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Contents at a glance:

Arbitration Watch:

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1. Polish Finance Ministry not talking about BIT arbitration at ICC,
By Luke Eric Peterson

Poland's Finance Ministry has declined to comment on a recently concluded arbitration at the International Chamber of Commerce (ICC) with Spanish foreign investors.

Citing confidentiality obligations under Poland's tax laws, a Finance Ministry spokesman told ITN that the Department cannot comment on the arbitration or its outcome.

The arbitration under the Spain-Poland bilateral investment treaty is one of only a handful of treaty-based claims to be arbitrated at the Paris-based ICC.

While ITN has obtained information which indicates that Poland was found to be in breach of certain of its investment treaty obligations by an ICC tribunal, the Finance Ministry declined to comment on the outcome of the arbitration – which is understood to have concluded in late 2005.

Indeed, it is unclear how many investment treaty arbitrations Poland faces. Research conducted in 2005 by the editor of this newsletter for UNCTAD found at least 7 investment treaty arbitrations – placing Poland amongst the top ten countries when it comes to facing such claims. This may come as no surprise, as Poland holds the distinction of having the greatest proportion (94%) of its inward investment covered by investment treaties, according to a recent OECD study.

The country keeps no central public registry of such claims, and more than one government department can serve as the lead defendant in such cases.

While the Polish Finance Ministry defended Poland in the recently concluded ICC arbitration with Spanish investors, the Polish Treasury Department has also led the defense of several BIT claims.

A Treasury spokesperson told ITN that the Department handled an earlier arbitration claim by Saar Papier Vertriebs GmbH under the Germany-Poland investment treaty. (See: “Early investment arbitrations against "improper" use of environmental laws uncovered,” By Luke Eric Peterson, Jan 5, 2004, available on-line here).

A second arbitration, closely related to the Saar Papier arbitration, is also pending under the Germany-Poland bilateral investment treaty. German national, Mr. Lutz Schaper, a shareholder of the Saar Papier enterprise, is pursuing an UNCITRAL arbitration, seeking damages further to those already awarded to the Saar Papier firm. The hearings in that case are being conducted before an ad-hoc tribunal whose members have not been publicized. The hearings themselves are closed.

The Polish Treasury is also embroiled in a major ongoing investment treaty arbitration with the Dutch-based insurer Eureko, relating to a thwarted privatization of Poland’s largest insurance company. (See: “Divided tribunal finds Polish privatization 'reversal' violates treaty with Netherlands”, By Luke Eric Peterson, Sept.15, 2005, available on-line here).

Finally, Poland is known to be involved in at least one other treaty-based arbitration – this one with the US agricultural company Cargill – which was, until recently, pending before the International Centre for Settlement of Investment Disputes (ICSID). Following an agreement amongst the parties, the ICSID proceeding was discontinued in 2004, and the parties agreed to reconvene a proceeding under the UNCITRAL rules of arbitration, before the same arbitral tribunal.

While few details of the Cargill case have been reported, the US firm is known to be challenging Poland's tightening of agricultural production quotas for isoglucose, a wheat-based sweetener produced by a Cargill subsidiary in Poland. Cargill, which is one of the world's largest privately-traded firms, alleges that Poland's actions constitute a breach of investment protections contained in a 1994 Business Economic Relations Treaty between Poland and the United States.

2. Parties continue to await ICSID ruling on challenge to tribunal in Pey v. Chile case, By Luke Eric Peterson

An unprecedented challenge by the Government of Chile to the three member tribunal presiding over a long-running ICSID arbitration still awaits resolution at the time of this writing.

A source familiar with the Pey v. Chile arbitration informs ITN that the parties to the arbitration, along with the arbitrators in that case, continued to exchange correspondence related to the challenge application, up until about mid-January. ICSID has now closed the file and World Bank President Paul Wolfowitz is expected to issue a decision sometime in February.

As reported in an earlier edition of ITN (see link below) Chile mounted its challenge in August of last year, arguing that the "glacial pace" of the proceeding, as well as other recent developments, provided cause for disqualification of the presiding tribunal.

Immediately after Chile's challenge was filed, Chile's party-designated arbitrator, Mr. Galo Leoro Franco, resigned his seat on the tribunal. However, the remaining tribunal members, Prof. Pierre Lalive and Mr. Mohammed Bedjaoui have opposed the Chilean request.

The arbitration pitting Mr. Victor Pey Casado and the Salvador Allende Foundation against the Republic of Chile was first registered at ICSID in 1998. Mr. Pey claims ownership of the Chilean newspaper, El Clarin, which was seized, and later formally expropriated, during the 1973 coup by General Augusto Pinochet.

Sources:

"World Bank President will rule on Chile's effort to disqualify tribunal in ICSID case", By Luke Eric Peterson and Damon Vis-Dunbar, ITN, Dec.14, 2005, available on-line here.

