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Contents at a glance:

Arbitration Watch:
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1. US investor notifies Canada of potential arbitration over thwarted waste site,
By Luke Eric Peterson

A US citizen, Vito G. Gallo, has notified the Government of Canada of his intention to submit an international arbitration claim in relation to his company's investments in a landfill site which was hoped to have handled waste from the city of Toronto.

Mr. Gallo's Canadian company owns a former open-pit iron ore mine, the Adams Mine, in northern Ontario which was intended to serve as a landfill for non-hazardous household and commercial waste. Currently, the site is home to a manmade lake, and the waste disposal scheme would have involved deposit of waste in the lake, and the regular removal of contaminated water for treatment.

However, following a change in government in the Province of Ontario, Mr. Gallo alleges that he was unable to renew a key water removal permit which had been granted by the predecessor Government, but which had subsequently expired.

Subsequently, Mr. Gallo alleges that a provincial law was passed, Bill 49, which imposed a blanket prohibition on the disposal of waste at the Adams Mine site; revoking other licenses and permits related to the site; and which had the intention of putting his Ontario-based company out of business.

According to a Notice of Intent dated Oct.12, 2006, Mr. Gallo alleges that the Government of Canada is responsible for breaches of Articles 1105 (Minimum Standard of Treatment) and 1110 (Expropriation) of the North American Free Trade Agreement (NAFTA).

Although his company was offered some compensation by the Ontario Government, Mr. Gallo alleges that this offer was "limited and inadequate", failing to encompass the full value of his investments and his consequent loss of profits. In response, Mr. Gallo is claiming $355,100,000 (US) in compensation, as well as compensation for other costs and expenses.

Under the rules of NAFTA Chapter 11, a Notice of Intent must be served at least 90 days before a formal request for arbitration may be lodged. Accordingly, Mr. Gallo would be free to pursue formal arbitration in mid-January of 2007.

The proposed use of the Adams Mine site for waste disposal has been an enormously contentious issue in domestic Ontario politics. According to the Province of Ontario's website, some 23,000 submissions were made in response to a request for public comment on an application by Mr. Gallo's company for a water removal permit which would have permitted removal of contaminated water from the proposed site so that it might be treated.

Among its effects, Bill 49, introduced by the current Ontario Government precludes the use of lakes (including man-made lakes on former mining pits) for purposes of waste disposal. The Canadian Environmental Law Association, acting on behalf of various local opponents of the Adams Mine waste disposal scheme, had expressed concerns as to the environmental propriety of landfilling in lake-sites such as the Adams Mine.

2. Wave of new third party submissions in Glamis Gold arbitration with USA,
By Fernando Cabrera Diaz

The ongoing NAFTA Chapter 11 dispute between Canadian mining company Glamis Gold Ltd. and the United States has become the object of extensive outside interest, as evidenced by last month's filing of a series of applications and submissions by non-parties to the arbitration.

The catalyst for the arbitration is a California law which requires the complete backfilling of open-pit mines near Native American sacred site, including the site of a planned project by Glamis Gold.

The company is seeking no less than $50 million USD in compensation for what it sees as measures tantamount to expropriation contrary to NAFTA. The Canadian firm alleges that California's backfilling requirement was aimed specifically at it and would make its proposed mine no longer economically feasible, rendering its investments there worthless.

As previously reported by ITN, the case has attracted the attention of a range of non-governmental actors. Already, the arbitral tribunal hearing the Glamis Gold dispute has allowed so-called non-disputing party submissions (i.e. amicus curiae briefs) to be made by environmental group Friends of the Earth and the Quechan Indian Nation. (See earlier ITN reporting at: http://www.iisd.org/pdf/2005/investment_investsd_oct4_2005.pdf)

Last month three additional applications were filed with the tribunal for leave to file submissions in support of or against elements of Glamis Gold's claim.

The tribunal must decide whether to grant leave and accept these non-disputing party submissions based on the criteria set out in a set of guidelines agreed by the 3 NAFTA Governments (Mexico, USA, Canada) in 2003. These criteria include whether the submissions will aid the tribunal in resolving factual or legal issues and whether there is a public interest in the subject-matter of the arbitration.

