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Contents at a Glance:

Arbitration Watch:
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1. Canada prevails in UPS arbitration, as tribunal splits over NAFTA Ch.11 breaches,
By Luke Eric Peterson

In a much-awaited ruling handed down this week, an international arbitration tribunal has rejected a claim by the US-based express courier service UPS, which had alleged that Canada's postal service engaged in anti-competitive practices contrary to Canada's obligations under the investment chapter of the North American Free Trade Agreement.

The arbitral tribunal rejected allegations that Canada was in breach of NAFTA Article 1105 which provides foreign investments with the so-called minimum standard of treatment under customary international law.

Notably, the tribunal members diverged as to UPS's claim that Canada had discriminated against the US courier service, contrary to the NAFTA Article 1102 obligation to provide National Treatment.

While arbitrators L. Yves Fortier and Justice Kenneth Keith held that Canada had not violated the terms of the National Treatment obligation, arbitrator Ronald Cass held, in a dissenting opinion, that Canada had committed breaches of that obligation.

UPS first mounted its arbitration claim against Canada in 2000, alleging that its subsidiary UPS Canada found itself at a disadvantage to Canada Post's express courier service, Purolator.

Among other claims, lawyers for UPS had pointed to the policies and infrastructure which undergirded Canada Post's letter-delivery operation, and alleged that some of those perquisites – such as publicly-located postal drop-off boxes and exemptions from customs procedures applicable to other companies – served to put Canada Post's express courier service in a more favourable situation than that of other private operators.

At press time, the arbitral ruling in the UPS case had not been released to the public. Under the terms of a confidentiality order governing the arbitration, the parties will first review the award to ascertain whether any confidential business information need be redacted.

The UPS case had attracted a significant amount of public scrutiny, with several non-governmental organizations intervening in the case, including the Canadian Union of Postal Workers, and the US Chamber of Commerce.*

Among the issues to have been debated in the arbitration was the extent to which Canada's Publications Assistance Program (PAP) – a policy designed to promote the wider distribution of Canadian newspapers and periodicals – may have unfairly disadvantaged UPS. The US firm had objected to a rule which restricts PAP subsidies to those publishers who use Canada Post as their distribution channel.

For its part, Canada had retorted that the PAP was exempted from review under NAFTA Chapter 11 by virtue of NAFTA Annex 2106 which provides that any measures adopted or maintained with respect to cultural industries will be governed by the rules of the earlier Canada-US Free Trade Agreement (a NAFTA precursor which offers less powerful foreign investment protection obligations).

Until the UPS ruling, the cultural industries clause of the NAFTA had yet to be interpreted by an arbitration tribunal. According to a brief backgrounder issued by the

Government of Canada**, the tribunal in the UPS case upheld Canada's argument that the Publications Assistance Program was exempted from scrutiny by virtue of the Annex 2106 cultural industries clause. "In any event," the backgrounder adds, "the tribunal found there was no violation of national treatment".

The parties to the arbitration were ordered to bear their own legal costs, and to share the costs of the arbitration proceeding.

Because the arbitration was conducted under the UNCITRAL procedural rules, the award might be subject to (limited) review by the domestic courts of the place of arbitration (Washington, DC). At press time, there was no word as to whether the award might be challenged in the US courts.

Sources:

*"Business group, union and NGO weigh in on UPS arbitration against Canada", By Luke Eric Peterson, Investment Treaty News, Nov.21, 2005, available on-line here.

**Government of Canada press release and backgrounder available here.

Previous ITN reporting: "Tribunal still deliberating in NAFTA dispute brought by UPS against Canada", By Fernando Cabrera, December 19, 2006, available on-line here.

2. ICSID rejects Argentina's bid to disqualify tribunal in Sempra/Camuzzi arbitration, By Luke Eric Peterson and Fernando Cabrera

The International Centre for Settlement of Investment Disputes (ICSID) has rejected a bid by Argentina to disqualify the three members of an arbitral tribunal sitting in an investment treaty claim brought by the natural gas companies Sempra and Camuzzi.

In a letter sent to the parties last week, ICSID indicated that the challenge had been rejected by the Chairman of the ICSID Administrative Council (the Centre's governing body). As is customary in the ICSID context, no reasons were given to explain or justify the decision.

