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Arbitration Watch:
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1. Umbrella clause reasoning annulled in CMS-Argentina case, remainder upheld,
By Luke Eric Peterson

As ITN was going to press, a decision was handed down by an ad-hoc annulment committee in the first investment dispute arising out of the Argentine financial crisis to have been decided on its merits.

In 2005, US-based CMS Gas Transmission Company secured an award in its favour, with an ICSID tribunal ruling that Argentina had committed several breaches of the US-

Argentina bilateral investment treaty. The US firm had alleged that actions taken by Argentina in response to its financial crisis – including a freeze on public utility rates – served to breach contractual undertakings, as well as the US-Argentina treaty.

The presiding tribunal ultimately held Argentina to have breached the fair and equitable treatment obligation in that treaty, as well as a so-called umbrella clause which was deemed to require Argentina to “respect any obligation it may have entered into with regard to investments”.

The award obliged Argentina to pay some $133 Million (US) to the US investor for its losses, as well as its lost profits through the year 2027. The largely favourable arbitral ruling for CMS also emboldened other foreign investors with cumulative claims pending against Argentina worth several billion dollars.

Following the adverse outcome in the CMS case, Argentina applied to the ICSID in an effort to annul the award – a limited form of post-award review available under the ICSID system.

Hearings in that case were held in May of 2007, and a final decision was rendered by an ad-hoc committee earlier this week.

According to a source familiar with the outcome, the committee has annulled the portion of the 2005 award relating to the so-called umbrella clause. That portion of the award had generated some puzzlement from observers, as it was not entirely clear how CMS could have suffered a breach of contractual stabilization undertakings given that the company was not itself party to any of those contracts. (Rather subsidiaries of US firm were party to those legal agreements).

Indeed, a different ICSID tribunal in another subsequent arbitration against Argentina, had held that the US water services company Azurix could not claim for alleged breach of the supposed umbrella clause in the US-Argentina treaty, because Azurix was not itself party to any of the contracts which it alleged Argentina to have breached. (Rather, other corporate subsidiaries had concluded those contracts with the Argentine province of Buenos Aires).

At press time, the decision in the CMS annulment proceeding had not been published.

Sources:

ITN Interviews

Previous reporting on the CMS-Argentina award is available here:
http://www.iisd.org/pdf/2005/investment_investsd_may27_2005.pdf

Previous reporting on the annulment application by Argentina is available here:

http://www.iisd.org/pdf/2005/investment_investsd_oct26_2005.pdf

2. Divided panel declines to annul ICSID award in Peruvian environmental dispute, By Luke Eric Peterson

An ad-hoc ICSID annulment committee has declined, by a 2-to-1 margin, to annul a 2005 jurisdictional decision rendered in an environmental dispute between a Chilean company and the Republic of Peru.

In so doing, the three-member committee left undisturbed a ruling which had held that ICSID lacked jurisdiction over the dispute due to its having arisen prior to the entry into force of the Chile-Peru bilateral investment treaty.

Chilean pasta manufacturer, Lucchetti, had turned to ICSID in 2003, following a move by the municipality of Lima to cancel operating permits for a Lucchetti-owned pasta factory adjacent to an environmental preserve.

Lucchetti had alleged that it was the victim of a politically-motivated campaign against the Chilean-owned project, leading to violations of the protections contained in the Chile-Peru bilateral investment treaty.

By contrast, Peruvian officials insisted that their persistent efforts to enforce legitimate environmental rules and regulations had been thwarted (for a time) by alleged corruption which generated favourable judicial rulings in Lucchetti's favour. (Peru presented evidence before the tribunal, including video recordings which were alleged to have shown that former Peruvian intelligence chief Vladimir Montesinos Torres had ordered Peruvian judges to render judgments in Lucchetti's favour).

Municipal authorities referenced this alleged corruption in the preamble of a 2001 Decree which revoked the investor's permits.

However, the ICSID tribunal hearing Lucchetti's claim against Peru professed to not make any ruling on the corruption allegations which swirled around the investor's conduct. Rather, the tribunal held that it lacked jurisdiction over the claim on temporal grounds: because the "dispute" was deemed to have arisen prior to the entry into force of the Peru-Chile Treaty in 1998.

