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Arbitration Watch:

1. Egypt prevails for second time in recent months in an ICSID arbitration,
By Luke Eric Peterson

The Egyptian Government has prevailed in an arbitration brought by a California-based family of investors pursuant to the US-Egypt bilateral investment treaty.

In a ruling dated June 18, 2007, a three-member tribunal at the International Centre for Settlement of Investment Disputes (ICSID) upheld jurisdiction to hear a claim brought by

Ahmonseto Inc. and others, but rejected all claims of treaty violations on the merits.

Although the arbitral award has not yet been released to the public, the outcome has been reported in the Egyptian press.

The arbitration is the second ICSID proceeding in less than a year where Egypt has prevailed on the merits.* In 2006, US-based Champion Trading Company and Ameritrade International lost an arbitration where they had alleged that they were disadvantaged by a Government price-support mechanism used in the Egyptian cotton market.

The Ahmonseto v. Egypt claim was initiated in 2002, and the US-based claimants had sought at least \$100 Million (US) in compensation for alleged losses in relation to a textile production business in Egypt.

Sources:

* See earlier ITN reporting: “Egypt prevails in ICSID dispute with American investors over alleged discrimination”, By Fernando Cabrera Diaz, Investment Treaty News, December 1, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_dec1_2006.pdf

2. ICSID annulment committee splits, but award in Soufraki v. UAE is upheld,
By Luke Eric Peterson

An ICSID annulment committee has ruled in a 2-to-1 fashion against a bid by Mr. Hussein Nuaman Soufraki to overturn an arbitral award rendered in 2004 in favour of the United Arab Emirates.

Mr. Soufraki turned to ICSID arbitration against the UAE in 2002, alleging that UAE authorities violated the terms of the Italy-UAE bilateral investment treaty by virtue of the alleged mistreatment of Mr. Soufraki’s investments in a Dubai port project.

However, as earlier reported by ITN, the presiding arbitral tribunal held in 2004 that it had no jurisdiction over the dispute. The tribunal had determined that Mr. Soufraki’s Italian citizenship had lapsed, thereby rendering him ineligible to make a claim under the Italy-UAE treaty.

Following this jurisdictional set-back, Mr. Soufraki moved in 2004 to have the award annulled.

But, in a ruling dated June 5, 2007, a majority of the three-member annulment committee rejected this annulment bid; Committee members Florentino Feliciano and Brigitte Stern ruled in favour of the UAE, whilst Omar Nabulsi authored a dissenting opinion, wherein he held that there were grounds which would justify the annulment of the original arbitral

award.

To date, the committee's ruling and Mr. Nabulsi's dissenting opinion have not been made public.

3. UK Court rejects Ecuador's bid to overturn \$71 Mil Occidental Award, By Luke Eric Peterson

The UK Court of Appeal has rejected a bid by Ecuador to overturn a lower court ruling which had upheld a \$71 Million (US) arbitration award in favour of the US-based Occidental corporation.

As first reported in ITN, Occidental won the underlying arbitration with Ecuador in 2004, after an arbitral tribunal ruled that Ecuador's failure to provide certain tax refunds to the US oil company triggered violations of the US-Ecuador bilateral investment treaty.

The Ecuadorian Government turned to the UK courts, where the UNCITRAL-based arbitration proceeding had been legally sited, in an effort to overturn that award. However, in March of last year, the UK high Court of Justice held that Ecuador had not proven that the arbitral tribunal exceeded its jurisdiction contrary to English law. An ITN report of the lower court's 2006 judgment is available on-line*.

Ecuador appealed the 2006 ruling, but in a judgment dated July 4, 2007, a panel of 3 UK Judges affirmed the lower court's reasoning.

ECUADOR GROWS MORE CONFRONTATIONAL ON BIT LAWSUITS

For its part, Ecuador has stated publicly that it will seek leave to appeal the latest ruling to a higher court in the UK.

Lately, the Ecuadorian Government has expressed growing dissatisfaction with the US-Ecuador bilateral investment treaty, which entered into force in May of 1997. Earlier this year, the Ecuadorian Government announced that it might give notice to the United States in order to set in motion a process of terminating the controversial agreement.

