Investment Treaty News (ITN), September 20, 2006

Published by the International Institute for Sustainable Development
(http://www.iisd.org/investment/itn)

Contents at a glance:

Editor's Note:
----

1. Clarification as to Possible Revision of UNCITRAL Arbitration Rules

An ITN analysis piece authored by the Editor, and circulated on Sept 3, 2006, had indicated that the UNCITRAL Secretariat had tabled a 'proposal' which could extend the principle of confidentiality under the UNCITRAL rules of arbitration to the fact of an arbitration's existence.

In fact, the Secretariat had proposed that the Working Group (a body of Member-Government representatives) examine the need for such a "confidentiality obligation", without itself taking a position on the need for such an obligation - or whether such an obligation would mandate greater or lesser confidentiality.

ITN regrets any confusion caused by the earlier report. We plan to report further on the UNCITRAL’s potential revision of its arbitral rules, including the outcome of a recent Working Group meeting in Vienna, in subsequent issues of this newsletter.

Arbitration Watch:
----

2. Hungary prevails in ICSID arbitration with Norwegian telecoms firm,
By Luke Eric Peterson

The government of Hungary has prevailed in an ICSID arbitration initiated by the Norwegian telecommunications firm Telenor. The Norwegian firm is the fourth largest foreign investor in Hungary, holding a majority stake in Pannon, the second largest mobile phone service provider in Hungary.

Telenor mounted its arbitration in 2003 under the terms of the Norway-Hungary bilateral investment treaty.

The Norwegian firm objected to various regulatory measures taken by the Hungarian authorities, including the imposition of a Universal Service Obligation which required all telecommunications providers to contribute a small share of their revenue to a program designed to compensate those fixed-line telephone service providers who deliver service to persons in poor or rural areas.

Telenor had objected that its local mobile-service provider was forced to subsidize players in the fixed-line business, and the firm alleged that this and other regulatory measures imposed on Pannon violated the protections contained in the Norway-Hungary investment treaty.

In a Decision on Jurisdiction released to the parties on Sept. 13, an ICSID tribunal rejected all of Telenor’s claims on jurisdictional grounds. According to a summary provided by the law firm, Arnold & Porter, which represented Hungary in the arbitration, the tribunal held that there had not been a prima facie case in favour of jurisdiction over a claim that Hungary’s actions amounted to expropriation contrary to the relevant treaty.

Moreover, as the Hungary-Norway treaty provided only for recourse to investor-state arbitration in case of expropriation claims, the tribunal held there was no jurisdiction to arbitrate over other alleged breaches of the treaty, for e.g. an alleged failure by Hungary to provide "fair and equitable treatment".

Telenor had sought to invoke the Most-Favoured Nation (MFN) provision in the Hungary-Norway treaty, in a bid to "borrow" a more favourable consent-to-arbitration clause found in a different treaty. However, according to the summary provided by Arnold & Porter, the tribunal rejected this argument, noting that "In these circumstances, to invoke the MFN clause to embrace the method of dispute resolution is to subvert the intention of the parties to the basic treaty, who have made it clear that this is not what they wish."

At least on its surface, the ruling on MFN appears to accord with that made by a separate tribunal in a recent investment treaty arbitration by a pair of Belgian investors against Russia. (See "Russia prevails in Stockholm arbitration with Belgian construction firm owners", Investment Treaty News, Aug.23, 2006, available at: http://www.iisd.org/pdf/2006/itn_aug23_2006.pdf)

Notably, the tribunal ordered Telenor to pay the full costs of the proceeding, including the fees and expenses of the arbitrators, and the legal costs and expenses of Hungary.

The award has yet to be released to the public. A call placed to counsel for the claimants was unreturned at press time. Hungarian press reports have released few details of the ruling, but have indicated that the Government prevailed in what is described as a $140 Million (US) arbitration.

3. Argentina permitted to challenge ICSID award without posting security,
By Luke Eric Peterson

A three-member committee charged with examining Argentina's bid to over-turn an $130 Million+ arbitral award in favour of the US-based CMS Gas Transmission Company has agreed to stay enforcement of the award pending the outcome of the annulment proceeding.

At the same time, the Committee rejected a request by CMS that Argentina post a bank guarantee or offer other assurances that it would pay the award should its annulment application fail.

