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Arbitration Watch:
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1. Ecuador moves against Occidental Petroleum contract and assets,
By Luke Eric Peterson

The Ecuadorian Government has cancelled an oil contract with Occidental Petroleum, the country's largest foreign oil investor, and has ordered the seizure of the company's Ecuadorian assets.

The move is likely to spawn a further bout of international litigation between the California-based company and the Ecuadorian Government.

In 2004, Oxy prevailed in a bilateral investment treaty arbitration with the Ecuadorian Government over the firm's entitlement to Value-Added Tax refunds in Ecuador. Ecuador is currently challenging that arbitral award in the UK courts.

Meanwhile, shortly after the conclusion of Occidental's arbitration, the state-owned energy firm Petroecuador accused Occidental of having improperly transferred a share of its Ecuadorian production activity to a Canadian energy firm. Petroecuador requested that the Minister of Energy investigate this allegation, and rule as to whether it breached the terms of Occidental's contract with Petroecuador.

In a ruling announced yesterday, Minister of Energy Ivan Rodriguez announced that Occidental's actions were in breach its participation contract, and ordered the immediate winding up of Occidental's activities in the country

The move comes on the heels of an April, 2006 hydrocarbons law which increased the state's take of oil revenues. Ecuadorian President Alfredo Palacios has been under strong domestic pressure to exact greater concessions from foreign energy firms in a climate of high oil prices, and great economic deprivation suffered by ordinary Ecuadorians.

The so-called windfall tax introduced by Palacios Government has been a red flag for foreign investors, who have murmured that they might launch arbitration claims against the Ecuadorian Government for breach of tax stability guarantees contained in energy contracts, as well as for breach of relevant investment treaties concluded by Ecuador.

In a May 4, 2006 filing with the US Securities and Exchange Commission (SEC), Occidental revealed that it is "evaluating potential legal actions" in response to the new windfall tax. Oxy contends that the new law breaches the terms of the company's participation contract with state-owned Petroecuador, as well as the terms of the US-Ecuador bilateral investment treaty.

The US Government has echoed those views, with the Associated Press reporting that a US Embassy spokeswoman in Quito has characterized the new hydrocarbons law as a breach of the US-Ecuador bilateral investment treaty. Recently, free trade talks between the United States and Ecuador were suspended – a move widely attributed to US displeasure with Ecuador's energy policies.

Sources:

ITN Interviews

"Ecuador voids Occidental Petroleum's oil concession", By Gonzalo Solano, Associated Press, May 16, 2006

"Quito rally urges Occidental's expulsion", By Hal Weitzman, Financial Times, May 9, 2006

"U.S. says Ecuador oil-tax law violates bilateral investment treaty", By Jeanneth Valdivieso, Associated Press, April 21, 2006

2. Analysis: Foreign investors still in the dark as to terms of Bolivian nationalization, By Luke Eric Peterson

According to a source familiar with the legal thinking of multinational energy companies operating in Bolivia, the firms remain unclear as to the potential impact of President Evo Morales' recent move to nationalize energy interests.

Morales has issued a nationalization decree which is heavy on rhetoric, but light on details, says this source.

While the Bolivian military has seized energy firm assets, the companies continue to operate exploration and production activities. Most have written letters to the Bolivian Government indicating that, until further notice, they will carry on "business as usual", while also hastening to reserve their rights to take legal action at a future date. These letters supplement so-called triggering letters which were sent by the companies some time ago, so as to comply with the mandatory waiting periods imposed by bilateral investment treaties as a prelude to formal arbitration.

The source tells ITN that the foreign companies are waiting to see how this month's nationalization decree will be implemented, and what sort of contractual terms will be on offer. Although companies have been given 6 months to migrate to new contracts with the Bolivian Government, the government has not tabled the draft contracts which would start negotiations.

Among the foreign investors with large stakes in Bolivia, are the Spanish-based Repsol, British Gas, British Petroleum, Brazil's Petrobras, and the French firm Total.

With the exception of Petrobras, the home countries of each firm has concluded a bilateral investment treaty with Bolivia. However, a source tells ITN that Petrobras might be able to compensate for the lack of a Brazil-Bolivia investment treaty, by invoking the rights of Petrobras subsidiaries in Argentina and the Netherlands to bring an arbitration claim under investment treaties signed by those countries with Bolivia. Nevertheless, the Brazilian firm might be reluctant to go to international arbitration with Bolivia, given Petrobras ties to the Brazilian state.

3. Czech Republic moves to set aside arbitral award in Saluka case, By Damon Vis-Dunbar

The Czech Republic has moved to set aside a partial award handed down last March, in an investment treaty dispute with a subsidiary of Japan's Nomura Holdings.