In reaching this conclusion, the tribunal rejected the investor's argument that there had been two distinct disputes with Peru: one of which was resolved in favour of the investor thanks to 1997-1998 Peruvian court rulings, and a second distinct dispute which arose only in 2001 (i.e. after the investment treaty had entered into force) following the Lima Municipality's revocation of the investor's permits.

Ultimately, both the temporal jurisdiction finding and the tribunal's handling of the alleged wrongdoing on Lucchetti's part were raised by the Chilean investor when it turned to ICSID in an effort to have the tribunal's award annulled.

Under the ICSID system, there is no appeal of arbitral awards; instead, parties may seek annulment on five narrow grounds. In case of annulment requests, the ICSID appoints a three-member ad-hoc committee to hear a given annulment request. In the Lucchetti case, the ICSID appointed Mr. Hans Danelius, a retired Justice of the Swedish Supreme Court; Mr. Andrea Giardina, a law Professor at the University of Rome and Counsel to the Italian law firm Chiomenti; and Sir Franklin Berman QC, a former Legal Advisor to the UK's Foreign Office and an arbitrator and international law advisor with Essex Court Chambers in London.

Ultimately, Sir Franklin, in a dissenting opinion, would take the view that there were sufficient grounds for annulling the tribunal's earlier decision. Conversely, Messers Giardina and Danelius declined to annul the ruling.

Lucchetti had argued that the original tribunal manifestly exceeded its powers when it "arrogated to itself an authority it did not properly possess, to determine that a government measure taken after an investment treaty's entry into force fell outside that treaty's coverage, simply because its 'subject mater' was the same as earlier government measures which were formally, legally and irrevocably invalidated by the local courts …."

Notably, the Committee conceded that different arbitrators might reach different conclusions as to whether there, in fact, had been two disputes (one of which might have arisen after the Chile-Peru BIT had come into force). Nonetheless, the committee added that it was not empowered to determine whether the original tribunal's ruling was "right" or "wrong"; rather, the committee simply noted that the tribunal's finding was "clearly a tenable one".

The committee also observed that the tribunal had not spelled out clearly the interpretive steps which it took in reaching its interpretation of Article 2 of the Chile-Peru BIT. However, the committee added that this "somewhat simplified" approach betrayed no signs that the tribunal "disregarded any significant element of the well-known and widely recognized international rules of treaty interpretation." As such, there was no manifest excess of powers, in the view of the majority of the committee.

The committee also rejected another ground advanced by Lucchetti: namely, that the tribunal had made a serious departure from a fundamental rule of procedure. Here, Lucchetti made two arguments, one of which contended that the tribunal had implicitly accepted Peru's allegations of corruption, in violation of "Lucchetti's fundamental right to be presumed innocent of any criminal offence."

However, the committee, in rejecting this ground for annulment, accepted at face-value the claims of the original tribunal, which had insisted that it ignored the allegations of illegality by Lucchetti. Rather, the original tribunal professed to have denied jurisdiction over Lucchetti's claim solely on the basis that it was rooted in a long-standing dispute which pre-dated the entry into force of the Chile-Peru treaty.

Finally, the committee would go on to reject Lucchetti's third argument: that the tribunal had failed to state its reasons in its 2005 ruling. Again, the committee conceded that the tribunal had not provided a "full picture of the various elements which should be taken into account for treaty interpretation". However, the committee added that it detected no contradictions or imprecisions which would leave doubt as to the "legal and factual elements upon which the Tribunal based its conclusion."

THIRD COMMITTEE MEMBER WOULD HAVE ANNULLED AWARD

As already noted, Sir Franklin Berman QC parted ways with the majority and in a dissenting opinion took what he characterized as a "sterner view" of the "manifold shortcomings of the Tribunal's Award". Sir Franklin professed the view that ICSID tribunals must offer "clear and strong" explanations in the event that they decline jurisdiction over investment treaty claims at the initial stage. Should a tribunal fail to offer "clearly explained and justified" grounds, their ruling might be annullable.

Indeed, Sir Franklin stresses the need for tribunals to make clear to claimants – and to "other consumers of the ICSID system" – what it has done and why, in cases where it moves to decline jurisdiction over a claim (and not hear the claim on its merits).