The investment pact has been used by a growing number of US investors to mount international lawsuits against Ecuador.

Most notable, in May of 2006, Occidental mounted a second arbitration against Ecuador, after the Ecuadorian Government cancelled the US firm's oil exploration contract amidst allegations that Occidental had improperly transferred a share of its Amazonian oil venture to a Canadian energy company.

Oxy accuses Ecuador of having violated the terms of the relevant contract, and of the US-

Ecuador bilateral investment treaty.

For its part, Ecuador has been a reluctant participant in the resultant ICSID proceeding. The Government declined to designate a member of the arbitration panel which will hear the claim, thus obliging ICSID to nominate that arbitrator. More recently, however, press reports have suggested that Ecuador is hiring an international law firm to defend the claim.

Oxy seeks a reported \$1 Billion (US) in compensation for the confiscation of its oil concession and assets.

* “Ecuador fails in bid to overturn Occidental award, but appeal in the works”, By Luke Eric Peterson, Investment Treaty News, March 14, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_mar14_2006.pdf

4. German nationals challenge Namibia’s land reform as discriminatory,
By Damon Vis-Dunbar and Luke Eric Peterson

Three German nationals are posed to confront Namibia’s Ministry of Lands and Resettlement in Namibian court later this month, in response to the expropriation of their farms under the country’s 1995 land reform act.

The three land owners, Gunter Kessl, Heimaterde CC, and Martin Josel Riedmaier, were notified in 2004 that their farms were to be seized, as the Namibian government undertook a regime of compulsory expropriations in an effort to redress a heritage of highly stratified land ownership.

Counsel for the land owners tells ITN that they are not challenging Namibia’s right to reclaim land, nor the amount of compensation offered. Rather, the land owners allege that the way the expropriation was carried out was in breach of the land reform act, as well as discriminatory under the Namibia-German bilateral investment treaty (BIT).

Namibia’s land reform act of 1995 gives the government the right to expropriate property in the public interest, provided just compensation is offered. However, the German land owners argue that the Ministry of Lands and Resettlement failed to follow the sequence of steps that must be taken before property is seized.

The farmers also allege that the Namibian government breached the national treatment standard of the Namibia-German bilateral investment treaty. According to counsel for the land owners, the government targeted farms owned by foreign nationals, and thus failed to meet its international obligation to treat German investors the same as Namibian nationals.

A spokesperson for the Ministry of Lands and Resettlement would not comment on the

case so long as the dispute was before the courts. However, this person did say that the Ministry strongly refuted the allegation that they have targeted foreign investors when expropriating land.

The challenge by the German land owners comes as domestic pressure mounts on the Namibian government to quicken the land reform process. Speaking to the newly formed Fifth Land Reform Advisory Committee in June, the Minister of Lands and Resettlement, Jerry Ekandjo, said efforts to redistribute land had been hampered by high land prices.

“More often than not, enormous time is spent on convincing commercial farmers to reduce the prices offered to the state,” said Mr. Ekandjo, as reported by the newspaper New Era.

Mr. Ekandjo also said that the cases pending in Namibian courts had also slowed efforts to acquire and redistribute land.

Hearings before the High Court of Namibia are slated for 23-25 July.

INVESTMENT TREATY RULES SHAKING UP LAND REFORM DYNAMIC?

The recent developments in Namibia are only the latest instance where land-owners have adverted to international law protections contained in foreign investment treaties in an effort to challenge land reform measures taken by governments.

As has been previously reported in ITN, a prominent family-run UK business group initiated an arbitration against Venezuela in 2005 after the Venezuelan Government moved to confiscate certain agricultural landholdings as part of a land reform programme in that country. The Vestey Group, which acquired some 350,000 hectares of land in Venezuela over more than a century, subsequently struck a compromise with the Venezuelan Government. Under the terms of that deal, the UK owners would cede two cattle ranches in that country, whilst retaining a number of other major Venezuelan properties. Following this agreement, the investment treaty arbitration was terminated at ICSID.