As reported earlier in ITN, a three-member tribunal found the Czech Republic to be in breach of the Fair and Equitable provision of the Czech-Netherlands bilateral investment treaty. Damages have not yet been awarded, and are to be the subject of a separate proceeding.
(See "Saluka Investments claims partial victory against the Czech Republic", ITN, March 29, 2006, available here)

The Dutch-based subsidiary of Nomura, Saluka, had purchased a stake in a newly privatized Czech Bank, Investicni a Postovni Banka (IPB), which later faced insolvency and was placed under forced administration. Saluka argued that IPB was deprived of financial assistance which the Czech Republic provided to competitors – a claim supported by the tribunal.

In seeking an appeal, the Czech Republic maintains that it acted consistently with its public policy on financial support, as it was when Saluka purchased the IPB shares, according to a statement by the Finance Ministry.

"The Czech Republic changed its approach to public support for banks before the first part of IPB shares were obtained in October 1998 from Nomura by Saluka, which only at that point became a foreign investor enjoying protection under the Czech-Dutch treaty," said a statement by the Finance Ministry, as reporter by Reuters News.

The appeal has been filed with a federal court in Switzerland.

Sources

"Czechs appeal against Nomura arbitration verdict", Reuters News, May 3, 2006

"CR appeals March's arbitration verdict in dispute with Nomura", CTK Business News, May 3, 2006

4. France Télécom latest foreign firm to waive claim against Argentina,
By Damon Vis-Dunbar

France Télécom has settled its investment dispute with Argentina, a move that coincides with a letter of understanding between Argentina and Telecom Argentina on steps toward a new tariff structure.

While confirming that France Télécom had "waived its claim" against Argentina, the company has released no statement about the settlement, and a spokesperson said no comments would be issued on the matter.

France Télécom, which had a stake in Telecom Argentina, launched the suit in 2003, after Argentina responded to its financial crisis by freezing tariffs on a range of public services, including telecommunications.

The settlement comes on the heels of a similar letter of understanding between the Spanish firm Telefonica and Argentina, which could lead to suspension of their case which is currently pending at the International Centre for the Settlement of Investment Disputes (ICSID).
(See "Argentina in settlement talks over several BIT arbitrations", ITN, Feb. 17, 2006, available here)

Meanwhile, two water concessionaires - Aguas Provinciales de Santa Fe S.A and Aguas Argentinas S.A. – have agreed to withdraw their ICSID claims against Argentina, in order to facilitate the sale of shares in the companies to third parties. However, the arbitration proceedings are continuing in both cases, as other shareholders maintain their right the pursue compensation.

Suez, a large French firm with multiple suits against Argentina, is a stakeholder in both Aguas Provinciales and Aguas Argentinas. It has not withdrawn its claims in either case, according to a company spokesperson.

In addition to these recent settlements, a string of foreign investor claims against Argentina have been suspended in 2006 at the ICSID, reducing somewhat the burden of litigation borne by the Argentine Government since its financial crisis. As new deals are tabled the foreign firms are once again returning to profit.

As reported in the last issue of ITN, the Spanish firm Gas Natural is inching closer to a settlement after it suspended proceedings until August 2006, by which time the parties hope to have a new tariff structure in place.
(See "Gas Natural and Argentina move cautiously towards a settlement", ITN, April 27, 2006, available here)

Other cases suspended this year at the ICSID include:

- SAUR International v. Argentine Republic – suspended on April 2006

Saur, a French water utility firm, launched its suit at the ICSID in 2002, after rates were frozen for the water and sewerage concession held by Obras Sanitarias Mendoza, an Argentine company it controls. Saur is said to be seeking between $200 and $300 Million US. Proceedings have been suspended for six months, as the firm works with the Province of Mendoza on tariff adjustments.

- Enersis S.A. and others v. Argentine Republic – suspended on March 2006

The electrical distributor Edesur (controlled by the Chilean firm Enersis, which is controlled, in turn, by the Spanish firm Endesa) reached a preliminary agreement with the

Argentine government last summer. The deal prescribes an initial tariff hike of 15 per cent, and a new five-year tariff scheme to be in place later this year.

- Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic – suspended on March 2006

Aguas Cordobesas is jointly controlled by the Spanish company Aguas de Barcelona and the French firm Suez. Negotiations over new tariffs, which led to the suspension of the ICSID proceedings, have been difficult, with strong public opposition to higher fees. Suez has suggested recently that it may seek to withdraw from Aguas Cordobesas should it find a willing buyer.