In the present case, he noted that the Governments of Chile and Peru had clearly disagreed as to the interpretation of Article 2 of their bilateral investment treaty. He pointed, in particular, to the fact that Peru had initiated a parallel state-to-state arbitration, against Chile – in an effort to arbitrate certain interpretive disagreements - following the move by Lucchetti to bring its investor-state claim. While the ICSID tribunal declined a request by Peru to suspend the ongoing investor-state proceeding whilst this state-to-state proceeding ran its course, Sir Franklin wrote that it was clear that the ICSID tribunal had been made aware of a disagreement as to interpretation of the Chile-Peru treaty (even if the ICSID tribunal did not wish to suspend its own proceedings whilst that disagreement could be resolved).

In view of this clear disagreement as to the proper construction of the treaty, Sir Franklin opined that the ICSID tribunal ought to have handled with "extra caution" the Peruvian Government's own arguments as to the proper interpretation of that treaty in the context of the Lucchetti dispute.

Ultimately, he would hold that the tribunal had failed to explain clearly and adequately the various steps it took in reaching the interpretation of Article 2 which was ultimately reached.

3. Lithuania victorious in dispute with Norwegian parking lot business,

By Damon Vis-Dunbar and Luke Eric Peterson

The Government of Lithuania has successfully defended itself in an ICSID suit brought by a Norwegian investor who entered into a contract to build and maintain parking facilities in the historic old town of the city of Vilnius. The dispute erupted when that contract was terminated, following legislative changes that brought the agreement into conflict with Lithuanian law.

In an award handed down in September, the tribunal found that it held jurisdiction to hear the dispute, before subsequently holding that Lithuania was not in breach of its obligations under the Norway-Lithuania bilateral investment treaty (BIT).

The Norwegian company, Parkerings, formed a consortium that successfully bid on a tender to construct a vast multi-story parking facility in Vilnius. The original agreement would have seen the consortium create, develop, maintain and enforce the public parking system, with revenue generated through the right to collect parking fees and enforce regulations for the next 13 years.

However, it later became evident that parts of the fee-sharing deal clashed with Lithuanian law. Later, changes to national legislation enacted by the Lithuanian Parliament disallowed the type of public-private partnership that Parkerings and the city of Vilnius had entered into, which frustrated attempts to revise the original agreement. Concerns were also raised by a government body over the impact the proposed parking lots would have on the heritage of the old town district.

Progress on building the parking lots stalled as both the city and Parkerings reacted to these legislative hurdles. Eventually, in 2004, the city of Vilnius decided to sever its contract with Parkerings, on the grounds that the company had failed to fulfill its obligations under the agreement. Parkerings responded in 2005 by taking Lithuania to arbitration at the International Centre for Settlement of Investment Disputes (ICSID).

Central to the dispute was the fact that changes to Lithuania’s domestic laws had negatively impacted Parkerings business by fracturing the legal integrity of their agreement with the city of Vilnius. Counsel for Parkerings argued that the investor was “entitled to expect that Lithuania maintain a stable and predictable legal and business framework.”

WAS THE INVESTOR ENTITLED TO A STABILIZED LEGAL REGIME?

While the tribunal acknowledged that an investor has a right to a stable legal environment in principal, it also asserted that an investor should realize that laws change over time. What’s more, Parkerings had entered into its agreement with Lithuania during the country’s transition from a Soviet style economy to a more liberalized economy which was seeking eventual membership in the European Union. In this context, ongoing adjustments to domestic legislation were to be expected.

The tribunal also placed emphasis upon the fact that Lithuania had not made assurances that the legal framework on which the contract hinged would remain stable. The tribunal pointedly noted that the parties had not included a so-called stability clause, which would have guaranteed that the legal and/or economic features of the agreement remained unchanged. Accordingly, the tribunal held that the investor had assumed the "business risk" inherent in investing in such a context where the laws might change to the detriment of the investment.

There could be no "legitimate expectation" on the part of the investor that the Government of Lithuania "would not pass legislation and regulatory measures which could harm its investment".

Having also found that the regulatory and legislative measures in question were not enacted in an unfair or unreasonable manner, the tribunal held that the investor had not made out its claim of breach of the treaty's "fair and equitable treatment" standard.

OTHER TREATY BREACHES NOT FOUND

Having failed to show that changes to Lithuanian law were specifically aimed at prejudicing Parkerings' investment, the tribunal struck down the charge that Lithuania had failed to ensure adequate protection as provided under the BIT.

