as an obligation "to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory."

While NAFTA permits certain performance requirements already in existence prior to 1994, the claimants hold that such grandfathered requirements cannot be amended so as to be made more restrictive.

“These mandatory levels of expenditure stand in contrast to the measures in existence in 1994, which allowed expenditures on research and development based on commercial need, resources available in the Province and what appeared reasonable under the circumstances,” says counsel for the claimants in the arbitration request.

If the guidelines are not rescinded, the investors say damages will amount to over \$60 million.

Sources:

The request for arbitration in Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada is available from the website of Ministry of Foreign Affairs and International Trade Canada:

“US Oil Companies signal intention to sue Canada over local content requirements”, By Luke Eric Peterson, Investment Treaty News, November 15, 2007

7. Tribunal orders Ecuador to cease legal action against foreign oil company,
By Damon Vis-Dunbar and Luke Eric Peterson

In an ongoing contract dispute with potential implications for the investment treaty realm, an ICSID tribunal has placed a temporary injunction on Ecuador, ordering the government to refrain from prosecuting representatives of the oil company City Oriente. However, the ruling was promptly ignored by Ecuador, with the General Prosecutor seeking the arrest of several of the company’s Quito-based employees.

The tribunal’s November 19 decision on provisional measures also directs Ecuador to cease insisting on payment of a sum of money which Ecuador is claiming under a recently enacted windfall royalty tax on hydrocarbon investments. Ecuador is demanding over \$28 million, which City Oriente has thus far withheld.

Since filing for arbitration in 2006 for breach of contract, City Oriente – a Panama-based company - complains that the government has applied a series of legal pressures to force payment of the disputed \$28 million. This includes filing a request with the Minister of Mines and Oil that the contract with City Oriente be terminated.

In its ruling, the tribunal held that this move infringes on ICSID’s exclusive jurisdiction: “Such termination proceeding needs to be stayed since, pursuant to the Contract, all disputes between the parties are to be settled through arbitration.”

Ecuador's General Prosecutor has also opened up a criminal investigation into several City Oriente employees on allegations of embezzlement. Here too the tribunal orders Ecuador to cease:

"... the tribunal acknowledges Ecuador's sovereign right to prosecute and punish crimes of all kinds perpetrated in its territory. However, it is the tribunal's view that such undisputed right of the Republic of Ecuador should not be used as a means to coactively secure payment of the amounts allegedly owed pursuant [to the hydrocarbon law]."

Nonetheless, days after the ruling on provisional measures, the Ecuadorian General Prosecutor moved ahead with efforts to take certain representatives of City Oriente into custody. Indeed, the decision on provisional measures describes a deteriorating dynamic between Ecuador and the ICSID arbitration process.

Ecuador did not attend the hearing in which the matter of provisional measures was argued, saying that it needed more time to select an international law firm to defend its interests. The government also holds that the proceedings should be held in Quito, not Washington.

The tribunal dismissed both arguments, saying that Ecuador has had a year since proceedings began to obtain legal counsel, and that it is under the tribunal's prerogative to decide where hearings will be held.

In a statement, the Ecuadorian Government has complained of "the arbitration court's aggressive posture."

City Oriente is one of a host of foreign energy companies in conflict with the Government of Ecuador over a hydrocarbon law introduced in April 2006, which increased the government's take of windfall oil profits, first to 50 percent, and more recently to 99 percent.

As foreign investors openly contemplate lawsuits, Ecuador is moving to curb its exposure to international arbitration. In November, Ecuador notified ICSID that it will not consent to see disputes over non-renewable resources arbitrated at the Centre.* The implications of the letter are unclear; the move may be more symbolic than legally binding, so long as investment treaties and contracts that allow for ICSID arbitration remain in force.

However, Ecuador is attempting to preclude ICSID arbitrations from being launched, despite active bilateral investment treaties being in force. In its letter to ICSID, Ecuador says it is withdrawing consent to ICSID arbitration which has been agreed to under various "instruments" unless consent by the investor has been "perfected through an express and explicit consent".

The position is similar to the one adopted recently by Bolivia, following its notice of withdrawal from ICSID. In letter in which the Bolivian Government asked the ICSID

Secretariat not to register a request for arbitration by Euro Telecom, Bolivia held that both parties to an arbitration must give written consent to ICSID – i.e. perfected consent - prior to a country’s notice of withdrawal, in order to be eligible to arbitrate at the Centre.

Ecuador is also contemplating renegotiating certain of its BITs, including its treaty with the United States. Informed sources say the government is in the final stages of drafting a model BIT, which will form a template for new or revised BITs. However, no schedule has been set for renegotiation of existing BITs. In the mean time, a US Government source tells ITN that Ecuador has not moved to terminate its BIT with the United States.

Sources:

*“Ecuador wants ICSID to stop presiding over mining and energy arbitrations”, By Luke Eric Peterson, Investment Treaty News, November 30, 2007

“ICSID registers arbitration claim in face of Bolivian objections”, By Damon Vis-Dunbar, Fernando Cabrera Diaz, and Luke Eric Peterson, Investment Treaty News, November 15, 2007

Briefly Noted:

8. Lecture on “state corruption in international arbitration” at Cambridge University,

On Friday January 18, 2008, The UK-based Lauterpacht Centre for International Law will feature a lecture by Lord Mustill, a frequent international arbitrator on the topic of “state corruption in international arbitration. The Lauterpacht Centre is located at Cambridge University. The lecture is slated to take place at 1PM. For more information see: <http://www.lcil.cam.ac.uk/news/article.php?section=26&article=611>

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