As was earlier reported in ITN, Argentina had sought the disqualification of the tribunal, following a decision by the tribunal not to admit a post-hearing submission, which appended two legal rulings rendered in other ongoing arbitrations against Argentina – and which Argentina deemed to be of relevance to its defence of the Sempra-Camuzzi arbitration.

In particular, Argentine government lawyers had flagged the favourable ruling in the LG&E v. Argentina arbitration, where an ICSID tribunal had declined to follow the lead of an earlier tribunal in the CMS v. Argentina arbitration; the upshot of the LG&E ruling had been to accept Argentina's defence of "necessity" so as to justify that country's actions taken during the course of its earlier financial crisis. In the LG&E ruling, the tribunal had absolved Argentina of liability for potential breaches of the US-Argentina bilateral investment treaty during a 17 month window during which the financial crisis was at its peak.

Sempra and Camuzzi had opposed the eleventh-hour bid by Argentina to have the tribunal admit the LG&E decision and another procedural ruling from the LG&E arbitration. Counsel for Sempra and Camuzzi had accused Argentina of delay tactics, and pointed out that the LG&E rulings were readily available to the public and presumably to the arbitrators in the Sempra-Camuzzi proceeding.

Ultimately, the tribunal signaled that it would not admit the two LG&E documents, citing the danger of further delays to the Sempra-Camuzzi proceeding and the potential "for a never ending exchange of arguments" over the potential relevance of the LG&E decisions.

Following this move by the tribunal, Argentina sought the disqualification of the tribunal members, objecting to what it characterized as an "arbitrary" ruling by the tribunal, and voicing concerns as to the capacity of the arbitrators to exercise independent judgment in the proceeding.

Later, following additional exchanges between the parties and the tribunal, Argentina would add that it feared the tribunal to have committed a "manifest prejudgment" by virtue of the tribunal's holding that it "does not consider necessary to review the relevance of the decision enclosed with Argentina's submission, which was rendered by a different tribunal, over a distinctive set of facts, and in view of a likely different set of arguments and evidence."

Indeed, counsel for Sempra and Camuzzi had objected that the LG&E ruling – which found Argentina to have acted out of "necessity" in relation to its treatment of LG&E – was grounded in the unique evidence presented in the LG&E proceeding.

For their part, Sempra and Camuzzi took the view that they had presented evidence in their own case to show that Argentina had not acted out of necessity, and that the country had, in fact, contributed to its own financial crisis. Because Sempra and Camuzzi were not privy to the evidence tabled in the LG&E case, they cautioned against relying upon the finding of necessity reached in the LG&E arbitration.

CHALLENGE REJECTED BY ICSID

Following extensive exchange of correspondence, and a period of review, ICSID ultimately rejected the bid by Argentina to disqualify the tribunal in the Sempra and Camuzzi case.

Notably, in the interim, another award was rendered in one of the myriad investment treaty arbitrations proceeding against Argentina. In a ruling dated May 22nd, 2007 Argentina was found liable for breaching protections owed to the US-based Enron Corporation under the US-Argentina bilateral investment treaty.

While the Enron tribunal rejected Argentina's defence of necessity – electing to follow the reasoning adopted in the earlier-resolved CMS v. Argentina arbitration – the tribunal made no mention of the conflicting ruling in the LG&E v. Argentina case. Nor did the Enron tribunal offer reasons for diverging from the necessity defence granted to Argentina in the LG&E case.

Privately, Argentine officials express frustration at the growing body of "contradictory" rulings in ICSID arbitrations arising out of the Argentine financial crisis.

It remains to be seen, however, whether the Sempra-Camuzzi tribunal will hand down a decision on liability which seeks to contextualize its own reasoning in light of the handful of existing arbitral decisions rendered by ICSID tribunals in Argentine financial crisis cases.

A ruling in that case could come sometime later this year.

Sources:

"Argentina moves to disqualify tribunal in dispute over admitting earlier rulings", By Luke Eric Peterson and Fernando Cabrera, Investment Treaty News, May 9, 2007, available on-line here.

Earlier ITN coverage of the Enron v. Argentina ruling: "Enron wins $106 Million (US) in financial crisis claim against Argentina", By Luke Eric Peterson, Investment Treaty News, May 27, 2007, available on-line here.

Earlier ITN coverage of the LG&E v. Argentina ruling: "Tribunal holds Argentina liable for BIT breaches, but accepts necessity plea in part", By Luke Eric Peterson, Investment Treaty News, October 5, 2006, available on-line here.