Meanwhile, in Zimbabwe, a group of Dutch farmers who were forcibly removed from their Zimbabwean farm-holdings have filed their own arbitration at the ICSID facility, alleging that Zimbabwe has expropriated their land without full market-value compensation, and that the Zimbabwean Government failed to provide protection and security for the Dutch landholders in the face of sometimes violent land invasions by third parties.

Sources:

ITN interviews

“German Farmers challenge Namibia land reform, international arbitration considered”,

By Damon Vis-Dunbar and Luke Eric Peterson, May 31, 2006

“Namibia: New Land Commission Unveiled”, By Mbatijua Ngavirue, New Era, June 26, 2007

5. New York Court rules against Chevron in environmental dispute with Ecuador,
By Damon Vis-Dunbar

The petrochemical company Chevron has encountered a setback in its bid to shield itself from Ecuadorian lawsuits that seek damages for environmental harm to the Amazon.

In a decision handed down on June 19, a New York District Court ruled that a 1965 joint operating agreement (JOA) does not apply to the government of Ecuador or the state-owned company PetroEcuador.

Although PetroEcuador was not a signatory to the 1965 JOA (the contract was between the Gulf Oil Company and Texaco, which merged with Chevron in 2001) Chevron has been trying to use an arbitration clause in the contract in an effort to initiate proceedings before the American Arbitration Association. The US firm is seeking indemnification against any adverse judgment that could arise out the Ecuadorian lawsuits.

Among the Court’s arguments was that Ecuadorian law in the 1970s was “too unsettled” to assume that it would support Chevron’s claim that the terms of the JOA have been transferred to PetroEcuador.

Chevron has filed a notice of appeal of the New York District Court ruling.

Thousands of residents of the Amazon are suing Chevron in Ecuadorian court for environmental damage to the Amazon basin incurred in the 1970s and 1980s. Amazon Watch, a non governmental organization, has put the bill for the clean up at \$6 Billion US.

In an attempt to protect itself from an adverse verdict in those cases, Chevron refers to a 1995 agreement with Ecuador and PetroEcuador, in which the two companies agreed to perform an environmental clean up costing some \$40 million US, in exchange for release from any future liability.

Chevron has long been critical of the legal process unfolding in Ecuador. This month, counsel for Chevron said “due process is not being respected in our case,” and threatened international arbitration as a possible recourse.

“We will not hesitate to go to international tribunals to review what we believe is an unfair trial and lack of due process in this country,” said Ricardo Veiga, Chevron’s

managing counsel for Latin America, as reported by Reuters.

Sources:

“Chevron warns Ecuador on BIT claim as contract and environmental disputes persist”,
By Damon Vis-Dunbar, Investment Treaty News, July 26, 2006

“Chevron says victim of unfair trial in Ecuador”, By Alonso Soto, Reuters, July 2, 2007

6. NAFTA Tribunal lacks jurisdiction to hear Texans’ water dispute with Mexico, By Fernando Cabrera

A tribunal constituted under NAFTA’s Chapter 11 has found that it lacks jurisdiction to hear a dispute brought by a group of Texans against Mexico over water access-rights to the Rio Grande river.

In an award handed down on June 19, a three member arbitral tribunal rejected the US-based claimants’ arguments that Chapter 11 could protect investments made in their own country (i.e. the United States) from actions taken by Mexico that were detrimental to those investments. At the same time, the tribunal rejected a parallel argument by the claimants that they had some Mexican-based investments (specifically rights to water in Mexico) which warranted protection under NAFTA Chapter 11.

As reported previously by Investment Treaty News*, in January of 2005 a group of Texas water districts - under the banner Bayview Irrigation District et. al - commenced an arbitration against Mexico alleging that that country had failed to live up to its commitments stemming from a 1944 water treaty between Mexico and the US. The 1944 treaty divided the waters of the Rio Bravo (AKA Rio Grande) River between the two countries; the waters feeding that river flow mostly from Mexican tributaries.