CMS expressed concern about a series of statements by former and current Argentine Ministers which have suggested that a failure to annul the award at ICSID could give rise to further legal challenges outside of ICSID.

According to its obligations under the ICSID Convention, an international treaty, Argentina would be bound to pay the award if the annulment committee declined to overturn that award.

However, Argentine officials have made public comments casting doubt on whether it will pay ICSID awards, and mooting the prospect of launching further challenges in the Argentine courts, or at the International Court of Justice.

Citing these public comments, counsel for CMS argued that Argentina failed to meet the test used in an earlier ICSID annulment proceeding (MTD v. Chile) where the presiding committee had held that if there was doubt as to whether a party would comply with its ICSID Convention obligations then the committee might order that a bank guarantee be posted during the period while the award was stayed (and under review by an ICSID annulment committee).

In weighing CMS's arguments in favor of a bank guarantee, the annulment committee, consisting of Judge Gilbert Guillaume, Prof. James Crawford, and Judge Nabil Elaraby, sought an undertaking from the Argentine Republic as to its intention to pay the award in the event that the award should not be overturned after review by the committee.

This undertaking came in the form of a letter from the Argentine Attorney General, Dr. Osvaldo Cesar Guglielmino. For its part, CMS expressed skepticism about the binding nature of this letter, stressing that it might not bind future leaders of Argentina, and expressing the further view that only the President of the Argentine Republic had the "power to issue undertakings that bind Argentina internationally under Argentine law".

Ultimately, however, the annulment committee pronounced itself satisfied that the Attorney General had the "authority to commit Argentina", and the committee concluded that Dr. Guglielmino's letter "irrevocably commits Argentina to enforce the pecuniary obligations imposed upon it by the Award in the event that annulment is not granted."

The committee accordingly ruled that enforcement of the award would continue to be stayed, without any need for Argentina to post a bond or bank guarantee.
The committee's reasoning has been met with some degree of skepticism on the part of lawyers representing foreign investors in arbitrations against Argentina.

Doak Bishop, a Houston-based Partner with King & Spalding, says that he is puzzled by the committee's decision not to require a bond given the test adopted in the MTD v. Chile annulment case. Bishop points to various statements by Argentine officials over the past few years, to the effect that the government would challenge ICSID awards in its domestic courts (which Bishops says would clearly violate Argentina's international treaty obligations) as reason to have doubts as to Argentina's stance.

He adds that successive governments have also repudiated positions taken by predecessor governments – raising fears that Argentina's positions on these issues are fluid.

Bishop takes a particular interest in the question of Argentina's compliance with its ICSID obligations, as he is lead counsel in a number of major BIT arbitrations with Argentina, including a claim by US-based water company Azurix Corp which was recently decided in favour of the US investor.

Bishop notes, however, that the letter provided by the Argentine Attorney General "is a particularly strong undertaking on behalf of the government that is designed to be relied upon by the annulment committee in making its decision on whether to require a bond and it should be binding under international law."

ITN was unable to obtain an official comment from the Argentine Attorney General's office as of press time, however, Carlos Alfaro, Chairman of the US-Argentine Chamber of Commerce tells ITN that the recent statement made to the CMS annulment committee appears to signal a new posture on the part of the Argentine Government.

"The statements made by the Attorney General in the case clearly show a change and gives further assurance that Argentina is committed in this case and under his tenure to comply with international law." He said.

"But certainly the statements of the Attorney General made on this case do not constitute a 'binding obligation as to other cases'. On the other hand, certainly it will be more burdensome for Argentina in the future to come out with legal arguments to justify a revision by local courts of an award rendered under an international treaty."

Indeed, Argentine press reports have speculated that President Nestor Kirchner may use the opportunity of a US visit this week to signal a new willingness to enforce any final ICSID arbitration awards.

Sources:

CMS Gas Transmission Company v. Argentine Republic, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, Sept. 1, 2006, available on-line at: http://www.worldbank.org/icsid/cases/arb0108_Decision_en.pdf

ITN Interviews

With a report by Fernando Cabrera

4. Italian holders of Argentine bonds mount $3.6 Billion claim at ICSID,
By Luke Eric Peterson

In a request for arbitration submitted to the International Centre for Settlement of Investment Disputes (ICSID) this week, some 170,000 Italians are seeking compensation from Argentina for losses related to that country's 2001 default on its sovereign debt.