Parkerings had also alleged that when the city of Vilnius terminated their contract, Lithuania had in indirectly expropriated their investment without compensation. Here the tribunal took its cues from the tribunal in Azurix Corp. v. the Argentine Republic and drew a distinction between actions emanating from the State as a party to an agreement on the one hand, and as a sovereign power on the other. Since the mayor of Vilnius severed the contract as any other party to a contract might do, rather than exercising a form of sovereign power, the tribunal found that there was no case of expropriation.

The tribunal added that a breach of contract is not always sufficient to constitute a violation of a BIT (a so-called umbrella clause might arguably have elevated a contractual breach to the level of a BIT breach; however, the Norway-Lithuania BIT did not contain such a clause). In this case, the tribunal held that the appropriate forum for the charge that the contract had been unfairly cancelled would be Lithuania's domestic courts. Should the investor be deprived of this recourse in some form, then the tribunal could consider if a contractual breach amounted to expropriation without compensation contrary to the BIT. As it was, Parkerings did not attempt to settle the dispute through the appropriate court in Lithuania.

Parkerings had also alleged that Lithuania breached the Most-Favoured Nation treatment provision of the BIT; the company drew a contrast between the treatment it received and the treatment enjoyed by a Dutch firm, Pinus Proprius. On the face of it, the two projects were comparable: Pinus Proprius, a competing foreign firm, also had an agreement to build a parking complex in Vilnius under a similar so-called Joint Activity Agreement with the city.

However, counsel for Lithuania argued that the two projects differed in important respects; notably in the public opposition to the Parkerings project on archaeological and environmental grounds. The Parkerings project infringed deeper into the city's Old Town as defined by UNESCO, sparking concern from the State Monument Protection Commission over the impact on the city's cultural heritage. The same commission also warned against increased traffic and air pollution which could accompany the (larger) Parkerings parking complex.

The tribunal ultimately held that the archaeological and environmental concerns attached to Parkerings' project justified different treatment. (See next item for further analysis of this subject)

The tribunal in the Parkerings-Lithuania case, consisting of Dr. Laurent Levy (Chair), Dr. Julian Lew and Hon. Marc Lalonde, was unanimous in their ruling that Lithuania was not liable for breaches of the Norway-Lithuania BIT. Under ICSID rules, the claimant has 120 days in which to file a request for annulment.

4. ANALYSIS: Archaeological and environmental differences distinguish FDI projects, By Luke Eric Peterson

In a ruling with wider public policy ramifications, an ICSID tribunal has held that characteristics such as the different historical, archaeological and environmental impacts of two foreign investment projects may contribute to a finding that the two projects are not in "like circumstances" for comparison purposes.

A finding that two or more projects are, in fact, in "like circumstances" is generally a prerequisite to an exploration as to whether one or the other project may have been treated more or less favourably contrary to a treaty obligation.

The tribunal in the Parkerings case held that the Norwegian claimant, if it wished to prove that it had been denied Most-Favoured Nation treatment contrary to the Norway-Lithuania BIT, would have to show that there was another investor, in like circumstances, that had been treated more favourably.

At the same time, the tribunal acknowledged that there might be policy reasons or a legitimate objective which would justify the differential treatment meted out, and which would lead to a conclusion that the two projects being compared were not, in fact, in like circumstances.

On the facts of the Parkerings-Lithuania dispute, the tribunal noted that the Norwegian company's local subsidiary, Baltijos Parkingas (BP), and a subsidiary of a Dutch counterpart were indeed competitors.

However, closer scrutiny of the respective parking projects of the two companies revealed that they would have notably different impacts upon the local community. In particular, the tribunal flagged as “decisive” the fact that a BP project “extended significantly more into the Old Town as defined by the UNESCO”.

The tribunal added:

“Indeed, the record shows that the opposition raised against the BP projected multi-story car park were important and contributed to the Municipality decision to refuse such a controversial project. The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project.”

Ultimately, the tribunal would hold that the similarities between the projects did not suffice to place them in like circumstances. The greater size of the BP project, coupled with its encroachment into the sensitive Old Town of Vilnius, was deemed important enough to justify differential treatment.