- Camuzzi International S.A. v. Argentine Republic – suspended on February 2006

Camuzzi, an Italian firm has two claims currently pending against Argentina, one stemming from its investment in electricity and transport companies, the other in gas distribution companies. The case suspended last February relates to its investment in two energy subsidiaries and an energy transport company. The firm's gas case is still in progress. "Camuzzi has associates in the (gas distribution) companies, so a decision there would not be unilateral," a company spokesperson told the Dow Jones Commodities Service.

- AES Corporation v. Argentine Republic – suspended January 2006

The US power company AES, which operates Empresa Distribuidora La Plata (Edelap), was one of the first to reach a preliminary agreement with the Argentine government on tariff hikes. Like the letters of understanding signed by other utility providers, the agreement is said to include an initial rate hike of 15 per cent, followed by a new tariff scheme for the next five years.

Sources:

ITN Interviews

"Saur suspends Ciadi case to renegotiate OS Mendoza contract", El Cronista, April 17, 2006

"Interest growing in Suez stake of Cordoba water utility", Business News Americas, April 18, 2006

"Argentina: Transpa renegotiation deal in the offing", El Cronista, March 29, 2006

"Telecom Argentina to sign new contract with government on Monday", Dow Jones International News, March 2, 2006

"Aguas Provinciales de Santa Fe: A taste of things to come?", Business News Americas, February 8, 2006

Negotiation Watch:
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5. UK and Mexico sign investment treaty, following on heels of UK treaty review,
By Luke Eric Peterson and Damon Vis-Dunbar

The United Kingdom and Mexico signed a bilateral investment treaty last week at an EU-Latin America summit.

The agreement diverges somewhat from the BIT template favoured by the UK Foreign & Commonwealth Office (FCO).

Among the innovations is a NAFTA-style clarification as to the meaning of the terms "fair and equitable treatment" and "full protection and security"; this move comes in response to concerns amongst the NAFTA countries (Canada, Mexico and the United States) that these provisions were open to broad interpretation by arbitral tribunals.

Additionally, the BIT provides for the consolidation of similar investor-state claims, so as to streamline resolution of such cases, and reduce the risk of separate tribunals presiding over similar claims and handing down divergent rulings.

In other respects, the BIT hews to an older-style template.

The terms of the new BIT apply at the post-establishment stage, which is to say that they protect foreign investments and foreign investors once they have been established in a host state according to relevant laws, however the agreement does not impose new obligations on the two governments with respect to the entry and establishment of investments. By contrast, the NAFTA, as well as most Canadian and US BITs, provide national treatment at the pre-establishment stage, which has the effect of placing foreigners on a level footing with local investors with respect to acquiring or establishing businesses in a host state.

The new treaty does not follow the trend set by recent Canadian and US BITs in mandating that investor-state arbitration proceedings be opened to the public. Nor does the treaty expressly provide for the participation of amicus curiae in such arbitrations.

As well, the UK-Mexico BIT does not adopt a provision found in recent Canadian and US BITs, which is designed to clarify the distinction between indirect expropriation and legitimate non-compensable exercises of government regulation.

The Mexican Government has negotiated 22 bilateral investment treaties to date, most of which have entered into force. Mexico has also concluded 12 free trade agreements, 11 of which have investment provisions.

For its part, the United Kingdom has negotiated some 120 BITs since the start of that country's BIT program in the 1970s. Recently, the UK Foreign & Commonwealth Office (FCO) has undertaken a re-examination of its negotiating approach. Following that internal review, the FCO rejected any immediate need to alter certain treaty provisions, such as those on indirect expropriation or Most-Favored Nation treatment (MFN), which have engendered some controversy as a result of their interpretation by arbitral tribunals.

According to a copy of the 2005 review findings, obtained by ITN through an access to information request, the FCO noted that it "would not be feasible to renegotiate" more than 100 of its existing BITs so as to clarify the meaning of expropriation under the treaties. Moreover, the FCO held that there was "no urgent need to act unless it becomes clear that arbitral tribunals are interpreting the UK's (BITs) in a way not envisaged at the time of negotiation or where interpretations are inconsistent with sustainable development goals."

Notably, the FCO did move to add a clause to its future investment treaties which would clarify that the UK reserved the right to limit financial transfers where such limits were prescribed by the UK's obligations under European Community Law.

