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Contents at a glance:

Editor's Note:
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1. Investment Treaty News now available in Spanish

(Spanish version of this note follows)
Thanks to the financial support of the International Development Research Centre (IDRC), future editions of Investment Treaty News (ITN) will be made available in the

Spanish language.

To allow for translation, Spanish editions will be distributed by email and on the web approximately one week after the publication of the English editions. Current subscribers who would prefer to receive email editions of ITN in Spanish, can email us at: nti-espanol@lists.iisd.ca

A web archive has been created to host the Spanish editions of ITN. For more information visit: http://www.iisd.org/investment/itn/default_es.asp

Gracias al apoyo financiero del Centro Internacional de Investigaciones para el Desarrollo (IDRC), futuras ediciones de Noticias sobre Tratados de Inversión (NTI) estarán disponibles en español.

A fin de permitir la realización de las correspondientes traducciones, las ediciones en español serán distribuidas vía e-mail y se publicarán en la Web aproximadamente una semana después de las ediciones en inglés. Los actuales suscriptores que prefieran recibir las ediciones de NTI en español por e-mail, pueden dirigirse a nosotros a: nti-espanol@lists.iisd.ca

Se ha creado un archivo web para incorporar las ediciones de NTI en español. Para mayor información visite: http://www.iisd.org/investment/itn/default_es.asp

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Arbitration Watch:
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2. Belgian court declines Poland's request to annul award in insurance fight,
By Luke Eric Peterson

A Belgian court has rejected a bid by the Republic of Poland to overturn an arbitral award which was rendered last year in a notable investment treaty dispute.

In a ruling dated Nov 23, 2006, the Brussels Court of First Instance rejected three grounds advanced by Poland in an effort to reverse an international arbitral ruling in favour of the Dutch-based Eureko corporation.

Eureko had turned to arbitration against Poland in early 2003 alleging that the country had reversed course on a promise to privatize fully a national insurance company, PZU.

In August of 2005, the three-member arbitration tribunal issued a divided ruling, with the majority finding that Poland had breached several obligations under the Netherlands-Poland bilateral investment treaty.

At that time, the tribunal signaled that it would shortly issue an order clarifying the next stages of the arbitration, including a calculation of the damages owing to Eureko. However, before the tribunal could do so, Poland turned to the courts of Belgium (where the arbitration had been sited for legal purposes) in an effort to annul the award. In parallel, Poland also sought to challenge one of the three presiding arbitrators, in a separate action which remains before the Belgian courts.

In the majority opinion of the arbitral tribunal, Poland was held to have violated the treaty strictures against expropriation without compensation, as well as obligations to provide fair and equitable treatment and to "observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party" (a provision which the majority considered to be a so-called umbrella clause, elevating contract breaches to the plane of international law).

The dissenting arbitrator maintained that the majority lacked jurisdiction to hear the dispute, and that they had misapplied Polish law in their interpretation of the contractual agreements between the two parties – finding a commitment to hold an Initial Public Offering where Poland and Eureko had merely signaled their "intent" to pursue such a course.

In its arguments before the Belgian court, counsel for the Republic of Poland would revert to the reasoning of the dissenting arbitrator. In particular, Poland argued that the arbitral tribunal had lacked jurisdiction over the dispute because mere "statements of intent" were not enforceable undertakings under Polish law, and therefore could not constitute "investments" according to the terms of the Netherlands-Poland treaty. Besides this, Poland had argued that the contract between Eureko and Poland, as well as several addenda, had prescribed the Polish courts as the appropriate forum for resolution of disputes related to that contract.

However, the Belgian Court would reject these arguments, leaving in place the view of the majority of the arbitral tribunal that there had been a binding undertaking under Polish law to hold an IPO – and, hence, these contractual rights of Eureko to see such an IPO could be considered an "investment" under the Netherlands-Poland investment treaty.

The majority opinion of the arbitral tribunal has been the subject of some scholarly discussion, with one academic-practitioner, Zachary Douglas, of the University of London, opining that the majority of the tribunal permitted Eureko to "cherry-pick" amongst contractual provisions – insisting upon a contractual right to bid on additional shares in a future IPO, while declining to accept the dispute resolution mechanism provided under that same contract, namely recourse to the Polish courts.