Opposing elements of Glamis Gold's claim are the Sierra Club, Earthworks, and the Quechan Indian Nation. In a joint submission, the first two groups argue that backfilling is essential to preventing the environmental problems associated with open-pit mining because "backfilling reduces the formation of acid mine drainage – the primary source of toxic pollution from such mines – by limiting the exposure of the mining wastes and pit walls to oxygen and water."

Citing an earlier arbitral ruling in the much-publicized Methanex v. United States Case, Sierra Club and Earthworks argue that because of its valid environmental objectives and non-discriminatory nature, the California legislation does not violate NAFTA requirements of minimum standard of treatment and fair and equitable treatment, nor NAFTA expropriation provisions.

Of note, Sierra Club and Earthworks also criticize Glamis Gold's claim on the grounds that the company is claiming to be a foreign citizen in order to be able to rely on NAFTA

while at the same time claiming to be a U.S. citizen in order to meet U.S. federal mining law requirements for the ownership of mining claims in the U.S. This same issue of the company's nationality was also raised in an earlier non-party submission made by the environmental group Friends of the Earth in 2005.

Meanwhile, the Quechan Indian Nation has filed a supplemental application for leave to make a submission, as the group felt that it needed to make a further submission after having reviewed the preliminary legal arguments tabled by the disputing parties in recent months.

Finally, the National Mining Association (NMA) has also filed a submission, which supports Glamis Gold's claim. In its submission the NMA argues that the law in question was targeted directly at Glamis Gold's project itself and destroyed all of its value, making it tantamount to expropriation in violation of NAFTA. The NMA also complains that blocking the company's project would hurt investment in mining projects in the United States.

The tribunal must decide whether or not to accept these non-party submissions before the hearings on the merits of the case which are currently scheduled for May of 2007.

Sources:

Documents associated with the Glamis Gold dispute available on US Government site: http://www.state.gov/s/l/c10986.htm

Statement of the NAFTA Free Trade Commission on Non-disputing party participation: http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file660_6893.pdf#search='statement%20of%20the%20free%20trade%20commission%20on%20non'

3. Italian firm resorts to arbitration over cancellation of Venezuelan energy contract,
By Luke Eric Peterson

An international energy firm has filed an arbitration claim alleging that Venezuela's shake-up of its hydrocarbons landscape violates international law.

The claim by Italian firm ENI S.p.A. has been filed with the International Centre for Settlement of Investment Disputes (ICSID) and is understood to be the first investment treaty arbitration arising out of the energy policies of President Hugo Chavez's administration.

The Italian firm alleges violations of an investment protection treaty in place between the Netherlands and Veneuzela. (There is no ratified investment protection treaty between Italy and Venezuela). ENI is understood to be seeking more than $1 Billion (US) in compensation.

Until last year, ENI held an operating services agreement (OSA) for the Dacion oil-field in Venezuela, however the company balked at a government request to migrate to a different form of contract which would have given the Venezuelan government a majority stake in the operation.

Whereas, most of the operators of these OSA's consented to new contractual arrangements, both ENI and the French firm Total dug in their heels against the changes. Ultimately, the two firms saw their contracts ended by the government. At the time, ENI signaled that it would seek full reparation for its losses, first through negotiation, and ultimately through litigation. For its part, Total has yet to signal whether it will launch its own arbitration.

ENI's arbitration claim must be screened by the ICSID Secretariat; assuming the case is registered by the Washington-based Centre, a tribunal would be selected to arbitrate the dispute.

Venezuela has faced other investment treaty claims outside of the energy sector, and is currently defending several claims at the ICSID in relation to mining, financial and agricultural investments.

Sources:

"Venezuela signs contentious new contracts with foreign oil companies", Investment Treaty News, April 11, 2006, available on-line at:
http://www.iisd.org/pdf/2006/itn_april11_2006.pdf

4. Bangladesh wrestles with various foreign investment disputes,
By Fernando Cabrera Diaz and Luke Eric Peterson

Fierce community opposition to a proposed open-pit coal mine in North-West Bangladesh could lead to an international arbitration, as government officials insist that they plan to cancel a UK investor's contract.