According to the claimants, Mexico diverted water owed to Texan farmers under the treaty, resulting in billions of dollars worth of losses for Texas farmers. The claimants alleged that this was in violation of Chapter 11’s national treatment and expropriation provisions.

From the outset, Mexico objected to the jurisdiction of a tribunal constituted under Chapter 11 to hear the dispute given Mexico’s view that Chapter 11 only protects claims by investors of one NAFTA party who have made or are seeking to make investments in another NAFTA party. As such, Mexico denied that Chapter 11 was designed to introduce legal obligations for Mexico in relation to US-owned investments located wholly within the US.

Accordingly, the claimants’ apparent lack of an investment in Mexico became the initial issue under dispute, and with the consent of the Parties, the tribunal agreed to treat that

issue first.

In arguing that the tribunal indeed has jurisdiction to hear their dispute, the claimants first argued that NAFTA's Chapter 11 does not require them to make investments in Mexico in order to bring a claim against that country. In support of this view they pointed to Article 1101(1) (a) which outlines the scope and coverage of Chapter 11, and states that the chapter applies to "investors of another Party" without reference to the location of their investments. Similarly they also pointed to the provisions on national treatment and the definition of "investor" in Article 1139, which also do not mention the location of investments.

In a second argument on jurisdiction the claimants also contended that the tribunal had jurisdiction to hear their claim under Article 1101(1) (b) which says that Chapter 11 applies to measures adopted by a Party relating to "investments of investors of another Party in the territory of the Party..." To support this second jurisdictional argument, the claimants alleged that they owned certain "water rights" in Mexico, which were granted to them as a result of the 1944 treaty, and that these rights constituted an investment in Mexico.

In response to this second argument, Mexico countered that the 1944 treaty does not grant anyone property rights to water while it flows through Mexican territory. Mexico also pointed out that any dispute arising out of that treaty must be resolved between the Parties – Mexico and the US – under the mechanism set out in that treaty.

In its June 19, 2007 ruling the tribunal essentially agreed with Mexico on both jurisdictional arguments. On the first argument, the tribunal held that while Chapter 11 was titled simply 'Investment' and not "Foreign Investment", it deals with the latter. "The ordinary meaning of the text of the relevant provisions of Chapter 11 is that they are concerned with foreign investment, not domestic investment," held the tribunal. The tribunal pointed out that this was the interpretation of the chapter made by all three NAFTA parties.

The tribunal further reasoned that had Chapter 11 been intended to diverge from the approach of other international investment agreements and to accord protection to investors of a Party who had made wholly domestic investments, one would find clear indications of this in the preparatory documents of the treaty - which one does not.

However, the tribunal did agree with the claimants that the definition of investor in Article 1139 "does not explicitly require that the person or enterprise seeks to make, is making or has made an investment in the territory of another NAFTA Party."

Nevertheless, the tribunal continued, "the text of the definition does require that the person make an 'investment'", something which the scope and coverage section of Chapter 11 (Article 1101(1) (b)) restricts to "investments of investors of another Party in the territory of the Party." The tribunal concludes:

"In the opinion of the Tribunal, it is quite plain that NAFTA Chapter Eleven was not

intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States, in circumstances where those investments may be affected by measures taken by another NAFTA State Party.”

The tribunal also rejected the claimants’ second argument, that they owned water rights in Mexico and therefore could base a claim under Article 1101(1) (b). On this point, the tribunal held that:

“One owns the water in a bottle of mineral water, as one owns a can of paint. If another person take it without permission, that is theft of one’s property. But the holder of a right granted by the State of Texas to take a certain amount of water from the Rio Bravo/Rio Grande does not ‘own’, does not ‘posses property rights in’, a particular volume of water as it descends through Mexican streams and rivers towards the Rio Bravo/Rio Grande and finds its way into the right-holders irrigation pipes. While the water is in Mexico it belongs to Mexico even though Mexico may be obliged to deliver a certain amount of it into the Rio Bravo / Rio Grande for the taking by US nationals.”