One observer contacted by ITN for comment on the ruling, Marcos Orellana, an Attorney with the DC-based Center for International Environmental Law (CIEL) praised the tribunal for giving “proper weight to environmental factors”. Orellana adds that tribunals have differed in their approaches to interpretation of “like circumstances”, and he favours an approach where there is no presumption of breach that would then need to be “justified” (for example by reference to environmental or other justifications). Rather, he argues that tribunals should weigh environmental considerations as one of the factors which determine whether investors are, in fact, in like circumstances, rather than treating environmental considerations as if they were “mere” exceptions or justifications.

(Orellana’s organization has intervened as an amicus curiae in selected investment treaty disputes to raise environmental, public health or other concerns - in certain cases acting alongside the IISD (publishers of this newsletter) – however, his group had no involvement in the Parkerings-Lithuania arbitration.

5. Tribunal chosen in arbitration over South African Black Empowerment policies,
By Luke Eric Peterson

Some eight months after an arbitration claim was registered against South Africa at the International Centre for Settlement of Investments Disputes, an arbitral tribunal has been constituted to hear what has the makings of a landmark international case.

As earlier reported in ITN, a group of family-owned European mining enterprises accuse South Africa of violating the terms of investment protection treaties concluded in the immediate post-Apartheid period with Western European Governments.

The claimants object to various actions and measures taken by South Africa in relation to the mining sector which are alleged, by the claimants, to deny them fair and equitable treatment, national treatment and protection against expropriation without compensation.

As previously reported the 2004 Mineral and Petroleum Resources Development Act (MPRDA) served to vest all mineral and petroleum rights with the South African Government. Businesses are obliged to apply to the South African Government – within a given time frame - for a right to convert their former resource holdings into "new-order" rights, which are held and used under license from the state.

For its part, the South African Government has sought to transform the country's socio-economic landscape so as to bring about so-called broad-based Black Economic Empowerment (BEE). As part of the country's mineral rights conversion process, South Africa's Department of Mining and Energy takes into account the South African Constitution's overall goal of redressing historical, social and economic inequalities. In particular, applicants for mineral rights licenses are expected to meet various social, labour and development targets; among these are certain affirmative action requirements for the hiring and promotion of black or other historically disadvantaged persons.

Some recent investment protection treaties concluded by the Republic of South Africa have incorporated express language designed to insulate certain of these policies from charges that they violate investment treaty protections. However, the two treaties under which the recent ICSID claim has been filed do not contain express references to South Africa's Black Economic Empowerment policies.

On Sept.18, 2007, the ICSID formally constituted the tribunal which will hear the claim brought by Piero Foresti, Laura de Carli and others against the Republic of South Africa.

The claimants appointed as arbitrator Judge Charles N. Brower, a former Acting Legal Advisor to the US State Department, and a Judge on the Iran-US Claims Tribunal. Meanwhile, South Africa nominated Joseph M. Matthews, a Miami-based lawyer at Colson Hicks Edison and a frequent arbitrator in commercial cases.

Sitting as President of the tribunal is Prof. Vaughn Lowe, Chichele Professor of Public International Law at Oxford University.

Messers Brower and Lowe have served as arbitrators in other investment treaty arbitrations. Judge Brower is arbitrator in at least 15 ongoing investment treaty cases, and has sat in previous cases including Occidental v. Ecuador, Siemens v. Argentina and ADC v. Hungary. Prof. Lowe is sitting on tribunals in two ongoing ICSID matters involving Azerbaijan and Kyrgyzstan respectively.

Following constitution of the tribunal, the parties are expected to agree a timetable for submission of written briefs in the case. As per ICSID custom, should South Africa raise jurisdictional objections to the case, the merits phase would be suspended until those jurisdictional arguments could be heard.

6. Award finally published in NAFTA’s first financial services investor-state arbitration, By Fernando Cabrera Diaz

The arbitral award in a dispute between California-based Fireman’s Fund Insurance Company and Mexico was made public earlier this summer – following a year of negotiations between the parties regarding what sensitive information needed to be excluded from the publicly-released document. According to the heavily redacted award, the tribunal found that Mexico had discriminated against the American investor – however the tribunal lacked jurisdiction over such a claim. Meanwhile, the tribunal held that Mexico’s behavior did not go as far as an expropriation of the US investor’s investment.

