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Arbitration Watch:
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1. Hearings on the merits commence in Zimbabwe arbitration with Dutch farmers,
By Luke Eric Peterson

Hearings commenced this week in Paris in an ICSID arbitration between a group of Dutch farmers and the Zimbabwean Government. (In common with most ICSID arbitrations, the hearings are closed to the public and the media.)

The Dutch farmers are seeking to hold Zimbabwe liable for the loss of their agricultural holdings in that country. In a series of written briefs and counter-briefs filed in recent months, the two sides have jousted over Zimbabwe's liability for alleged breaches of the Netherlands-Zimbabwe bilateral investment treaty.

In a rather unusual turn of events, Zimbabwe did not raise objections to the tribunal's jurisdiction, thus ensuring that written and oral arguments on the merits would proceed forthwith.

The claimants, all Dutch nationals, allege that their agricultural landholdings were subjected to violent invasion and seizure by self-professed Veterans of Zimbabwe's War of Independence, culminating in the outright confiscation of those landholdings by the Zimbabwean state without any payment of financial compensation. Further, the claimants allege that the Zimbabwean police failed to provide physical protection and security as guaranteed to foreign investors by the Netherlands-Zimbabwe bilateral investment treaty.

As earlier reported in ITN, a 2005 constitutional amendment is alleged to have effected a formal expropriation of the claimants' landholdings in Zimbabwe. However, the claimants argue that they were effectively deprived of their investments well in advance of that date, thanks to a pattern of harassment, intimidation and violence which led them to abandon their holdings in the period from 2000 to 2002.

In a counter-memorial filed with ICSID, Zimbabwe rebutted certain of the claims put forward by the claimants. Notably, however, the Zimbabwean Government acknowledged that certain "deprivations" had taken place without payment of compensation; indeed, the Government insisted that this was the "only issue for arbitration". The Government added that it would "pay compensation in full as and when it is able to do so", an apparent reference to the straitened economic situation in which the hyper-inflation-wracked country finds itself.

In a subsequent written Reply filed with ICSID, the claimants insist that they are owed full compensation without delay, stressing that the deprivations suffered by the Dutch farmers have gone uncompensated for a number of years already.

Moreover, the claimants contend that other live issues need to be arbitrated, including Zimbabwe's alleged liability for various breaches of the Netherlands-Zimbabwe treaty. In addition to the aforementioned expropriation and protection & security claims, the claimants also maintain that Zimbabwe has violated a so-called umbrella clause contained in the treaty. Notably, the latter claim is premised upon the alleged breach by Zimbabwe of an express undertaking tendered to the Dutch Government in 2000 to the effect that the Zimbabwean Government would not subject to compulsory acquisition those farms owed protection under the Zimbabwe-Netherlands treaty.

The claimants contend that the subsequent breach of this so-called Note Verbale amounts to a breach of the customary international law rule that a state is responsible for its undertakings; in addition, the claimants argue that the same actions lead to a breach of the

so-called umbrella clause, Article 3(4) of the BIT, which provides that “Each Contracting Party (to the BIT) shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party”.

ZIMBABWE INVOKES STATE OF NECESSITY AND EMERGENCY

In its most recent written filing, the Zimbabwean Government seeks to rebut the claimants’ assertions that the process of land reform in Zimbabwe has proceeded in a haphazard, illegal, and ultimately “disastrous” manner. Zimbabwe insists - contrary to the claimants’ assertions - that the process has served an essential public interest: giving land to the landless peasants of Zimbabwe. Moreover, the Government portrays itself as having responded in the face of actions by non-governmental actors to seize and invade various properties – rather than as the author and architect of those land invasions and seizures.

On the Government’s view, a “riotous” and “chaotic” situation arose following the surprise rejection of a national referendum on a constitutional amendment which would have paved the way for the acquisition of rural land without compensation.

Faced with a national emergency, the Zimbabwean Government maintains that “compensation is not due in a period of emergency, a period of necessity.” The Government adds that the tribunal should, in the event that compensation is deemed to be owing to the claimants, appoint an independent auditor to determine the amounts owing. Moreover, the Government also appears to argue, without elaboration, that the state of emergency in Zimbabwe adhered until September 15, 2005.