The claim alleges various breaches by Argentina of its commitments under the Italy-Argentina bilateral investment treaty.

In February of 2005, the Argentine government reached a much-publicized settlement with approximately 76% of the holders of its defaulted bonds; this deal paid holders a reported 34 cents on the dollar.

Following this settlement, the Argentine government signaled that it would not negotiate better terms with hold-out bondholders, and an umbrella coalition, the Global Committee of Argentine Bondholders (GCAB) sought legal advice as to what further steps might be taken by dissident bondholders against Argentina.

As reported in ITN last year, GCAB was apprised by Washington law firm White & Case that the avenue of investment treaty arbitration might be open for bondholders of various nationalities. Following many months of behind-the-scenes organizing, a coalition of Italian holders of Argentine Federal Bonds has now taken their case to Washington D.C., where a claim was filed with the ICSID this week.

The bondholders' request for arbitration will be reviewed by the Secretariat to see if it may be registered by the Centre – a necessary step before an ICSID arbitration could begin.

Sources:

Task Force Argentina (TFA): http://www.tfargentina.it

Global Committee of Argentine Bondholders: http://www.gcab.org

5. ICSID tribunal affirms jurisdiction over Chilean investors' dispute with Argentina,
By Fernando Cabrera

An arbitral tribunal set up under the rules of the World Bank's International Centre for Settlement of Investment Disputes (ICSID) affirmed its jurisdiction to arbitrate a claim against Argentina began by two Chilean firms under the Argentina-Chile bilateral investment treaty (BIT).

Chilean firms Metalpar S.A., a manufacturer of vehicle frames, and Buen Aire S.A., an investment and technical consulting firm, are similar to the long line of disputes that have at their root the response by Argentina in late 2001 to the financial crises that engulfed that country.

At the heart of the dispute are investments that the claimants made through the Argentinean companies Metalpar Argentina S.A., a vehicle manufacturer, and Loma Hermosa Investments S.A., both of which the claimants effectively owned. Among their investments the claimants allege to have made capital contributions in excess of 32 million US dollars to these two companies.

According to the claimants several measures enacted by Argentina in response to its financial crises had the affect of destroying their investments. In particular, the claimants point to the so called ‘Pesification Law’ of January of 2002, which forcibly converted all agreements made in US dollars into pesos at a rate established by the Argentinean government. They allege that this law had the effect of devaluing contracts made in U.S. dollars by as much as 300%.

Before the Pesification Law, Metalpar Argentina offered financing to customers purchasing its vehicles through contracts made in US dollars. The claimants allege that the devaluation of these contracts as a result of that law amounted to expropriation in violation of the Argentina-Chile BIT.

Argentina raised several preliminary objections to the ICSID tribunal’s jurisdiction to arbitrate the dispute, many of which have been rejected by previous tribunals arbitrating in similar cases. In its first objection to jurisdiction, Argentina argued that the investments in question were not foreign investments due to the fact that they were made by Argentinean subsidiary companies; a position which was rejected on the basis of the treaty’s broad scope of coverage.

Another objection centered on the firm Buen Aire’s failure to register under Argentina’s Public Commercial Register as required by Argentinean law for all foreigners investing in the country. Argentina argued that because of this omission, the investments were not legal. This argument was rejected by the tribunal, which noted that under the same Argentinean law, the penalties for this type of omission were warnings, or at worst fines, making a denial of recourse to ICSID tribunals a disproportionate punishment.

Argentina also argued, as it had done unsuccessfully in the past, that the dispute in question did not arise directly from an investment as required by article 25(1) of the ICSID Convention. Essentially Argentina’s position continues to be that the impugned measures affecting the investment must be directed specifically at the investment. The tribunal, following a line of reasoning laid out by the ICSID tribunal in Camuzzi International S.A v Argentina and others, rejected this argument and held that the requirement in these cases is simply a causal connection between the acts of the state and the effect on the investment, with the intent of the state being irrelevant to the analysis.

Finally, Argentina argued that as a sovereign state it had authority to enact emergency measures to protect itself and its citizens. The tribunal agreed with this view, but went on to hold that the issue of liability for breach of the BIT obligations was a separate issue. The tribunal held that a country could enact valid legislation that, at the same time, had the effect of expropriating foreign investments in violation of BIT provisions, and allowing for international arbitration.