3. Canada seeks public feedback on its environmental review of India investment treaty, By Fernando Cabrera

As bilateral negotiations heat up between Canada and India on a Foreign Investment Protection Agreement (FIPA), Canada has released a report on an initial environmental assessment of the FIPA for public consultation. Canada has given the public until June 25, 2007 to make comments on the report.

The negotiations on the Canada-India FIPA were re-launched in 2004 using Canada's new model FIPA as the basis. Canada anticipates the negotiations to be completed successfully in the next few months.

The report outlines the results of the environmental assessment carried out under the 2001 Framework for the Environmental Assessment of Trade Negotiations. Environmental assessments under the framework focus solely on the possible environmental impacts that trade pacts such as the Canada-India FIPA could have on Canada. The impacts on the other negotiating party or the world at large are not taken into consideration.

This is the second time that this framework has been applied, having once been used in the context of the Canada-Peru FIPA which was signed in November of last year. Given that the Canada-Peru FIPA was not expected to attract much investment from Peru to Canada it was not surprising that that environmental assessment concluded the pact would have little effect on Canada's environment.*

According to the initial environmental assessment conducted for the Canada-India FIPA, the pact is not expected to make significant changes to investment flows and therefore the environmental impact in Canada is expected to be minimal.

At the same time the assessment found that the "FIPA will not have a negative effect on Canada's ability to develop and implement environmental policies and regulations." According to the report Canada intends to safeguard its policy space in this respect.

While finding that the FIPA will yield insignificant changes to cross-border investment flows, the assessment does deal with the particular Canadian sectors in which Indian investors have shown an interest in increasing their participation as a result of the FIPA.

The first sector looked at is Information and Communication Technology. The report points out the dangers the sector can pose to the environment, including those posed by e-waste (electronic equipment discards) and the toxic materials used in the chip making process. However, the report concludes that major Canadian firms in the telecommunications sector are leaders in environmental stewardship, having environmental policies in place, providing education to employees on the subject, and with many using third party auditing of their policies.

In the financial sector the report concludes that the only possible effects are indirect impacts from the financing or insuring of projects in other sectors.

Moving to the auto sector, the report highlights possible impacts from the increased production of automobiles. These impacts include an increase in the extraction of natural resources and an increase in air emissions due to higher energy use. Of these possible environmental impacts, the report only says that technologies can be used to improve energy efficiency and lower emissions.

In the oil and gas sector the report focuses on public concerns over water usage and land reclamation methods associated with extracting oil from the oil sands in the province of Alberta. The water usage concerns include the potential negative impacts on the aquatic system, the removal of water from the watershed, and the ponds being created by the surface extraction activities

On the land reclamation side, the report cites concerns that the proposed reclaimed landscape will be significantly different that the original forests. There are also concerns about the fragmentation of the forest as a result of the construction of new roads and exploration well sites. The report also acknowledges the high emission of greenhouse gasses that oil production from the oil sands generates in comparison to conventional crude oil production.

The report concludes that technology will be an essential element in addressing the environmental impacts of increased oil production. It points to the government's CANMET Energy Technology Centre in Alberta which is conducting research into environmental technologies that hope to reduce the industry's dependence on natural gas and water, as well as lower GHG emissions.

Aside from looking into the possible impacts on the Canadian environment, the report also discusses several environmental cooperation activities between Canada and India, including work done between the countries' respective environmental ministries under the banner of the Canada-India Environmental Institutional Strengthening Project. As part of the project the parties worked to increase India's institutional capacity to deal with environmental issues such as air quality and hazardous waste.

Given the initial environmental assessment's findings, the intermediate step of preparing a draft assessment has been deemed unnecessary, and a final assessment will instead be completed directly, while taking into account inputs from the interested public. The release of the final assessment is expected to coincide with the conclusion of negotiations with India.

Information on how to submit comments to the Environmental Assessment Committee as well as a copy of the report on the initial environmental assessment can be found on DFAIT's website.

Sources:

*See "Canada Peru set to sign investment agreement by year's end", by Luke Eric Peterson, December 14, 2007, Investment Treaty News, available on-line here.

4. Tribunal selected to hear chemical company's claim against Canadian ban on Lindane, By Luke Eric Peterson

A tribunal has been constituted to hear a NAFTA Chapter 11 arbitration between US-based Chemtura Corporation and the Government Canada.