The Zimbabwean Government invokes, in particular, the terms of Article 7 of the Netherlands-Zimbabwe BIT which provides a relative degree of protection for foreign investors. Article 7 of the treaty provides that in cases of national emergency, riot or insurrection, foreigners suffering losses in respect of their investments will be treated on a footing comparable to locals and/or nationals of third countries. However, the treaty does not include a clause similar to one found in the US-Argentina BIT, which stipulates that the treaty does not preclude measures necessary for the maintenance of public order or for the protection of a state’s essential security interests. (The latter type of clause has been invoked by Argentina in various of the arbitrations arising out of that country’s financial crisis*)

ZIMBABWE APPOINTS OUTSIDE COUNSEL IN ADVANCE OF HEARINGS

Although the Zimbabwean Government’s Office of the Attorney General represented Zimbabwe during the early phases of the ICSID arbitration, recently an outside law firm, Paris-based Kimbrough & Associes, joined the case as co-counsel.

Meanwhile, the claimants are represented by Charles O. Verrill Jr. of DC-based law firm Wiley Rein LLP and Matthew Coleman of the London office of Steptoe & Johnson.

A three-person tribunal, chaired by the former President of the International Court of Justice, French lawyer Gilbert Guillaume, is hearing the claim. For its part, Zimbabwe nominated as arbitrator, former Pakistani Minister of Justice, Mohammad Wassi Zafar; the claimants selected Ronald Cass, former Dean of the Boston University School of Law.

* See "Argentina must respect award despite ICSID finding that it has errors of law", By Luke Eric Peterson, Investment Treaty News, September 15, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_oct15_2007.pdf

2. Argentina and UK firm send arbitrator-challenge to venue where reasons are provided, By Luke Eric Peterson

The Government of Argentina and a UK-based energy firm, National Grid, have asked the London Court of International Arbitration (LCIA) to rule on a bid by Argentina to challenge a member of a three-person tribunal presiding over an arbitration between the two parties.

As earlier reported in ITN, Argentina moved in late July to challenge arbitrator Judd Kessler, on the basis of comments he made at a July hearing on the merits; Argentina contends that those comments prejudged certain matters in dispute, thus raising concerns as to Mr. Kessler's impartiality and independence to preside over the case.*

Mr. Kessler, who had been appointed to the tribunal to replace Whitney Debevoise - who had resigned from the tribunal in order to accept a political appointment from the US Government -, declined to step down in the face of Argentina's challenge. He is understood to reject the contention that he lacks the requisite impartiality to preside over the dispute.

The arbitration is being conducted under ad-hoc auspices, using the UNCITRAL rules of procedure. Recently, Argentina and National Grid agreed to submit the challenge to the LCIA for a ruling – a move which will ensure that the two parties will be informed of the reasons underlying any ruling on the challenge to Mr. Kessler.

The London body has a policy of providing reasons when it makes rulings on challenges to arbitrators. By contrast, other arbitration institutions do not provide such reasons – which has been a particular sore point for Argentina.

As reported earlier in ITN, Argentine officials have expressed frustration that certain venues do not provide any explanation for decisions to disqualify (or uphold the appointment of) arbitrators.

Indeed, Argentina had earlier sought to challenge another member of the tribunal in the National Grid case. The International Chamber of Commerce made a ruling on that challenge: rejecting it in January of 2006. However, the Argentine Government then

turned to the Argentine courts, in a (thus far unresolved) effort to have the ICC ruling invalidated on the grounds that it was accompanied by no explanation or reasoning for the decision to reject the challenge.

Notably, the arbitration proceedings in the National Grid v. Argentina dispute resumed after the ICC ruling in question, notwithstanding Argentina's bid to have the Argentine courts weigh in on the subject.

ITN understands that the arbitration proceedings remain ongoing while the LCIA deals with Argentina's challenge to Mr. Kessler.

Sources:

* See "Tribunal rejects demand by Argentine court to suspend ongoing arbitration", By Fernando Cabrera and Luke Eric Peterson, July 31, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_july31_2007.pdf

3. Czech Gov't seeks to annul jurisdiction ruling in UNCITRAL broadcasting dispute, By Luke Eric Peterson

The Czech Republic has turned to a United Kingdom court in an effort to overturn a jurisdictional ruling rendered by a tribunal on behalf of the Luxembourg-based broadcasting company, European Media Ventures (EMV).