As earlier reported in ITN, the European Commission has exerted pressure on members of the European Union to ensure that their investment treaties are in compliance with the terms of European Community Law. Last year, legal actions were brought against several governments by the European Commission in an effort to compel those governments to alter the terms of existing investment treaties and to bring them into line with European Community Law. (See: "Euro Commission takes three states to Euro Court of Justice over BITs", ITN, Oct.26, 2006, available here)

Sources:

ITN Interviews

"UK Government: UK and Mexico sign trade agreement in Vienna", Press release, May 12, 2006

6. Canada-Peru investment agreement nears completion but release of text is in doubt, By Damon Vis-Dunbar

Canada and Peru are putting the finishing touches on a bilateral investment treaty after several years of sporadic negotiations.

A Peruvian source said that Canada and Peru tied up most outstanding issues earlier this

month, while a spokesperson for International Trade Canada (ITC) said only “a few minor issues” remain outstanding.

Brooke Gratham, a spokesperson for ITC, said that negotiations are expected to be concluded this month.

“We do not anticipate the need for further meetings between the parties,” wrote Mr. Gratham in an email. “Outstanding issues should be able to be dealt with through written communication.”

Both parties have remained tight-lipped about the treaty throughout the negotiations, which have dragged on longer than expected. As reported earlier in this bulletin, ITC had expressed confidence that the agreement would be concluded by the end of last year, although neither party would comment on the delay.

While an end to formal negotiations appears imminent, it may still be some time before the public is privy to the agreement’s contents. As a rule, Canada does not publish the text of such investment agreements until they have been ratified by Cabinet and entered into force.

This is in contrast to other governments, such as the United States, which posts its trade and investment agreements before they are presented to Congress for ratification, and invites feedback from industry and environmental interests on the draft text.

It is unclear whether Peru will keep the treaty text under wraps until it has been ratified. Carlos Herrera, a Peruvian negotiator on investment matters, noted that Peru had published its recently signed free trade agreement with the US, prior to that agreement’s coming into force. However, he would not say if Peru intended to do the same with the Canadian investment agreement.

Nor is ratification guaranteed, particularly in Peru. A presidential runoff is slated for June 4th, pitting the centre-left Alan García against the more radical Ollanta Humala. Mr. Humala has said he will scrap the US free trade agreement, which contains a comprehensive investment chapter, should he come to power.

Earlier, sources had indicated that the current Peruvian administration, headed by President Alejandro Toledo, was eager to secure the Canada-Peru investment agreement before it left office.

Canada holds significant investments in Peru; International Trade Canada put the total at $1, 790 Million CDN in 2003, the bulk of which exists in the mining sector. In sharp contrast, Peru has invested about $1 Million US.

Given such lopsided investment trends, “The Canada/Peru FIPA is not likely to result in a significant increase of investment flows from Peru into Canada,” states Canada’s trade department. “The main effect of a FIPA is likely to be greater protection for existing

Canadian investment in Peru."

Sources:

ITN Interviews

Canada's Foreign Investment Protection and Promotion Agreement negotiating template, available here.

Initial Environmental Assessment of the Canada-Peru Foreign Investment Protection and Promotion Agreement, available here.

Briefly Noted:
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7. Canadian lumber firm not abandoning NAFTA suit yet, despite softwood deal,

According to a report in Canada's Globe and Mail newspaper, Canadian firm Tembec is not prepared to abandon its NAFTA Chapter 11 lawsuit against the US Government, despite the fact that the Canadian and US Governments have reached a tentative settlement in a long-running dispute over Canadian exports of softwood lumber to the US market.

Tembec CEO James Lopez has been reported to want to see the final terms of the deal before he would move to end his company's investor-state lawsuit against the United States.

The firm filed its NAFTA claim in December of 2003, alleging that US anti-dumping and countervailing duties imposed on Canadian softwood lumber are in breach of investor protections guaranteed under the NAFTA. In May of last year, Tembec's claim was consolidated with that of two other Canadian firms which had brought similar NAFTA suits against the US. The three claims are currently being heard by a single arbitral tribunal.

Efforts to contact spokespersons with the other two Canadian firms, Canfor and Terminal Forest Products, were unsuccessful at press time. Canfor CEO Jim Shepard told a British Columbia newspaper that the deal between the US and Canada is a compromise deal, and while not ideal, is one which the Canadian industry "can live with".

The settlement between Canada and the United States was announced by the two governments late last month.

Sources:

"Tembec wants details before dropping NAFTA suit", May 12, 2006, available here.

"Canfor CEO irked by details", May 3rd, 2006, Prince George Free Press, available here.

8. Montreal arbitration conference will examine various investment treaty issues,

The International Council for Commercial Arbitration (ICCA) is holding a 4 day Congress in Montreal, Canada, from May 31st to June 3rd. Panel discussions of leading arbitration lawyers and arbitrators will canvass a number of topics of which bear upon international investment treaties and their interpretation. Complete program details are available here.

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