Following the recent ruling of the Belgian court, the Republic of Poland can seek to appeal the ruling to a higher court; otherwise, the arbitral proceeding could resume following a ruling of the Belgian courts on a separate effort by Poland to remove one of the arbitrators, Judge Stephen Schwebel.

3. Pakistan Attorney General advises states to scrutinize investment treaties carefully, By Luke Eric Peterson

The Attorney General of Pakistan, Mr. Makhdoom Ali Khan, speaking at a recent Washington arbitration conference cautioned states to scrutinize closely any international investment treaties which they conclude with other governments.

Speaking of his own country's experience, Mr. Khan noted that Pakistan long treated such treaties as "photo-op" agreements, which could be signed hastily, with little consideration of their concrete legal consequences.

"Because someone is going visiting someplace and wants to sign an 'unimportant' document; or someone is coming over for a visit and an 'unimportant' document has to be signed. And a BIT … until very recently was regarded as one such (unimportant) document", Mr. Khan noted at a Colloquium hosted by the International Centre for Settlement of Investment Disputes (ICSID).

The Attorney General speculated that dozens of the BITs concluded by Pakistan had been viewed as "photo-op" agreements, and their full import became clear only after foreign investors began to invoke the treaty rights in the course of initiating investor-state arbitrations against Pakistan.

"These are signed without any knowledge of their implications. And when you are hit by the first investor-state arbitration you realize what these words mean," Mr. Khan said.

In Pakistan's case, the first arbitration to arise under one of its investment treaties was filed by a Swiss multinational, Société Générale de Surveillance S.A. (SGS) in 2001. The Attorney General noted that when this case was filed, the Pakistani Government was taken by surprise: "SGS having lost before the Swiss Supreme Court, having lost in Pakistan, how could it start a third round?"

However, the Attorney General noted that Pakistan came to appreciate that investment treaties offer something akin to a judicial review of domestic actions. "In many ways, the foreign investor is seeking an international arbitral review of sorts of government conduct on important public policy issues - issues which, until recently, were immune from any non-domestic scrutiny."

Mr. Khan added that the substance of these international disputes – dealing with issues such as the alleged denial of justice or water rights – have the potential to excite emotions, and trigger demands for much greater transparency to be brought to bear upon the arbitration process.

The Attorney General noted that investor-state arbitrations pose challenges which rarely crop up in more traditional commercial arbitrations (which typically do not involve states, and may see two private parties contesting over commercial matters).

Pointing to a "well-recognized trend toward transparency", Mr. Khan observed that citizens are demanding to know more about what their governments are doing in these contexts. He added that transparency can have costs, including in financial terms, where documents must be prepared for public distribution and hearings opened to public viewing. However, the Attorney General noted that it behooves states to pay this price or to risk public censure.

Added to this, Mr. Khan, acknowledged that tensions may arise between the public's right to know, and the procedural integrity of the arbitration process. He ventured that some witnesses or claimants might be intimidated if arbitrations are subjected to the full glare of publicity, and that it behooves arbitrators to ensure the integrity of the process.

The Attorney General noted that sometimes difficult balancing acts must be struck by tribunals, as was the case in the recent Biwater v. Tanzania arbitration (See: "ICSID Tribunal issues ruling on confidentiality in Tanzanian water concession dispute", Investment Treaty News, October 19, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_oct19_2006.pdf)

Ultimately, he urged governments to give greater consideration to such tensions prior to executing further investment treaties.

"(Investment treaties) must be carefully negotiated and executed after some consideration. Now, whether it should be executed at all, given the open-ended concepts which are involved … which have impact on significant policy considerations, is an issue which is too wide for this particular symposium."

Mr. Khan added that the current system of investor-state arbitration is not a foregone conclusion, and that some new treaties are being concluded without such an investor-state mechanism. The Philippines, for example, has recently concluded an economic partnership agreement with Japan which does not offer foreign investors access to investor-state arbitration.

Nevertheless, the Pakistani Attorney General suggested that governments ought live up to those commitments which they have made: "But if the states do sign these treaties, whether thinkingly or unthinkingly, and these are executed, then states have no right to claim any special status or an unabridged right to undermine the integrity of the process which they have agreed to participate in."

4. Uruguay decries Argentine protestor blockades in pulp mills dispute, Fernando Cabrera Diaz

Uruguay has submitted a request to the International Court of Justice (ICJ) seeking provisional measures in its ongoing dispute with the Republic of Argentina over two controversial Uruguayan pulp mills being constructed on the banks of a river which divides the two South American countries. Uruguay's submission requests that the ICJ order Argentina to prevent Argentinean protestors from blocking a vital bridge, as well as other connection-points between the two countries.