EMV turned to arbitration in 2005, following a rejection by Czech media regulators of a bid to have a crucial television broadcasting license transferred to an entity controlled by EMV.

The dispute, which has been widely reported upon in the Czech media, has been likened to the earlier CME-Lauder arbitrations brought against the Czech Republic following another high-stakes tussle over a television broadcasting license. CME prevailed in its arbitration with the Czech Republic, securing more than $300 Million (US) in compensation; a parallel claim by CME's major shareholder, Ronald S. Lauder, was rejected on the merits by a separate panel of arbitrators. (While the two arbitrations were brought under different bilateral investment treaties, the sharply-divergent outcomes have generated much debate as to the need for consistency from tribunals charged with interpreting investment treaty obligations.)

For its part, EMV alleges that Czech authorities breached protections contained in the Czech Republic's bilateral investment treaty with Luxembourg. Earlier this year, a three member tribunal ruled that it had jurisdiction to hear elements of EMV's case on its merits. The proceeding is being conducted under the UNCITRAL rules of procedure, under which there are no mandatory publication requirements. As far as ITN can determine, the fact that the tribunal has issued a jurisdictional ruling has not been

reported until now.

In an effort to challenge the tribunal's jurisdictional holding, the Czech Republic has resorted to the UK courts. However, the arbitration tribunal hearing EMV's claim is continuing on with the proceedings; a hearing on the merits is expected to take place in early 2008.

The tribunal hearing the case consists of Lord Mustill as Chair, and party-appointed arbitrators Christopher Greenwood QC and Julian Lew QC.

4. Vivendi-Poland UNCITRAL arbitration goes forward quietly as tribunal is constituted, By Luke Eric Peterson

In a less-noticed development in a high-profile dispute over ownership of a major Polish mobile telephone company, French-based multinational Vivendi is pursuing a bilateral investment treaty (BIT) claim against the Republic of Poland.

The claim, which was initiated last year under the UNCITRAL rules of arbitration, alleges Poland to have breached its obligations under the France-Poland BIT.

This treaty-based claim against the Polish Government adds to a long list of arbitrations and lawsuits which are already in motion in relation to the fight over Polska Telefonia Cyfrowa (PTC). Among these is a Billion-Dollar commercial arbitration between Vivendi and Elektrim, two firms that are grappling over control of a Polish joint venture which holds the keys to the lucrative Polish mobile telephone service. In addition, a Deutsche Telekom subsidiary has also been locked in arbitration and litigation with Elektrim over a disputed stake in the same Polish mobile business.

At the same time, various court actions related to the disputed concession have been ongoing in several countries including Poland, Austria, the United Kingdom and the United States.

Amidst this legal morass, Vivendi filed on August 10, 2006 a BIT claim against the Polish state, alleging that the state and its instrumentalities have failed to live up to "its obligations to protect and fairly treat foreign investors under (the France-Poland) treaty".

ITN can report that an arbitral tribunal has been constituted in the Vivendi-Poland arbitration. The tribunal consists of chairman Dr. Klaus Sachs, and party-appointed arbitrators Ibrahim Fadlallah and Merrick Furtek.

For its part, Poland has faced a sizable number of BIT arbitrations – although comprehensive figures are unavailable. Many of the BIT arbitrations known to have been initiated against Poland have proceeded outside of the World Bank's ICSID facility, meaning that they need not be listed on a publicly available registry.

Last year, ITN reported that Poland had faced an arbitration claim under the Spain-Poland bilateral investment treaty; that claim was arbitrated at the International Chamber of Commerce's International Court of Arbitration. However, the Polish Finance Ministry declined to provide further details of the dispute.*

* For an earlier ITN recap of several BIT arbitrations involving Poland see: "Polish Finance Ministry not talking about BIT arbitration at ICC", By Luke Eric Peterson, Investment Treaty News, January 31, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_jan31_2006.pdf

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Negotiation Watch:
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5. European treaty may revive debate over power to conclude investment agreements, By Damon Vis-Dunbar

The debate over who in the European Union (EU) holds the legal authority to conclude international investment agreements (IIAs) with non-European countries - the European Community or individual Member States - is set to intensify as the EU Reform Treaty throws dust into an already hazy situation.