London-based Asia Energy PLC, created solely for the purpose of operating the proposed Phulbari mine in Bangladesh, was assigned the rights to mine the area by the Australian firm BHP in the late 1990s. Last autumn, the company submitted a feasibility study for the operation of the mine to Bangladeshi authorities, who were expected to decide within three months whether to approve the project.

However, local opposition to the proposed open pit mine – which would necessitate the relocation of tens of thousands of citizens - has been strong, culminating in recent violent protests. On August 26, protesters attempted to storm the company's offices in Phulbari

leading to a confrontation with police. In the ensuing altercation, local media report that six protesters were killed and dozens injured. Under a deal brokered by a local mayor with the protestors, the Bangladeshi government will cancel the contracts for the controversial project.

Indeed, Asadul Habib Dulu, junior food and relief minister, has since indicated that all contracts with Asia Energy would be cancelled and that no open-pit mining would be permitted anywhere in the country.

Local press have speculated that the dispute could land in international arbitration. In addition to any contractual arbitration options open to the UK investors, there is also a long-standing investment protection treaty in place between the UK and Bangladesh.

However, an Asia Energy official tells ITN that its contract remains in force at the present time, and that the company remains focused on the long-awaited decision on the feasibility study which was submitted to the Government of Bangladesh in October of 2005.

To date, Asia Energy has invested upwards of 32 Million (USD) in the Phulbari project. At its peak, the proposed mine is predicted to generate some 15 million tonnes of coal per year.

Bangladesh's dispute with Asia Energy comes at the same time as a power company partially owned by the Bangladeshi Government has lost an arbitration with a German investment company in relation to the cancellation of a contract for the operation and management of an electricity plant.

On Oct.2nd, a three-member arbitration panel at the Singapore International Arbitration Centre (SIAC) awarded German-based Lahmeyer International Pally Power Service (LIPPS) over 15 million Euros in a case it brought against the Rural Power Company Ltd (RPC).

The German firm alleged that it was forcibly expelled from the operation and maintenance of the Mymensingh Power plant in August of 2005. The tribunal operating under the UNCITRAL rules of procedure, and pursuant to an arbitration clause in the relevant contract, found in favour of the claimant; awarding not only compensation, but also the bulk of the German firm's legal costs.

For its part, the Government of Bangladesh is embroiled in other international arbitrations at the International Centre for Settlement of Investment Disputes. One pending case involves a claim by the Italian firm Saipem S.p.A. alleging violation of the Italy-Bangladesh bilateral investment treaty. (See ITN's report here: http://www.iisd.org/pdf/2005/investment_investsd_aug3_2005.pdf).

A second claim at ICSID arises out of a contractual dispute which has been brought by Chevron in relation to dispute gas sales revenues related to three gas production fields.

There have been media reports of additional international arbitrations filed against Bangladesh. For example, the Canadian firm Niko Resources reportedly turned to arbitration in relation to a dispute over responsibility for two gas blow-outs in fields where the Canadian firm operates. The gas blow-outs have been a particular source of controversy as they resulted in extensive property and environmental damage, and have yielded demands from the Bangladesh Government for financial compensation to be paid by the Canadian company.

At press time, a spokesperson for Niko had not returned a telephone query requesting further information about this potential claim.

Local press reports have drawn attention to Bangladesh's less than stellar record in defending against international arbitration claims. A recent report in the Daily Star newspaper suggests that the country's record has been "very poor" - with the Government losing "hundreds of millions of dollars" in such cases.

Also looming over Bangladesh's run-ins with certain foreign investors has been the country's reputation for extreme corruption, with foreign investors routinely citing the resource-rich country as one of the most difficult venues in which to operate. In its 2006 Corruption Perceptions Index, Transparency International ranked Bangladesh - whose GDP per capita qualifies it as one of the Least-Developed Countries (LDCs) - as being one of the most corrupt countries as perceived by businesspersons and country analysts.

Negotiation Watch:
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5. EU Governments debate Euro Commission's investment negotiating ideas,
By Damon Vis-Dunbar and Luke Eric Peterson

Representatives from European governments are currently mulling over draft provisions on investment as they work towards forming a template to be used by the European Commission (EC) in its future free trade agreement negotiations.