The arbitration claim arose following a move by Canada to phase out a controversial agro-chemical used as a pesticide and fungicide.

The tribunal will be chaired by Prof. Gabrielle Kaufmann-Kohler, a Swiss lawyer with extensive experience serving as arbitrator or chair in ICSID proceedings. Canada nominated Cambridge University Law Professor James Crawford to the tribunal, while Chemtura selected Charles N. Brower, a Judge on the Iran-US Claims Tribunal.

Chemtura's corporate predecessor, the Crompton Corporation, had first warned Canada in 2001 that it might sue the Government for $100 Million (US) in compensation for the alleged expropriation of its Canadian investments, following a Government move to ban the chemical Lindane.

Chemtura objects to a decision by Canada's Pest Management Regulatory Agency (PMRA) to ban Lindane due to the chemical's health and environmental effects.

The US firm insists that the PMRA decision lacked sufficient scientific underpinning, and was inspired by a desire to resolve an ongoing trade dispute between Canada and the United States.

Chemtura notes that US canola growers had complained during the late 1990s of finding themselves at a competitive disadvantage vis a vis Canadian farmers, thanks to the widespread use of Lindane-based seed treatments in Canada, at the same time as such treatments were banned in the United States.

The US firm accuses Canada of caving to US criticism, and agreeing to a ban on the manufacture and sale of lindane-based seed treatment products in Canada.

According to Chemtura, the US and Canada ultimately struck a deal which would involve the cessation of manufacturing and sales of lindane-based seed treatment products in Canada. The US firm also accuses Canada of reneging upon a commitment to undertake further scientific risk assessments, the outcome of which would have determined the ultimate fate of Chemtura's product.

According to Chemtura, the firm has endured breach of various NAFTA Chapter 11 obligations, including those related to National Treatment, Minimum Standards of Treatment, Expropriation, and Performance Requirements.

With respect to the last of these claims, Chemtura's Notice of Arbitration contends that Canada's ban on the sale and use of Lindane amounts to a requirement that substitute Canadian products be used in lieu of Lindane produced and sold by the US firm.

The arbitration is slated to take place under the UNCITRAL rules of arbitration.

As has been earlier reported in ITN, the move by Chemtura to push forward with an arbitration against Canada also comes on the heels of a decision by US regulatory authorities to eliminate the use of Lindane in all agricultural contexts.

Sources:

Legal documents related to Chemtura arbitration available on the Government of Canada's NAFTA Chapter 11 repository here.

Earlier ITN reporting: "US Chemical firm pressing forward with NAFTA suit against Canada", By Luke Eric Peterson and Fernando Cabrera, Investment Treaty News, February 14, 2007, available on-line here.

5. Poland embroiled in new arbitration over privatization reversal,
By Luke Eric Peterson

An ITN investigation reveals that the Government of Poland is defending against an arbitration claim brought by the German sugar company, Nordzucker, in a dispute over the non-privatization of two Polish sugar producers.

Nordzucker accuses Poland of having breached the terms of the Germany-Poland bilateral investment treaty (BIT), by virtue of breaking "commitments" made to the company. An arbitration was launched last year under ad-hoc rules, and has been quietly proceeding since that time.

At the core of Nordzucker's case is an allegation that Polish authorities reversed course on a commitment to sell the German firm two state-owned sugar producers (including a total of five production plants). While the German firm did acquire two producers in 1999, they had plans to acquire two others, which would have brought their total market-share to 20% of Poland's sugar industry.

When the Polish Government announced that it would fold the desired producers into a larger state-owned concern, Nordzucker turned to the courts, and ultimately to international arbitration thanks to the provisions of the Germany-Poland BIT.

In broad terms, the arbitration bears surface similarities to another ongoing investment treaty arbitration, Eureko v. Poland, where the Dutch insurance giant has accused Poland of reneging on a commitment to sell a controlling stake in Poland's largest insurer, PZU.

Eureko turned to investment treaty arbitration in 2003, alleging that Poland had violated terms of the Poland-Netherlands bilateral investment treaty.

In a partial award rendered in 2005, a majority of the three-member arbitration tribunal held Poland liable for certain breaches of the Netherlands-Poland BIT.