3. Contrary to press rumours, foreign energy firms still on arbitration stand-by in Bolivia, By Luke Eric Peterson

A source familiar with the thinking of multinational oil and gas companies investing in Bolivia tells ITN that there is no truth to a media report that several of these firms have signaled a readiness to abandon their threats to take the country to international arbitration.

Citing a “senior advisor” of new Bolivian President Evo Morales, the Financial Times newspaper reported on January 23rd that Spanish firm Repsol and French firm Total “had indicated they were prepared to drop a threat to take Bolivia to international arbitration over a hydrocarbons law that raised taxes on foreign investors.”

However, a source tells ITN that this is “completely false”. According to this person, the so-called triggering letters sent by more than half-a-dozen multinational firms, warning Bolivia of potential claims under bilateral investment treaties and setting in motion mandatory 3 or 6 month negotiating windows, remain very much in place.

As such, the foreign oil companies remain on stand-by when it comes to bringing arbitrations. At the same time, this source notes that the companies would prefer a negotiated settlement, and they have expressed a willingness to see negotiations with the new government continue even after the lapse of the minimum negotiating windows prescribed under the relevant international treaties.

This source notes that the ball remains in Bolivia’s court, however, as foreign companies are waiting to see how newly elected President Evo Morales will reconcile his oft-repeated desire to nationalize Bolivia’s hydrocarbons sector, while maintaining foreign investment in that sector.

At least eight foreign investors, including Repsol, Total, British Gas and Exxon-Mobil, formally notified Bolivia of potential arbitration claims, after a 2005 Hydrocarbons law adopted by the Bolivian legislature gave foreign investors 180 days in which to migrate to new contracts with the government. However, that 180 day window has since lapsed, and the Government has yet to produce new model contracts for the oil and gas sector.

Although the new Hydrocarbons law obliged foreign investors to pay a new 32% royalty to be tacked onto an already-agreed 18% royalty rate, it remains to be seen if new contracts might lessen the impact of this new royalty somehow, for example by permitting deduction of all or some of this new amount from the income taxes paid by foreign companies to Bolivia.

(Editor’s Note: Due to an editing error, an earlier story in this newsletter had identified BP as one of the eight international firms which had notified Bolivia of an arbitration claim. In fact, it was British Gas (BG) which has done so.)

Negotiation Watch:
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4. Korea loosens local movie screening quota in order to open FTA talks with US,
By Luke Eric Peterson

After years of vacillation, the Republic of Korea has announced that it will halve the quota which currently limits the amount of foreign content which may be shown on the country's cinema screens.

The Korean screen quota system has long been under pressure from the US-based Motion Pictures Association of America (MPAA) which seeks greater global market penetration for US films. The MPAA had opposed negotiation of a US bilateral investment treaty, or broader free trade agreement, with Korea, so long as the country maintained its screen quota.

Korean press outlets report that South Korean Finance and Economic Minister Han Duck-Soo signaled late last week that a reduction in the quota is slated to come into force on July 1 of this year. The move is widely expected to pave the way for the launch of free trade negotiations between the US and Korea, perhaps to be announced as early as this week.

In a statement issued on January 26th, US Trade Representative Rob Portman said:

"The decision by Korea to liberalize its restrictions on foreign films is good news for Korean movie-goers and the US film industry. The long-standing Korean requirement that domestic films be shown on local theater screens 146 days out of the year placed US movies at a significant disadvantage. Today's move to reduce the requirement by half to 73 days will help level the playing field and increase movie choices for Koreans."

Korea's cultural industry has been less enamoured of the announcement. In a press conference on January 27th, Yang Ki-hwan of the Coalition for Cultural Diversity in Moving Images, in comments reported by The Korea Herald, said that "The government's move signifies a cultural coup d'etat."

Ironically, Korea's capitulation on the issue of film quotas, comes not long after the European Commission had successfully pressured the United States to renegotiate a series of investment treaties which were in place between the US and Eastern and Central European Governments, so as to provide greater scope for the preferential treatment of local films and audio-visual productions.

In preparation for the accession of ten Eastern and Central European Governments to the European Union in May of 2004, the European Commission, which serves as the EU's executive branch, demanded of the United States that new EU member-countries enjoy greater flexibility to introduce new measures which favor local (EU) audio-visual productions; permit the use of quotas favoring local (EU) content in the audio-visual sector; or to require foreign investors and service providers (for eg Cinema operators) to abide by minimum local-content rules.

Under the terms of pre-existing US investment treaties with certain new EU candidates, such measures might have been prohibited by the operation of the agreements rules on national treatment and its ban on the imposition of so-called performance requirements on foreign investors.

A copy of the protocol agreed between the US and European Union with respect to the US-Czech Republic bilateral investment treaty, and which introduces greater flexibility for audio-visual productions, has been posted on-line in the Documents Centre operated by Investment Treaty News:(http://www.iisd.org/investment/itn/documents.asp)

Sources:

"U.S., Korea inch closer to launch FTA", By Donna Borak, United Press International, January 26, 2006

US Trade Representative Rob Portman press release, January 26, 2006, available on-line here.