Member states have begun by focusing on provisions that deal with the establishment rights granted to foreign investors (i.e. provisions which offer foreign investors a right to enter and establish investments in another country).

Toward this end, the EC has tabled draft provisions that draw upon the World Trade Organization's General Agreement on Trade in Services (GATS) - an agreement that deals with investments in the services sector. The EC has suggested extending GATS-type disciplines on national treatment and market access to non-services investments.

This would "put an end to the artificial distinction between establishment in the services

sector (so called commercial presence) and establishment in other economic sectors," says a recent paper from the EC to member states, which has not been made public.

The result would go beyond the provisions that exist in current EU agreements, such as the EU-Chile Association Agreement – an agreement which provides national treatment and most-favoured nation treatment to foreign investors at both the pre-establishment and post-establishment phase, subject to certain exceptions.

The EC proposals tabled to member-governments go further by mooting a dedicated "market access" obligation – which would commit countries to allow foreign investors to establish new investments in designated sectors - in addition to the national treatment and MFN provisions (which are themselves designed to ensure that EU investors enjoy rights of entry at least on par with those enjoyed by investors from the destination country or from third countries).

Notably, the EC's draft proposal clarifies that the grant of most-favoured nation (MFN) treatment would apply only to the question of establishment, and not to other issues such as dispute settlement or protection against expropriation. The dispute settlement provision would be a standard state-to-state mechanism under the given trade or association agreement; rather than an investor-to-state mechanism which would permit individual investors to sue their host government, as is common under bilateral investment treaties and a growing number of bilateral free trade agreements.

A number of exceptions are spelled out in the draft provisions, including certain economic sectors such as audio visual services, national maritime cabotage and air transport services. The chapter also seeks to make room for parties to "regulate and to introduce new regulations to meet legitimate policy objectives," and makes specific reference to the right to enact measures intended to protect public morals; human, animal or plant life or health; relating to the non-discriminatory conservation of exhaustible natural resource; or necessary for the protection of national treasures of artistic, historic or archaeological value.

Furthermore, market access and national treatment commitments would be open to a list of sectoral exceptions, outlined in an annex to the chapter. For example, governments might wish to exempt certain economic sectors or industries such as insurance, cultural industries, or health care, so that they may provide more favourable treatment to domestic players in those industries.

The proposed draft provisions are described by the EC as a "minimum platform" on which an ambitious investment policy can be built into EU FTAs. Yet whether member states will agree on these proposed provisions remains an open question.

Currently, responsibility for foreign investment policy is shared between the EC and individual member states. The EC has dealt with opening up foreign markets on behalf of EU investors, while the member states have entered into bilateral investment treaties (BITs) that offer specific legal protection for national investors venturing abroad (for e.g.

providing protection against expropriation by a foreign government).

The shared responsibility over FDI has been a source of some tension. It flared during the World Trade Organization's Uruguay round of negotiations, when the EC asked for competence to negotiate on behalf of member states on non-goods trade, including investment. That met resistance from EU member governments, with the European Court of Justice eventually holding that the EC did not hold exclusive competence on FDI policy.

The present talks between the EC and member governments do not contemplate expanding the EC's legal competency to negotiate investment agreements, said sources involved in the negotiations. "We don't have instructions from the capitals to do that," said a source.

As such, investment provisions in EU FTAs based on an agreed negotiating template would still require unanimous approval from all EU member government, rather than approval by a mere majority of European governments (as had been contemplated as part of proposed changes contained in a recent failed EU Constitutional treaty).

While the EC has characterized the current discussions as having "a view to develop an ambitious investment policy," there is ambiguity as to what sort of overall policy the EC and members states are working toward. "EU governments would like a more ambitious common text, realizing that this is an asset" said a European government representative on the Article 133 committee (a group of national level officials who supervise EU trade policy). "But there is no concrete idea of how this will look."

There is no timeline attached to these discussions and participants agree they will not move quickly given that two separate debates are taking place: internal discussions within individual member governments; and discussions amongst all member states and the EC as to the ambition of European policy.