A financial damages phase of that arbitration has yet to move forward, as Poland has sought to challenge one of the tribunal members overseeing the Eureko proceeding.*

POLAND FACES OTHER BIT CLAIMS

The Polish Government has faced a number of investment treaty claims in recent years – apart from the Nordzucker and Eureko matters - although a full accounting is not available.

A spokesperson with the Polish Treasury Department tells ITN that his Ministry is personally involved in several BIT arbitrations including one with the US agricultural giant Cargill, and another long-running dispute with German national Ingo Lutz Schaper, an investor in a Polish paper enterprise.

The Cargill claim was the subject of a profile in a recent edition of ITN.**

In addition to the cases handled by the Polish Treasury Department, ITN has earlier reported details of an otherwise unpublicized investment treaty arbitration by a group of Spanish investors against Poland at the International Chamber of Commerce.***

Sources

ITN Interviews

* "Challenge to Arbitrator Schwebel rejected by Belgian court, Poland seeks appeal", By Luke Eric Peterson, Investment Treaty News, January 17, 2007, available on-line here.

** (See: "Poland defending arbitration claim over agricultural quotas", April 13, 2007, available on-line here.)

*** "Polish Finance Ministry not talking about BIT arbitration at ICC", By Luke Eric Peterson, Investment Treaty News, January 31, 2006, available on-line here.

"Divided tribunal find Polish privatization 'reversal' violates treaty with Netherlands", By Luke Eric Peterson, Investment Treaty News, September 15, 2005, available on-line here.

"MSP Battles With Sugar Investors", Aug 6, 2003, Polish News Bulletin

6. ICJ has jurisdiction in Congo case, but rejects broad concept of diplomatic protection
By Fernando Cabrera

The International Court of Justice has held that it has jurisdiction to hear the diplomatic protection case pitting the Republic of Guinea, on behalf of Ahmadou Sadio Diallo, against the Democratic Republic of Congo (DRC).

In a ruling handed down May 24, the Court rejected several DRC objections to its jurisdiction but at the same time limited Guinea's case by rejecting its attempt to exercise an expanded version of diplomatic protection.*

As previously reported by Investment Treaty New, the dispute arose following Mr. Diallo's imprisonment and eventual expulsion from the DRC in February of 1996.

Guinea has taken up Mr. Diallo's claim in the absence of an investment protection treaty affording him the option of investor-state arbitration. For its part, Guinea alleges that the expulsion was a political maneuver intended to prevent Mr. Diallo from recovering millions of dollars worth of debts owed to his companies by the DRC and oil companies with connections to the then DRC government.

The DRC (Zaire at the time) said it expelled Mr. Diallo because his "presence and conduct have breached public order in Zaire, especially in the economic, financial and monetary areas, and continue to do so."

Guinea is seeking to exercise diplomatic protection for injuries caused to Mr. Diallo as a person and as a shareholder of his two companies. Guinea was also seeking an expansion of diplomatic protection to include diplomatic protection by substitution, which would allow it seek protection with respect to injuries to Mr. Diallo's companies even though they were incorporated in the DRC.

The DRC has raised objections to all three claims of diplomatic protection invoked by Guinea. It objected to the protection of Mr. Diallo's rights as an individual by arguing that Mr. Diallo did not exhaust "the available and effective local remedies…," as required by international law.

On this point, the Court held that the immigration officer who signed the notice removing Mr. Diallo characterized it as a "refusal of entry" - something which is not appealable under Congolese law – as such Mr. Diallo did not have a local remedy available. The Court rejected the DRC's argument that the immigration officer made a mistake and the removal was in fact an "expulsion" which is appealable under Congolese law.

The DRC also objected to Guinea's effort to assert diplomatic protection in relation to Mr. Diallo's rights as a shareholder arguing that this protection can only be invoked to protect against "acts of interference in relations between the company and its shareholders." The DRC argues that this was not the case with Mr. Diallo's detention and removal because he could have exercised his rights as a shareholder from abroad or have delegated his tasks to local administrators. The DRC also argues that local remedies were not exhausted with respect to this claim for protection.

Guinea on the other hand argued that under Congolese law Mr. Diallo's shareholder's rights include the right to control, supervise and manage his companies.   For Guinea the arrest, detention and expulsion had the effect of "preventing (Mr. Diallo) from continuing to administer, manage and control any of the operations" with the intent of preventing him from exercising his rights and recovering the debts owed to his companies. Guinea also disputed the DRC's claim that Mr. Diallo could have exercised his direct rights as shareholder from Guinea.