Fireman’s Fund’s involvement in Mexico began during that country’s financial crisis in the early nineties when the peso declined rapidly against the dollar, culminating in the first half of 1995 when the peso declined in value by 96%. The falling peso had a negative impact on Mexican banks, leading some of them to the brink of default.

In September 1995 Fireman’s Fund bought $50 million US in dollar-nominated debentures from Grupo Financiero BanCrecer, S.A. de C.V. (GFB), a Mexican holding company. The debentures were issued by GFB along with $50 million US equivalent of Mexican peso-denominated debentures sold to Mexican nationals, in order to increase capital in the troubled bank BanCrecer, owned by the GFB holding company.

However, over the next several years BanCrecer’s situation deteriorated as a financial crisis engulfed Mexico.

In 1997, BanCrecer got permission from Mexican authorities to buy back the $50 million (US) worth of peso-denominated debentures at face value from their Mexican holders. Upon being informed of this, Fireman’s Fund sought to sell its own debentures back to Bancrecer, however Mexican financial authorities rejected that bid.

The two parties disagreed as to the efforts and steps taken by the parties to work out a plan to save the bank from collapse. However, what was undisputed was that the bank ultimately did fail in 1999, leading to the Mexican Government taking over the institution.

Fireman’s Fund’s accused the Mexican Government of pushing the US company to invest more money into the ailing bank, in an effort to improve its financial health, but of not working to ensure that such a move to re-capitalize the bank would succeed. Furthermore, Fireman’s Fund alleged that the Mexican Government discriminated against it by allowing BanCrecer to buy back the debentures held by Mexican nationals, but not the ones held by Fireman’s Fund, a US company.

After negotiations to resolve the dispute broke down, Fireman’s Fund filed for arbitration under the North American Free Trade Agreement (NAFTA) in 2001. The company alleged violations of Chapter Eleven provisions on national treatment (1102), minimum standard of treatment (1105), and expropriation (1110) as well as Chapter Fourteen's own national treatment provision (1405).

As was previously reported in ITN, because the dispute pertained to financial services, the tribunal would ultimately hold that it had jurisdiction only over Fireman's Fund's expropriation claim.

Accordingly, while the claimants alleged that they had suffered discrimination at the hands of the Mexican Government, their only treaty recourse was to claim that their investments had been expropriated by the Mexican authorities.

Mexico, for its part, argued that it never committed itself to the Recapitalization Plan for BanCrecer, and that negotiations between its authorities, the claimants and others were never finalized.

Furthermore, Mexico claimed that its financial authorities had condoned BanCrecer's move to buyback peso-nominated debentures from Mexican investors (but not US-denominated debt held by Fireman's Fund) because some of these Mexican investments were accompanied by inadequate documentation and the authorities wished to avert lawsuits related to those Peso-denominated debt-holdings.

TRIBUNAL DOES NOT FIND EXPROPRIATION

The ICSID tribunal began its analysis by determining that Mexico had not compelled the claimant to participate in a plan to recapitalize the ailing bank. Rather, the tribunal found it was the claimants who took the initiative for such a plan in 1997, and there was never a finalized agreement reached between the parties.

Of particular note, however, the tribunal was unconvinced by Mexico's explanation as to why it had permitted a buy-back of Peso-denominated debt held by Mexican creditors. Indeed, the tribunal opined that Mexico had discriminated against Fireman's Fund when it allowed the buyback of the peso-nominated debentures held by Mexican nationals but not the dollar-nominated debentures held by Fireman's Fund. However, the tribunal recalled that NAFTA limited investor-state arbitration in the financial services sector to claims of expropriation, and excluded claims related to national treatment and minimum standard of treatment, under which the issue of discrimination is more relevant.

As for the eventual take-over of BanCrecer by the Mexican Government, the tribunal held that this was done with the consent of shareholders due to the hopeless financial state of the bank. Under the circumstances, the tribunal held that this action on Mexico's part could not be considered an expropriation contrary to NAFTA.

In a significant ruling, however, the tribunal ruled that each side should bear its own legal costs and split the tribunal's costs evenly. The tribunal acknowledged that Mexico's having prevailed in the preliminary and merits stages would ordinarily mean that costs would be awarded in its favour; however, the tribunal elected to deviate from this approach - in part because Fireman's Fund had respectable claims on the merits which the tribunal, nevertheless, lacked jurisdiction to hear.