The tribunal, composed of Rodrigo Oreamuno B. (president), Duncan H. Cameron and Jean Paul Chabaneix, will now move to a full hearing of the merits of the case.

Negotiation Watch:
----

6. Japan and Philippines leave investor-state arbitration mechanism unresolved in EPA, By Damon Vis-Dunbar

A comprehensive trade and investment pact between Japan and the Philippines was left without an agreed mechanism to settle investment disputes because the Philippines is reluctant to see investor-state claims submitted to international arbitration.

The Japan-Philippines Economic Partnership Agreement (EPA), signed in Helsinki on September 9, 2006, offers a range of rights and protections to foreign investors, including national treatment, most-favoured nation treatment, and protection against expropriation. But negotiators were unable to agree on a means to deal with investor-state disputes.

“The Parties shall enter into negotiations after the date of entry into force of this Agreement to establish a mechanism for the settlement of an investment dispute between a Party and an investor of the other Party,” states the EPA.

The EPA provides further clarification by adding: “This means that the disputing Party may, at its option or discretion, grant or deny its consent in respect of each particular investment dispute and that, in the absence of the express written consent of the disputing Party, an international conciliation or arbitration tribunal shall have no jurisdiction over the investment dispute involved.”

A Japanese official involved in the negotiations told ITN that the Philippines had resisted including a provision that would allow investment disputes to be settled through international arbitration. This person said that the Philippine’s ongoing dispute with a German firm, Fraport AG, over an investment in a passenger terminal in Manila’s Ninoy Aquino airport, was the reason for the reluctance.

Reports in the Filipino press have echoed these concerns, with an unnamed source in the Manila Bulletin saying that: “arbitration is very expensive ... we want an expedient mechanism that is within our resources.”

A consortium led by Fraport saw their contract severed in 2002, after a Supreme Court decision declared the contract contained irregularities. A request for arbitration by Fraport was registered with the International Centre for the Settlement of Investment Disputes (ICSID) in 2003, and hearings on jurisdiction were held last January.

The company says it is seeking more than $425 Million US for breach of the German-Philippines bilateral investment treaty. The broader dispute over the passenger terminal has spawned other international arbitrations, as well as domestic court cases. The stakes for the Philippines government (a developing economy where GDP per capita is approximately 5100 USD) are extremely high, as the legal claims amount to well over a Billion Dollars in potential damages.

This is the fourth EPA that Japan has entered into; pacts have also been signed with Singapore, Mexico and Malaysia. Those agreements allow for international arbitration under ICSID or UNCITRAL rules in the event of an investment dispute. The Japan-Malaysia EPA also permits arbitration under the rules of the Kuala Lumpur Regional Centre for Arbitration, in addition to ICSID and UNCITRAL.

In other respects, the Japan-Philippines EPA mirrors many of the detailed investment provisions seen in Japan's other EPAs. All of Japans EPAs extend national treatment to a full range of investment activities, including the establishment phase of an investment, with exceptions listed in the annexes.

The Agreement features a general exception which over-rides most of the investment provisions, and which permits host governments to take measures necessary to protect human, animal or plant life, or health, as well as measures necessary to protect public morals or to maintain public order.

Such a feature is more often found in investment rules contained in broader trade agreements; by contrast, most bilateral investment treaties contain no such general exception.

The EPA also stipulates that the expropriation provision applies to taxation measures where such tax measures amount to expropriation. However, Article 104 of the agreement also clarifies that "a taxation measure which is applied in a non-discriminatory manner shall not be considered to constitute expropriation."

The Japan-Philippines EPA must be ratified by both governments before coming into effect.

Sources;

ITN interviews

Japan-Philippines Economic Partnership Agreement is available on-line from the Japanese Ministry of Foreign Affairs:
http://www.mofa.go.jp/policy/economy/fta/index.html

"Japan-Malaysia ink investment rules – arbitrations may go to Kuala Lumpur Centre", By Luke Eric Peterson, Investment Treaty News, April 11, 2005

With a report by Luke Eric Peterson

7. Human Rights Watch warns Indonesia and foreign investors on forced evictions,
By Fernando Cabrera

Human Rights Watch has called upon foreign investors and the Indonesian government to ensure that major infrastructure projects are not facilitated through land seizures and forced evictions of Indonesian citizens.