On this question, the Court found that Guinea did have standing to seek protection for the violation of Mr. Diallo's shareholder rights, though it refrained from deciding exactly which rights that encompassed, stressing that this was an issue for the merits phase. The Court again rejected the DRC's argument that local remedies were not exhausted.

Finally, the DRC had objected to Guinea's third claim for so-called "diplomatic protection by substitution" arguing that this concept went "far beyond what international law provides." The DRC had argued that Guinea was asking the court for permission to invoke diplomatic protection on behalf of companies not having its own nationality, something contrary to the principle of diplomatic protection in international law.

Guinea countered that the concept of diplomatic protection by substitution as an exception to the general rule "that the right of diplomatic protection of a company belongs to its national state" has been confirmed by numerous arbitral awards as well as state practice. Given the fact that its national Mr. Diallo was sole shareholder and manager of DRC companies, Guinea argued that the exception should be applied to this case, so that Guinea could assert diplomatic protection over those companies.

The Court disagreed with Guinea on this claim, holding that at the present time State practice and decisions of international courts did not reveal an exception in customary international law as was being invoked by Guinea.

Guinea also pointed to Article 11(b) of International Law Commission's (ILC) Draft Articles on Diplomatic Protection of 2006, which allows for diplomatic protection by substitution where a company's incorporation in the State being sued "was required by it as a precondition of doing business." According to Guinea, DRC law required Mr. Diallo to incorporate his businesses there in order to do business in the country.

The Court went on to hold that it had not been established that Mr. Diallo was obliged to incorporate the companies in the DRC in order to operate there. As a result, the Court did not have to deal with the question of whether paragraph 11(b) of the ILC Draft Articles reflected customary international law.

The case will now move to the merits phase.

Sources:

(* For background information see earlier ITN reporting on this case: Jurisdictional decision expected this year in ICJ dispute between Guinea and DRC", By Fernando Cabrera, Investment Treaty News, April 27, 2007, available on-line here.

The ICJ's decision can be found here.

In-Depth:
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7. US and Glamis Gold dig in for fight over definition of expropriation under NAFTA, By Fernando Cabrera and Luke Eric Peterson

In advance of hearings to be held this summer, written briefs have been exchanged in a high-profile NAFTA Chapter 11 arbitration between the US Government and the mining firm Glamis Gold Ltd.

Much of the Glamis dispute centers around two measures adopted by California: the California State Mining and Geology Board (SMGB) regulations and California Senate Bill (SB 22).*

The SMGB's regulations were adopted to ensure that mined lands are returned to a usable condition and pose no danger to public health and safety. They require complete backfilling of open-pit metallic mines. Meanwhile, SB 22 was enacted to provide protection to Native American sacred sites; that legislation requires complete backfilling of open-pit metallic mines that are located within the vicinity of Native American sacred sites.

Legal arguments made by the US Government on one side, and the Canadian mining company on the other, highlight the lack of consensus as to when Government measures will be defined as an indirect form of expropriation – and trigger a requirement to pay compensation to affected foreign investors.

Glamis claims that the California measures have made its Imperial Mine project economically worthless and have resulted in an indirect expropriation. The Canadian firm mounted an arbitration under Chapter 11 of the North American Free Trade Agreement in an effort to claim compensation for this alleged expropriation. The US Government retorts that these measures were enacted to protect important Native American sites and ensure mined lands are returned to a usable condition and are not expropriatory.

What framework must be used in analyzing a claim of indirect expropriation is a question which has preoccupied a number of international arbitration tribunals, and a single agreed approach has yet to emerge from investment treaty disputes.

TEST FOR EXPROPRIATION

Glamis' central argument for expropriation before the NAFTA tribunal is that the California measures served to fully deprive the company of its property rights in the

Imperial Project. According to Glamis' legal expert, Professor Thomas Walde, full deprivation "leads to per se finding of expropriation…" without the need for further inquiry into other factors.

In this respect, Glamis urges an expropriation analysis which focuses narrowly on the effect or impact of the alleged expropriation; if the effect has been a total deprivation, then this should lead directly to a finding of expropriation under the NAFTA's Chapter Eleven. Glamis is seeking damages of at least 50 Million (USD) in compensation

However, Glamis argues that if the tribunal were to reject its argument that there has been a total deprivation, then the tribunal ought to apply a so-called balancing test. On this approach, the tribunal would look at the degree of impact or deprivation suffered by the investment, as well as other considerations such as the reasonableness of the investor's expectations and the character of the government measures.