Foreign direct investment (FDI) does not currently fall squarely under the EU's Common Commercial Policy, and the European Commission – the Executive Branch of the EU - and Member States have been divided as to who holds responsibility to conclude IIAs. When asked to rule on this question in the past, the European Court of Justice (ECJ) has emphasized that investment agreements with third countries are primarily the responsibility of Member States.

In line with this view, the balance of power over FDI has historically fallen to Member States, with the European Community's legal authority over FDI severely circumscribed. While the Community has so-called non-exclusive competency over investment - both on movements of capital and matters related to establishment (i.e. Foreign Direct Investment), this competence has not been fully exercised. In other words, even where the Commission has spearheaded negotiations of economic agreements containing investment provisions, the member-states have still signed off on the final version of those pacts.

In contrast, Member States have a long standing practice of using their powers in this area. Hundreds of bilateral investment treaties have been entered into between Member States and non-European countries. Moreover, under agreement between the European Commission and Members States, all EU governments must sign off on any investment

agreements negotiated by the Commission (for example, investment chapters in EU free trade agreements.)

As ITN has earlier reported, the Commission says that the quality of the EU investment agreements it negotiates should be more ambitious. In an internal note to Member States in 2006, the Commission observed: "In comparison to NAFTA countries' agreements, EC agreements and achievements in the area of investment lag behind because of their narrow content. As a result, European investors are discriminated against vis-à-vis their foreign competitors and the EC is losing market shares."

Yet the EU's 27 Member States are divided on the types of international investment agreements they would like to see the Commission negotiate. Some Members have fought to retain the right to negotiate their own bilateral investment treaties that offer legal protections to foreign investors (for e.g. protection from expropriation without compensation), while relegating the EC to focus on liberalization and market access. Other member-states have called for NAFTA-like investment agreements, which liberalize investment flows and provide extensive protections to foreign investors.

DRAFT EU CONSTITUTION AND NEW REFORM TREATY MUDDY THE WATER

It was in this divisive context that the draft Treaty Establishing a Constitution in Europe (aka the EU Constitution) emerged as a means to strengthen the European Union's ability to conclude IIAs.

While the Constitution was abandoned in 2005 following rejection in public referenda in France and the Netherlands, it would have brought FDI under the roof of the EU's Common Commercial Policy. In effect, this would have given the European Union the authority to conclude IIAs which could enter into force if a qualified majority of Member States gave their assent; heretofore, all EU Member States would have had to sign off on any agreement negotiated by the EU's executive branch. However, the draft EU Constitution created uncertainty by going on to state that the delimitation of competences between the EU and Member States on FDI would not be affected.

The EU Constitution's successor, the so-called Reform Treaty which Member States approved earlier this month in Lisbon, contains similar language: the Treaty brings FDI under the EU's Common Commercial Policy, before adding that legal competencies over FDI are unaffected.

One expert appointed by ITN says that the implications of the treaty are unclear.

"The drafting (of this article) is very controversial, and we can't predict how it is going to be interpreted," said Ramón Torrent, Professor of Political Economy at the University of Barcelona and a former director of external economic relations of the Legal Service of the Council of the European Union. "Including FDI under the scope of commercial policy, but also saying that this doesn't change competency, creates confusion," he said.

Given that the Reform Treaty may add more uncertainty to the question of who holds the power to conclude IIAs, it could fall to the European Court of Justice to provide some clarity.

The Reform Treaty must be ratified by all 27 Member States before it enters into force; a process that is unlikely to be completed before 2009.

To date, there has been little public discussion amongst experts or elected officials as to the potential implications of the Reform Treaty with respect to competence over FDI.

Sources:

ITN interviews

“EU members review intra-European BITs in light of potential overlap with EU Law”, By Damon Vis-Dunbar, Investment Treaty News, June 30, 2007

“New European Constitution would bring FDI under European competence”, By Luke Eric Peterson and Jan Ceyssens, INVEST-SD, October 20, 2003

6. Peru-US trade and investment pact moving towards approval by US Senate and House, By Fernando Cabrera Diaz

A critical vote on the US-Peru Trade Promotion Agreement could take place as soon as this week.

Late last month the United States Senate Finance Committee approved the so-called Peru-US Free Trade Promotion Agreement (TPA) – a wide-ranging trade and investment pact- after months of negotiations in which Democrats demanded new environmental and labor provisions be added to the agreement.