In a report released this month, “Condemned Communities: Forced Evictions in Jakarta” Human Rights Watch alleges that thousands of Indonesians are being subjected to “excessive use of force” – including beatings and destruction of homes and possessions - often as the government rushes to pave the way for major infrastructure projects.

Human Rights Watch has called on foreign investors to seek assurances that land has been acquired in a manner consistent with national and international human rights law.

The Indonesia government has yet to make an official statement on the Human rights Watch report, however an Indonesian diplomat told ITN that the Government had set aside compensation packages for those being evicted from their homes. According to this official, “skirmishes” like those reported on by Human Rights Watch occurred between a minority of tenants demanding higher compensation from the Government and officials carrying out evictions.

The criticisms by Human Rights Watch come at a time when the Indonesian government has renewed its efforts to develop its basic infrastructure and to attract foreign investment.

In November of 2005, the government staged an Infrastructure Summit with foreign investors.

Bede Sheppard, author of the Human Rights Watch report, tells ITN that the Presidential Decree on Land Acquisition (36/2005) - which has been used to carry out many evictions - seems to have been inspired by this Summit.

The Decree attracted criticism from NGOs and local groups, who noted that the Decree allowed evictions provided that they were deemed in the “public interest,” - a term that many critics viewed as vague and providing for a low threshold for evictions.

At a subsequent infrastructure forum held in February 2006 in Jakarta, the Indonesian Coordinating Minister for Economics conceded that progress continued to be slow in attracting foreign investors to infrastructure projects. Minister Boediono assured investors that the Indonesian government was concentrating “its efforts to sort out the problems holding back infrastructure investment.”

Following this forum, the Presidential Decree on Land Acquisition was amended.

Speaking in the Jakarta Post newspaper, Indonesian Communications and Information Minister Sofyan Djalil signaled that the amended Decree, issued in June of 2006, "would help attract foreign investment to development projects, which have often stalled because of unresolved land disputes."

The amended Decree also took onboard some concerns raised by critics. For example, the Indonesian Government responded to concerns over the vagueness of the term 'public interest', by narrowing the types of development projects that could take advantage of the provisions in the decree. The amended Decree focuses more narrowly on roads, freeways, dams, airports, railways and flood dikes whose location is deemed essential.

However, Human Rights Watch insists that the amended decree fails to address other key concerns. For example, the group says that the period during which negotiations over compensation for land acquisition must be pursued remains inadequate. Under the new Decree, the government can begin construction projects if compensation negotiations surpass 120 days (up from 90 days in the original decree).

Human Rights Watch says that this slightly longer time-period gives little incentive for the government to negotiate in good faith, as it can resort to forced evictions if its compensation offers are not accepted by the 120 day period. As a consequence, the group questions whether Indonesia is complying with its national and international human rights law obligations.

In a statement, Sophie Richardson, Deputy Director of the Asia division of Human Rights Watch, urges international investors to "be mindful of the poor track record in Jakarta when it comes to resettling people in a humane manner…"

Sources:

ITN Interviews

Human Rights Watch's report "Condemned Communities: Forced Evictions in Jakarta" is available on-line at this address: http://hrw.org/reports/2006/indonesia0906/

Briefly Noted:
----

8. US Senate OKs investment treaty with Uruguay

The United States Senate gave its approval on Sept.12th to an earlier-negotiated bilateral investment treaty with Uruguay, thereby paving the way for treaty to enter into force. Uruguay had ratified the agreement in December of 2005.

As was earlier reported in ITN, the treaty was negotiated between the US and the administration of Uruguayan President Jorge Battle. Prior to Uruguay's ratifying the agreement, the Battle administration was swept from office. The treaty became a political hot potato, but was ultimately ratified after President Tabare Vazquez secured several changes to the treaty text from the US Government.

While accounts differed as to whether these revisions were meaningful – or merely cosmetic – they proved enough for President Vazquez to push the treaty through the Uruguayan Congress in late December of last year.

The treaty will enter into force thirty days after the parties exchange their instruments of ratification.

Sources:

USTR press release, Sept. 14, 2006, available on-line at: http://www.ustr.gov/Document_Library/Press_Releases/2006/September/United_State_Senate_Approves_US_-_Uruguay_Bilateral_Investment_Treaty.html

"Uruguay surprises with ratification of contentious US investment treaty", Investment Treaty News, By Damon Vis-Dunbar, January 12, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_jan12_2006.pdf

---