The tribunal hearing the claim consisted of Mr. Alberto Guillermo Saavedra Olaverrieta, Prof. Andreas Lowenfeld, and Prof. Albert Jan van den Berg (President of the tribunal).

A copy of the redacted award is available on-line at:
http://www.investmentclaims.com/decisions/FiremansFund-Mexico-Final_Award.pdf

7. US Oil Companies signal intention to sue Canada over local content requirements,
By Luke Eric Peterson

US-based energy companies Mobil and Murphy Oil have formally signaled their intention to pursue arbitration against the Government of Canada pursuant to Chapter 11 of the North American Free Trade Agreement (NAFTA).

The two investors allege that they have been forced by the Canadian province of Newfoundland to make millions of dollars in research & development expenditures as part of their long-standing investments in the Hibernia and Terra Nova oil fields.

According to the terms of earlier deals with the province, the investors say that they made general commitments to promote local research and development. However, they object to recent moves by the Newfoundland Government to impose mandatory obligations for millions of dollars in additional R&D expenditures in that province.

Specifically, the claimants allege that Newfoundland cannot impose additional such "performance requirements" upon the foreign companies thanks to Canada's obligations under NAFTA.

The investors point, in particular, to Article 1106 (1) of the NAFTA which prohibits Canada from imposing or enforcing requirements "to purchase, use or accord a preference to goods or services provided in its territory, or to purchase goods or services from persons in its territory."

Mobil and Murphy Oil characterize the recent obligations imposed by Newfoundland authorities as requiring that "a fixed percentage of the project's revenue (be spent) on local services and goods for research and development".

Following a 90 day waiting period, the claimants can proceed to binding arbitration against Canada.

Although there had been a much-publicized announcement last month of a Memorandum of Understanding reached between the province of Newfoundland and a consortium of multinational energy firms to develop the hotly-contested Hebron oil field, it is important to note that the NAFTA Notice of Intent filed by Murphy Oil and Mobil relates to different oil projects in Newfoundland.

Briefly Noted:

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8. Governments did not discuss special investor-state rules at UNCITRAL meeting

Governments met in Vienna from September 10-14 to review the United Nations Commission on International Trade Law's (UNCITRAL) rules of arbitration. As reported in the September 7 issue of ITN, there had been the possibility that the UNCITRAL Working Group would discuss whether to draft special rules for arbitrations involving foreign investors and host states. This discussion might have occurred once the Working Group had finished a first reading of the draft revised UNCITRAL rules written by the UNCITRAL Secretariat. As it was, the Working Group did not complete its first reading of the rules, and the investor-state issue was not taken up. The issue could be on the agenda of a forthcoming meeting, slated for February 4-8, 2008, in New York.

9. Columbia University to host 2 day conference Oct. 30-31 on investment law

Columbia University's Program on International Investment (CPII) will host a conference on October 30 and 31. From the promotional materials:

"Against the background of the growth of foreign direct investment, the proliferation of international investment agreements and the rise of investment disputes, the Conference – entitled "What's Next in International Investment Law and Policy? Improving the International Investment Law and Policy System" – will identify some of the challenges that the international investment law and policy system is facing and discuss the way forward.

More specifically, the Conference will examine the expectations of key stakeholders as regards the international investment law and policy system. It will also look at the implications of a rise of FDI protectionism and, related to that, address the question of whether there may be a need to recalibrate this system by looking, inter alia, at key investor protection standards; corporate social responsibility; home country measures; and the special role that developing countries can play in further developing and strengthening the current system."

For more information about the event, visit the CPII website:
http://www.cpii.columbia.edu/events/

10. Looming Exxon arbitration with Venezuela garners extensive media interest

As has been widely reported in the mainstream media, US energy giant Exxon-Mobil has turned to arbitration against the Government of Venezuela, in a billion-dollar dispute over Exxon's investments in the heavy-oil Orinoco Belt region of Venezuela.

The investor alleges that its stake in the Cerro Negro project has been nationalized contrary to Venezuela's international law obligations.

A Request for Arbitration was filed with the International Centre for Settlement of Investment Disputes (ICSID) earlier this month. A decision by ICSID on the registration of that claim could take several months. Following registration, the parties will move to select an arbitral tribunal.

ITN will endeavour to report on this claim as it moves forward.