Having declined jurisdiction over the claims, the arbitration has come to a halt. Because the arbitration was conducted under the Additional Facility rules of the ICSID, the award may be challenged in the courts of the legal site of arbitration. ITN understands that the claimants have yet to take a decision on whether to seek to overturn the award in the courts.

Sources:

*US makes last-minute filing in arbitration between Texan farmers and Mexico, By Fernando Cabrera Diaz and Luke Eric Peterson, Dec 19, 2005, available online: http://www.iisd.org/pdf/2006/itn_dec19_2006.pdf

Award of June 19, 2007, in Bayview Irrigation District, et. al. v. United Mexican States, available on-line at: <http://ita.law.uvic.ca/documents/bayview.pdf>

7. Canadian uranium miner sues Kazakhstan under Foreign Investment Law,
By Luke Eric Peterson

Canadian mining company World Wide Minerals (WWM) has launched an arbitration against the Republic of Kazakhstan, and Kazatomprom, the state-owned uranium agency, alleging violations of the Kazakh Foreign Investment Law.

Under the terms of that 1994 Kazakh law, foreign investors can initiate international arbitration against Kazakhstan in the event of investment disputes.

Although arbitrations under national-level investment foreign investment statutes are relatively uncommon, a number of countries have concluded such laws. These laws can

provide for legal protections for foreign investors along similar lines to the protections contained in international investment treaties, as well as for arbitration of investment disputes.

While many foreign investment laws do not provide the advance-consent of the host government to international arbitration – requiring instead that the host country would have to give its consent before a given dispute could be arbitrated - some national investment laws, including that of Kazakhstan, do offer advance-consent.

World Wide Minerals (WWM) has invoked the law in an effort to bring an UNCITRAL-based arbitration proceeding against Kazakhstan in Stockholm, Sweden.

WWM's dispute with Kazakhstan dates back a decade; the Canadian firm invested in a Kazakh mining complex in 1996, assuming management of the facility and concluding various other agreements for uranium exploration and development.

However, WWM alleges that its agreements were illegally terminated in 1997, and certain properties and loans were confiscated without compensation. In particular, a dispute arose when another US-based company was found to have certain Uranium export privileges which WWM had understood to be owed to itself.

The Canadian firm pursued a claim against the Republic of Kazakhstan and Kazatomprom in the United States courts in the late 1990s, however the DC Federal District Court declined jurisdiction over the dispute in 2000. In 2002, an Appellate Court affirmed this ruling, albeit on somewhat different grounds.

In 2006, WWM moved to initiate arbitration against Kazakhstan under the terms of the agreements concluded with the Government in the mid-1990s. A further claim was initiated this year, when WWM invoked the protections of the Kazakh Foreign Investment Law in an effort to sue not only the Kazakh Government, but also Kazatomprom.

To date, an arbitral tribunal has yet to be constituted to hear either set of claims.

For its part, WWM claims some \$4 Billion (US) in damages, the overwhelming bulk of which is alleged lost profits related to uranium assets which WWM says that it had the right to acquire under various agreements.

Briefly Noted:

8. DC Panel to look at topic of review & annulment of investment treaty awards

A lunch-time panel discussion scheduled for July 23rd in Washington DC will explore the timely topic of review and annulment of investment treaty awards. The event organizers note that remarkably divergent approaches have been adopted by different committees or courts charged with reviewing arbitral awards, and the discussion will contemplate these different approaches.

Speakers will include Andrea Menaker, Office of the Legal Advisor, US State Department, who represents the United States in NAFTA Chapter 11 arbitration proceedings; Oscar Garibaldi, of DC law firm Covington & Burling, who has represented various clients in investment treaty arbitration, including US energy firm LG&E in their dispute with Argentina; and Gonzalo Flores, a long-standing staff-lawyer with the Washington-based ICSID.

The event will be held at the law offices of Steptoe Johnson at 1330 Connecticut Ave, N.W., Washington, DC, from 12:30 PM to 2 PM. For further information visit the website <http://www.dcbar.org> or contact Mark Kantor at: mkantor@abanet.org

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