5. OECD submits policy recommendations for attracting investment, seeks public input, By Damon Vis-Dunbar and Luke Eric Peterson

The Organization for Economic Cooperation and Development has stuck its head above the parapet once again with a set of proposals for national and international policy-making in the realm of foreign direct investment.

The Investment Committee of the OECD released this month a set of recommendations aimed at creating investment-friendly environments in countries, and is now soliciting feedback on these proposals from the interested public.

The Paris-based OECD was established in the Post World War Two period as a part of the Marshall Plan for the reconstruction of Europe. The body serves as an inter-governmental think-tank or secretariat for the leading developed economies.

In the mid-1990s, the organization encountered fierce international criticism over the so-called Multilateral Agreement on Investment (MAI), a proposed foreign investment promotion and protection treaty. While similar in many respects to the numerous bilateral investment treaties being negotiated by governments at that time, the MAI project attracted much greater public scrutiny due to its ambition and multilateral scope.

In 1998, the Government of France, under pressure from campaigning groups and the media, announced that it would withdraw from the MAI talks, citing concerns about the proposed agreement's potential impacts on culture, environment and other sensitive public policy issues. Although the French withdrawal hastened the demise of the MAI, in a little-noticed irony, the period during which the MAI was being discussed was also the high-water mark for the negotiation of bilateral investment treaties. In the 5 year period from 1994 through 1998, upwards of 900 such bilateral treaties were concluded with little publicity or notice.

For its part, the OECD has continued to work on issues related to investment law and policy, while refraining from coordinating the negotiation of such treaties. The organization's newly-released Policy Framework for Investment (PFI) is described by its authors in somewhat tentative terms, as a "non-prescriptive checklist of issues," focusing on such matters as: competitive tax regimes, techniques for investment promotion, and market-expanding trade and investment agreements.

The PFI provides its policy recommendations in a relatively elliptical fashion: through a series of questions, followed by annotations.

Under the Investment Policy heading, the PFI asks: "Are investment policy authorities working with their counterparts in other countries to expand international treaties on the promotion and protection of investment?" By way of explanation, a brief annotation observes that such investment agreements provide stability to investors "by reducing restrictions on a broadly defined range of investments … such as free transfer of capital."

The PFI also encourages countries to ratify multilateral instruments designed to protect international investors, such as the World Bank's Washington Convention establishing the International Centre for Settlement of Investment Disputes (ICSID), an institution that administers binding arbitration of investor-state disputes.

Under a chapter on policies for promoting responsible business conduct, the OECD advocates that governments draw a clear line between its own responsibilities, and those of investors. "Does (government) actively assume their responsibilities and avoid de facto privatization of public roles?" the PFI asks.

Earlier drafts of the PFI were circulated among various OECD advisory committees, and the initial comments of these groups highlight continued disagreement as to the appropriate terms of debate.

For example, the Trade Union Advisory Committee to the OECD (TUAC) has raised objections to the "overall balance" struck by the PFI.

"The rights and needs of investors are emphasized throughout the document, while the policy space required for host governments to meet societal and domestic development needs other than attracting investment appears to be largely ignored," the TUAC comments.

By contrast, the Business and Industry Advisory Committee to the OECD (BIAC) warned that the PFI should not encourage debate on “the relationship of commercial issues on the one hand, and the social and environmental issues on the other.”

The latest draft of the PFI is available on-line here.

The OECD has imposed a deadline of February 10, 2006 for public comments.

Briefly noted:
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6. ICSID Secretary General stepping down,

The Secretary General of the International Centre for Settlement of Investment Disputes (ICSID), Mr. Roberto Danino is stepping down from his post at the end of this month. Mr. Danino, a former President of Peru, joined the World Bank in November 2003 as ICSID Secretary-General and General Counsel for the World Bank.

A January 23rd report in the Financial Times newspaper chronicled “a bitter conflict” at the World Bank over the management style of new World Bank President Paul Wolfowitz, and the appointment of individuals with ties to the US Republican Party to senior roles. According to the report, Mr. Wolfowitz’s drive to stamp out corruption at the World Bank, has occasioned friction with staff members who “charge that Mr Wolfowitz is relying on a handful of close political advisers, and complain about a lack of confidence in staff who work in difficult conditions in countries with inadequate governance.”

The same FT report indicates that “Roberto Danino, the bank's former general counsel and senior vice-president who was highly-regarded within the bank, also announced his resignation this month. Mr Danino is said to have been unhappy at the suspicious attitude towards the staff.”

7. UN Development Programme releases discussion paper on investment treaties and Free Trade Agreement investment provisions,

The United Nations Development Programme published last month a discussion paper authored by the editor of this newsletter, Luke Eric Peterson, and IISD Trade and Investment Director Mark Halle. The paper, which analyses some of the potential development policy implications of international investment rules, is available on-line here.

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