An information officer at the ICJ tells Investment Treaty News that it is very rare for a respondent state in such a dispute to request provisional measures from the Court. Usually these requests are made by claimants, in an effort to temporarily enjoin certain state measures which may be at the centre of the legal dispute.

Indeed, Argentina had submitted its own request for provisional measures at the time of filing its claim with the Hague-based ICJ. Argentine lawyers had asked the Court to suspend the construction of two contested Uruguayan pulp mills while the ICJ case was being heard. However, the ICJ rejected that request in July, essentially holding that the construction phase of the projects - which could be halted if the court decided so in the merits phase - would not produce pollution of the kind that could cause irreparable damage to the River Uruguay.
(see earlier ITN reporting at: http://www.iisd.org/pdf/2006/itn_june15_2006.pdf)

Uruguay's own bid for provisional measures comes on the heels of a move by protesters to blockade a key border bridge near the Argentinean town of Colon. Protesters have criticized an October 11th announcement of the World Bank's International Finance Corporation (IFC) which ruled that the plans to build one of the two contested Mills complied with World Bank environmental standards, thus paving the way for World Bank funding for that project.

Protests surged on November 20 as the IFC prepared to announce that it would lend 170 Million USD to help build the Orion Mill in Uruguay; since then, protesters have managed to close bridges and disrupt traffic between the two nations.

In papers filed with the ICJ, Uruguay alleges that Argentina has not taken "all reasonable and appropriate steps at its disposal to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two States."

Hearings on Uruguay's request have been scheduled to start Monday, December 18 at The Hague. Meanwhile, the Republic of Argentina has until January 15, 2007 to file its memorial (i.e. its main legal arguments) with the ICJ.

Notably, construction on one of the two disputed mills, Celulosa de M'Bopicuá (CMB), has come to a halt following a decision of the Spanish company ENCE. The Spanish firm bowed to Argentinean protests and announced in early October that it was seeking another site for its project. However, the Orion Mill, which is being built by the Finnish company Oy Metsä-Botnia AB, remains under construction.

For its part, Argentina claims that the unilateral authorization given by Uruguay to the two companies to build on the Uruguayan side of the River Uruguay is in violation of the Statute of the River Uruguay. The Statute, signed by the two countries, set up a joint regime for the use of the river. According to Argentina, Uruguay has violated that Statute by authorizing mills which will have a negative impact on the water quality and on the environment of the surrounding area, and by doing so without Argentina's approval.

Uruguay, on the other hand, contends that the Statute of the River Uruguay does not give either side a veto power over construction projects carried out adjacent to the river. Uruguay also insists that it has met all obligations under the Statute by carrying out environmental assessments before authorizing the projects, and by applying what it describes as "the highest and the most appropriate international standards of pollution control to these two mills."

Sources:

For documents related to the case please the ICJ's website at:
http://www.icj-cij.org/icjwww/idocket/iau/iauframe.htm

5. Egypt prevails in ICSID dispute with American investors over alleged discrimination, By Fernando Cabrera Diaz

An arbitral tribunal at the International Centre for the Settlement of Investment Disputes has ruled in favour of the Arab Republic of Egypt in a dispute initiated by a group of American investors. In its decision, handed down in late October, the tribunal found that Egypt had violated neither the National Treatment obligation nor any transparency obligations under the Egypt-United States Bilateral Investment Treaty (Egypt-US BIT).

The claimants, Champion Trading Company and Ameritrade International Inc., are shareholders of the National Cotton Company (NCC), a private firm established in 1994 to trade cotton in the newly liberalized Egyptian cotton market. In the ICSID case, the US investors sought in excess of 300 million USD for, among other things, alleged discrimination suffered at the hands of Egyptian authorities. At the root of the dispute was a price-support mechanism established by Egypt, one which the claimants did not partake in, but which was utilized by other players in the cotton sector.

In 1994 Egypt passed a series of laws liberalizing its cotton industry in order to open it to private sector investment. The laws established a semi-liberalized scheme which allowed for the selling of cotton in the open market, while also providing government-run Collection Centres where cotton could be bought and sold at a government-calculated minimum price.