For its part, the US Government makes several preliminary objections, including that Glamis' claim is not "ripe" for arbitration – because there has been no final application of the regulations in question to Glamis' project.

The US Government then argues that there has been no expropriation – even assuming that the California measures deprived Glamis's investment of all of its value – because Glamis never had a property right to engage in the activities which have been prohibited by the challenged measures. In making this argument, the United States relies on certain "background principles" in existence at the time Glamis made its investments which it argues limited the nature of Glamis's property rights. The United States thus contends that the California measures in question were merely an implementation of these background principles.

In the alternative – assuming that the Tribunal does not find Glamis's property right to be limited by these background principles -- the US argues that the proper interpretation of the expropriation clause in this case requires that the tribunal examine the same three basic factors discussed by the investor. At the same time, the US noted that this list of three factors is not exhaustive, and that in other cases, other factors might need to be weighed.

EXAMINING THE IMPACT OF GOVERNMENT MEASURES

In its legal pleadings, Glamis argues that the measures taken by California have dispossessed it of the full value of its investment. Citing a valuation expert report produced by Behre Dolbear, a mining industry valuation company, Glamis claims that the value of its investment went from 49 million USD to zero as a result of the California measures.

The US disputes these figures citing both an internal Glamis analysis from 2003 in which the company found the project still had a net present-value of 9.1 million even assuming compliance with the challenged measures, and the US government's own expert reports that conclude that the property has actually gone up in value up to 159 million USD due to the skyrocketing price of gold.

Glamis, for its part, claims that the 2003 Glamis study cited by the US was merely a “back of the envelope analysis”: one which concluded that the project was not profitable even without fully accounting for the additional costs of backfilling and recontouring land.

Furthermore, Glamis adds that the projected net present-value of 9.1 million USD figure would be obliterated by the costs of posting hefty financial guarantees to insure that reclamation would take place, which it argues were not taken into account in its internal analysis. As for the rising gold prices, Glamis counters that mine operating costs have risen in tandem with gold prices going up 85% since 2002.

When each side applies its conclusions on the impact of government measures to their version of the tests they reach predictably opposite conclusions. Glamis argues that since a full deprivation has occurred the tribunal’s inquiry should lead to an immediate finding of expropriation. The US counters by arguing that the tribunal’s inquiry should end here, because under its version of the balancing test the lack of a severe enough injury - which its calculations demonstrate - means that Glamis’ claim fails at the first hurdle.

The US contends:“(i)f the economic injury (deprivation of right) is not severe enough…this alone compels denial of the claim.”

Nevertheless, both sides go on to make alternative arguments relating to the other two factors which might be part of a balancing test used by the tribunal.

INVESTOR’S EXPECTATIONS

According to Glamis it “acted at all times as a prudent, reasonable investor in pursuing its claims and its expectation that it would be able to mine at the Imperial Project site was reasonable based on the available facts as well as the structure of the applicable provisions of mining law.” The company claims that prior to a 1997 study - by which time it had made most of its investment - it had no way of knowing the area had religious or ceremonial value to the Quechan.

By contrast, the US argues that Glamis invested in a highly regulated area and should have reasonably anticipated the extension of those regulations. In particular, the United States points to SMARA, California legislation enacted in 1975, that requires mined lands to be reclaimed to a usable condition and pose no threat to health and safety.
The US Government notes that SMARA anticipates regulation, including backfilling, to achieve its ends.

Further, the US Government calls attention to the Sacred Sites Act, enacted in 1976, which prohibits activity that irreparably damages Native American sacred sites or that interferes with the free expression or exercise of Native American religion. For these and other reasons, the US contends that the “expectations” prong of the analysis should favor a finding of no expropriation.

Glamis counters that the fact the mining industry is regulated did not and could not have caused it to believe that a mandatory full backfilling requirement would be forthcoming. It argues that the mandatory full backfilling requirement set out by the California measures violated its expectations and that this factor favors a finding of expropriation.

NATURE OF THE GOVERNMENT MEASURES

Finally, both sides have different views on the nature of the California measures and what that means for purposes of an expropriation analysis. Glamis argues that once it had proven the severity of the harm caused to it, it was up to the respondent to show the justifiability of the government measures in dispute.