6. Canada and Peru sign bilateral investment treaty and release text,
By Damon Vis-Dunbar

Canada and Peru this week signed a bilateral investment treaty (BIT) that marks the first agreement based on Canada's post-NAFTA template.

It comes as Peru's free trade agreement (FTA) with the United States has been placed in jeopardy, following mid-term elections in the United States which put the Democrats in charge of the House and Senate. The investment chapter in that FTA bears strong similarities to the Canada-Peru BIT, with both reflecting lessons learned by the US and Canada with the investment provisions in their North American Free Trade Agreement (NAFTA).

The Canada-Peru BIT contains extensive liberalization commitments, setting national

treatment standards on establishment according to a negative list approach. In other words, each party pledges to permit investors from the other country to enter and establish investments on a National Treatment basis. For example, if Peruvian firms are permitted to establish businesses in a given sector, then Canadian investors would enjoy similar rights. However, exceptions to this treatment are permitted; these are listed in a sectoral annex to the treaty.

As with the investment provisions of the US-Peru trade agreement, the Canada-Peru BIT also offers greater transparency in relation to dispute settlement, such as the requirement that investor-state arbitration hearings be open to the public and that documents filed during the proceeding be published.

The BIT deviates slightly from Canada's NAFTA model in its fork-in-the-road provision, which determines whether a foreign investor can resort to both domestic courts and international arbitration, or must choose between these dispute settlement options. Under Canada's model, an investor must waive its right to continue domestic court proceedings should it choose to initiate international arbitration. But the Canada-Peru BIT forces an investor to decide at the outset whether to pursue litigation in domestic court or seek a settlement through arbitration. If domestic court proceedings have been initiated, an investor no longer has the right to pursue arbitration. This was done at the request of Peru, in order bring the treaty in line with its civil law structure.

The Canada-Peru BIT has been some three years in the making, and comes after a long hiatus for Canada. The country's last BIT was signed in 1998 with Costa Rica. After that Canada ceased negotiating BITs and entered a period of review. In 2003, Canada emerged with a model agreement - a negotiating template which borrowed heavily from the investment chapter of the North American Free Trade Agreement (NAFTA), but with innovations that reflected the country's experience with NAFTA's chapter on investment.

Sources:

The Canada and Peru Foreign Investment Protection and Promotion Agreement is available on-line at:
http://www.dfait-maeci.gc.ca/tna-nac/documents/Canada-Peru10nov06-en.pdf

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Briefly Noted:
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7. Ecuador targeted for arbitration by Spanish firm

A Spanish engineering and construction firm, Tecnicas Reunidas, is taking Ecuador's state petroleum company Petroecuador to ICSID, according to a local press report. The claim is being brought pursuant to the Ecuador-Spain Bilateral Investment Treaty.

According to a local report, the Spanish company was contracted in the mid-1990s to expand the capacity of the Esmaraldas oil Refinery. The Spanish firm is reportedly seeking some $35 million USD, however the nature of the dispute with Petroecuador was unclear at press time.

8. UNCTAD offers data on entry into force of BITs

A new briefing note from the United Nations Conference on Trade and Development offers an overview of the entry into force of bilateral investment treaties. Although some 2500 BITs have been negotiated to date, only a little more than 75% of those treaties have entered into force.

UNCTAD finds that earlier concluded treaties are more likely to have entered into force – with more than 90% of treaties concluded in the early 1990s now in force – thus suggesting that, with sufficient passage of time, most such treaties do become legally binding.

For more information see: http://www.unctad.org/en/docs/webiteiia20069_en.pdf

9. Award in Telenor v. Hungary arbitration now available on-line

The arbitral award in the ICSID dispute between Norway's Telenor and the Republic of Hungary has been made available on-line in the Investment Treaty News Documents Centre. See: http://www.iisd.org/investment/itn/documents.asp

For ITN's earlier reporting on this heretofore unreleased arbitral award, see "Hungary prevails in ICSID arbitration with Norwegian telecoms firm", available here: http://www.iisd.org/pdf/2006/itn_sep20_2006.pdf

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