Under this system, cotton seed growers (the producers) could accept the Government's minimum price at the Collection Centre, or take their goods to market and seek a market price. At the same time, cotton intermediaries - which specialized in purchasing cotton for onward sale to local mills or exporters - could buy cotton at Collection Centres at the government-set price or purchase it directly from producers at the prevailing market-price. If these intermediaries bought cotton at a Collection Centre, and the government-set price paid for such cotton was above the price which that cotton would later command on the open market, then a government programme offered compensation to these intermediaries for any financial shortfall

It was this compensation scheme which attracted the ire of the US claimants.

Between 1997 and 2003, the Egyptian Government offered compensation payments to various cotton companies who had purchased cotton at government-mandated prices, but sold it at a loss on the open markets.

The US claimants alleged that by paying out these settlements to Egyptian companies and not to NCC, an American owned company, the Egyptian government had violated the Egypt-United States BIT's national treatment provision. The claimants further argued that the settlements were handed out in a manner that lacked transparency.

The tribunal rejected these claims, however. It held that for the claimants to make out a violation of the Egypt-US BIT's national treatment provision the companies receiving settlement money and NCC would need to be in a like situation, as provided for under the treaty. In this case, however, the tribunal held, that the NCC was not in a like situation to those Egyptian firms which had collected compensation pay-outs from the government, because the US-owned company had never participated in the purchase of cotton from the Collection Centres.

Finding that the claimant's national treatment claim was unfounded, and also that a separate claim (related to alleged failures by Egypt to offer a transparent regulatory scheme) was similarly unfounded, the tribunal went on to award Egypt some of its costs, including its share of the tribunal's fees, as well as half of its legal costs.

Sitting on the tribunal were Yves Fortier chosen by the applicants, Professor Laurent Aynès chosen by the respondents, and chair Robert Briner. The arbitral award of Oct.27, 2006 is available on-line at: http://ita.law.uvic.ca/alphabetical_list.htm .

6. Czech Republic and Nomura Securities reach settlement,
By Damon Vis-Dunbar

The Japanese investment bank, Nomura Securities, has settled a long-standing dispute with the Czech Republic that will see a cap placed on the amount of damages an arbitral tribunal can award to Nomura subsidiary Saluka Investments BV. In return, the Czech Republic will drop its countersuit against Nomura.

The suits had the potential to cost both parties billions of dollars in damages. Nomura's Dutch affiliate, Saluka Investments, had been claiming as much 1.7 Billion Dollars (US) in damages. In its suit against Nomura, the Czech Republic had been seeking damages that reportedly ranged between 4 and 8 Billion Dollars (US).

Both cases relate to Saluka's investment in Investicni a Postovni Banka (IPB), a Czech bank, following (then) Czechoslovakia's privatization of its banking sector in the 1990's. In 2000, a string of bank runs led to IPB being placed under forced administration, and then transferred to a competing bank. Saluka holds that IPB was denied financial aid from the Czech government which competing banks had received.

A unanimous partial award was handed down last March in favour of Saluka, with the tribunal finding that the Czech Republic had breached the Fair and Equitable Treatment obligation of the Czech-Netherlands bilateral investment treaty. However, the tribunal did not find that Saluka's investment had been expropriated, as the company had also alleged.

The Czech Republic had filed for an appeal of the award with the Swiss Federal Supreme Court. But that appeal was rejected in September 2006.

Under the terms of the agreed settlement, the tribunal cannot award damages higher than 7 Billion Czech crowns (US$332 Million), said a spokesperson for Nomura. The arbitration between Nomura-subsidiary Saluka and the Czech Republic has taken place under the UNCITRAL rules of arbitration, before a tribunal consisting of Sir Arthur Watts, L. Yves Fortier, and Peter Behrens. The tribunal's decision on damages is expected in the Spring of 2007.

For its part, the Czech Republic has agreed to drop its counter-arbitration against Nomura, in which it had alleged that Saluka had breached a share purchase agreement, resulting in substantial financial losses for the government. A decision in that Zurich-based ad-hoc arbitration had been expected shortly.

Sources:

ITN reporting

"Saluka Investments claims partial victory against the Czech Republic", By Damon Vis-Dunbar and Luke Eric Peterson, Investment Treaty News, March 29, 2006

Negotiation Watch:
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7. Iraq concludes foreign investment law and engages in economic talks with EU,
By Fernando Cabrera Diaz

On November 20, the European Commission (EC) opened negotiations with the Iraqi government in the hopes of signing a Trade and Cooperation Agreement (TCA). In a press release issued by the EC, the Commission states that with this agreement it aims to "ensure a minimum level of predictability, transparency and legal certainty for economic operators" in Iraq.