For Glamis this meant the US had to show that the measures were non-discriminatory and of general application, noting that valid police power regulations can only be non-compensatory when, among other things, they meet these criteria.

Even if the measures were proven non-discriminatory, Glamis argues that the US would still have the burden to prove that they had been enacted for a valid public purpose, that there was a link between the public purpose and the measures, that the public benefit being sought was proportional to private harm caused, and that the claimant was not being asked to bear a disproportionate burden.

On this last factor Glamis notes that an otherwise permissible regulation must not disproportionately burden individuals such that they are required “to bear public burdens which, in all fairness and justice, must be borne by the public as a whole.”

The US disagrees with Glamis’s view, re-iterating that the burden is not on the Government to justify the measures. Lawyers for the US State Department argue that the tribunal is not in position to judge the purpose of the California measures nor is it its job to analyze the effectiveness of the measures at achieving their goals.

In other words, the US does not agree that the tribunal should enter into an assessment of the proportionality of the impugned measures, i.e., whether they are proportionate to their stated purpose.

As for the separate question of what burden has been imposed upon Glamis, the US Government argues that “(i)t is not ‘disproportionate’ for a State to require mining operators to internalize the costs of the environmental and cultural damage their own activities cause.”

Moving to the issue of discrimination, Glamis argues that the California measures were clearly discriminatory, aimed at stopping the Imperial Mine project. Glamis argues that this was made evident by then California Governor Gray Davis who directed the

Secretary of Resources "to pursue all possible legal and administrative remedies that will assist in stopping the development of the Glamis gold mine," According to Glamis, Governor Davis' instructions led to the California measures that have given rise to this dispute .

The US, for its part, argues that the California measures were non-discriminatory, of general applicability, stating that although they may have been designed with Glamis in mind, "(t)he California measures only instruct mining companies throughout the state – not just Glamis – to clean up after themselves, and to reclaim the land to a usable condition for others once their mining activities on the land are complete." The US also notes that the SMGB regulations have been applied to other mining projects in the State.

HEARINGS SLATED FOR AUGUST (AND SEPTEMBER)

It now falls to an arbitral tribunal to weigh the arguments of the US Government and Glamis Gold. Oral hearings are slated for August 13-17, 2007 in Washington DC. If necessary, a further week has been set aside from September 17-21, 2007.

In contrast with most investment treaty arbitrations, NAFTA arbitrations are often opened to public scrutiny, following public and media criticism of earlier close-door arbitrations. The Glamis v. USA hearings will be open to public viewing via closed circuit broadcast organized by the International Centre for Settlement of Investment Disputes.

The presiding tribunal consists of Prof. David C. Caron, the US nominee, Kenneth D. Hubbard, Glamis's nominee, and tribunal President Michael K. Young. Glamis's earlier nominee Donald L. Morgan, who served on the tribunal for several years, resigned from the tribunal in November 2005 following a challenge lodged by the US Government.

The reasons for that challenge have not been publicized, although ITN understands that they pertained to an alleged conflict of interest arising out of Mr. Morgan's involvement as a lawyer in ongoing litigation against the US Department of the Interior (the federal agency charged with issuing mining permits).

Sources:

(* NOTE: Glamis also claims an indirect expropriation at the hands of the US Department of the Interior, for its alleged refusal to process its Imperial Project Plan of Operation, something which would be required for mining to commence were California's backfilling laws rescinded.)

Documents pertaining to the Glamis case are available at US Department of State's website here.

Briefly Noted:

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8. Washington DC event to discuss Glamis Gold v. USA arbitration

The DC Bar Association is to host an afternoon panel discussion on June 26th entitled "International Investment Agreements and Natural Resources Disputes: The Case of Glamis Gold v. United States (NAFTA Chapter 11)"

The panel will be moderated by Margarete Stevens, King & Spalding (Former Senior Counsel at ICSID), and will include presentations from lead counsel for both sides in the Glamis arbitration (Andrea Menaker, Chief of the NAFTA Arbitration Division, U.S. State Department, and Alan Gourley, Crowell & Moring) followed by comments from a panel of experts (Ethan Shenkman, of the WilmerHale law firm, and Daniel Magraw, President, Center for International Environmental Law).

A registration form for the event can be found here.

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