Now that the Senate Finance Committee has approved the Peru-US TPA it awaits approval by the House of Representatives Ways and Means Committee, which had earlier signaled support for the agreement in a non-binding vote on September 25. A formal vote by the committee is scheduled to take place this week, after the committee finishes work on a bill to expand a federal assistance program for workers that have lost their jobs as a result of free trade agreements.

Lately, as trade agreement negotiations by the United States executive branch have slowed down with the expiration of the so-called Trade Promotion Authority (previously known as fast-track negotiating authority). Under that Authority, which expired on July 1, 2007, the Bush Administration had been allowed to negotiate trade agreements which Congress could approve or disapprove but not amend. The authority shortened the process of congressional consideration of trade agreements to a maximum of 90 days.

In recent months, the Administration has concentrated on seeking congressional approval for the four Free Trade Agreements (FTAs) that were signed prior to the expiration of Trade Promotion Authority. Along with the Peru-US TPA, trade deals with Korea, Panama and Colombia also await approval.

In order to get these agreements approved by the newly Democratic-controlled Congress, the Administration was obliged to reach an accord with Congressional leadership which would see changes to the labor and environment chapters of the FTAs.

At the moment, such revisions have been agreed by Peru and Colombia, while negotiations remain ongoing with Korea and Panama.

DEMOCRATS PUSH FOR CHANGE TO PREAMBLE OF US-PERU PACT

The investment chapter of the Peru-US TPA was not heavily altered in this process and remains mostly unchanged from the investment chapters found in recent US FTAs.

The only salient change made to the investment chapter was the inclusion of a clause in the agreement's preamble which, in order to provide "greater clarity", recognizes that foreign investors were not to be accorded greater substantive rights with respect to investment protections than domestic investors. The substantive implications of this new language – for example when the agreement's provisions are invoked in binding arbitration with a host-government – are not clear.

In common with the US-Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), which recently came into force, the Peru-US TPA has fairly extensive transparency provisions in relation to investor-state arbitrations. These provisions require that arbitration hearings be open to the public, and that most documents associated with these arbitrations be made public, including pleadings and memorials, as well as awards, orders and decisions of the tribunal.

The Peru-US TPA also gives arbitration tribunals the authority to accept amicus curiae submissions from interested non-parties.

One fairly new development in the investment chapter is found in the Most-Favored-Nation Treatment (MFN) provision. A footnote to the MFN clause states that it does not apply to Dispute Resolution Mechanisms (DSMs). In the past, certain investment tribunals have interpreted MFN protections so as to allow investors to engage in so-called 'treaty-shopping'; on occasion, this has included shopping for certain forms of more favourable dispute settlement options, such as a shorter time period in which investors must pursue amicable negotiations prior to launching a formal arbitration.

This new limitation of the MFN clause is also found the Colombia-US TPA, which was signed in November of 2006. However, earlier agreements such as CAFTA-DR signed in August of 2004, and the November, 2005 US-Uruguay BIT do not include this

limitation.

Briefly Noted:
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7. ICSID tribunal rejects Enron's request for post-award interest,
By Luke Eric Peterson

An ICSID tribunal has rejected a request by the Enron Corporation to supplement a $100+ Million (US) arbitration ruling with the addition of post-award interest.

As earlier reported in ITN, Argentina was held liable for breaches of the US-Argentina bilateral investment treaty in its dispute with Enron.* The tribunal awarded Enron fair-market value compensation for losses suffered to its natural gas transportation and distribution business during and after the Argentine financial crisis as a result of the treaty breaches. However, the tribunal's award of interest on this compensation was calculated to the date that the award was issued.

In June of this year, Enron filed a request with ICSID seeking a supplementary decision and/or a rectification of the tribunal's award, so as to obtain post-award interest as well (i.e. interest calculated until the date the award is paid by Argentina).

However, in a decision issued to the parties on October 25, 2007, the tribunal rejected this request by Enron. The tribunal held that Enron had not made a clear request for post-award interest during the arbitration proceedings, and that for the tribunal to award post-award interest - despite it not having been requested during the proceeding - would be in excess of the tribunal's powers. The tribunal cautioned that such an excess of powers might be subject to annulment under the ICSID rules.

Sources:

* "Enron wins $106 Million (US) in financial crisis claim against Argentina", By Luke Eric Peterson, Investment Treaty News, May 27, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_may27_2007.pdf

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