According to the EC, the agreement will cover "a wide range of issues, including trade in goods, services, measures to encourage investment, customs, intellectual and industrial property rights, and public procurement rules." The negotiations are taking place in Brussels with Iraqi Deputy Prime Minister Barham Salih negotiating on behalf of Iraq, and Commissioners Benita Ferrero-Waldner and Peter Mandelson representing the EC

It is not clear whether Iraq is in the process of negotiating any other investment agreements, although it appears unlikely. An official with Iraq's Mission to the United Nations in Geneva says that they are unaware with any bilateral investment treaties under negotiations. Another official, working with an intergovernmental organization and with an economic specialization on the Middle East told ITN that, given the instability in Iraq, such negotiations would be "highly unlikely unless someone was holding the pen for them."

While it is unclear if Iraq is pursuing any bilateral investment treaties, its negotiations with the EU come on the heels of the Iraqi Parliament's approval last month of a new foreign investment law. This new law replaces Coalition Provisional Authority's Order 39 on Foreign Investment signed into law by then-Head of the transitional government Ambassador Paul Bremer in 2003.

The new foreign investment law includes some common provisions found in Bilateral Investment Treaties (BITs), including protection against expropriation without compensation and the right repatriate capital and proceeds from investments. Notably, the law does place restrictions on the use of foreign workers, requiring that at least 50% of workers in investment projects be Iraqi nationals.

However, the new foreign investment law does not apply to the oil and gas sector, a sector which is thought to offer the most attractive opportunities for foreign investment in Iraq. Iraqi officials have been working on a separate bill intended to regulate investment in the sector but negotiations on this so called Oil Law have been hampered by disputes as to whether the regions or the national government will have the authority to sign contracts.

The issue of who ultimately has power over Iraq's most important natural resource is a divisive one. The northern Iraqi Kurdistan Region has already drafted its own hydrocarbons law and officials there oppose the centralized approach proposed by Iraq's Oil Minister Hussein al-Shahristani. The Minister, on the other hand, believes that all contracts with international companies should be signed by the ministry in Baghdad, something which Kurdish Regional Government (KRG) officials oppose.

In July of this the year the National Assembly of Kurdistan also passed its own investment law for the Iraqi Kurdistan Region in order to promote foreign investment there. Along with granting foreign investors national treatment, and a 10 year tax exemption, the Kurdish investment law allows foreign investors "to own the entire capital of any project that he establishes in the region under this law."

Iraq is also in the process of accession to the World Trade Organization (WTO). This process began with an application in September of 2004. As per WTO procedure the application was followed by a memorandum outlining Iraq's foreign trade regime which was submitted in September of 2005.

Based on the memorandum, interested WTO member-countries were able to submit questions to Iraq on its trade regime. A source at the WTO tells Investment Treaty News that Iraq's answers to these questions were recently received and that a Working Party established to oversee Iraq's accession is now likely to meet early next year to discuss these issues.

The next steps will involve bilateral negotiations between member nations and Iraq, as WTO applicants are required to make trade concessions in order to obtain member approval to join the WTO.

Overall the accession process is still years away from completion with the exact timeframe largely depending on Iraq's ability to move forward, something which is being hampered by the country's fragile political and security situation.

Sources:

EU Press Release:
http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1585&format=HTML&aged=0&language=EN&guiLanguage=en

The Kurdish Investment Law is available on the Kurdish Regional Government's website at:
http://www.krg.org/uploads/documents/InvestmentLaw_KRGOfficialEng__2006_08_04_h11m20s33.pdf

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Briefly Noted:
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8. IISD calls upon OECD to undertake further consultations on infrastructure rules

The International Institute for Sustainable Development, in a commentary to be published on-line on Monday Dec.4th, 2006, calls upon the Organisation for Economic Cooperation and Development to refrain from adopting a set of OECD Principles for International Investor Participation in Infrastructure at a meeting of the OECD Investment Committee next week. The IISD commentary raises doubts as to whether the draft principles adequately take into account the interests of developing countries and the viewpoints of public stakeholders.

The commentary is to be made available on-line at http://www.iisd.org/investment

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