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Editor's Note:
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1. In Memorium: Konrad von Moltke

It is with deep regret that this news bulletin announces the untimely passing of Dr. Konrad von Moltke, a Senior Fellow of the International Institute for Sustainable Development (IISD). Dr. von Moltke played a central role in the growth and development of IISD's research programme on international trade and sustainable development. He pioneered IISD's work on international investment agreements and was

the father of IISD's recent effort to develop a model international investment agreement which promotes sustainable development objectives. In January of this year, he chaired an experts meeting in The Hague, Netherlands which brought together NGOs, academics, government officals, arbitrators and lawyers to discuss an early draft of IISD's proposed model agreement on investment.

For many years, Dr. von Moltke taught at Dartmouth College in New Hampshire. He was a founder and advisor to several international non-governmental organizations, and in 2001 he was appointed to a high-level advisory panel convened by then WTO Director General Mike Moore to advise him on challenges and opportunities confronting the WTO and the global trading system. Konrad was also a valued supporter and mentor to a younger generation of researchers and advocates working on international policy issues. A media release by IISD President David Runnalls, marking Dr. von Moltke's passing, is available at:
http://www.iisd.org/media/2005/may_20_2005.asp

Arbitration Watch:
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2. First domino falls on Argentina as tribunal rules in financial crisis arbitration,
By Luke Eric Peterson

In a much-anticipated ruling, an arbitration tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has held that various actions taken by Argentina in relation to its recent financial crisis violated contractual commitments made to a US Natural Gas company, as well as legal protections contained in the US-Argentina bilateral investment treaty.

In its award dated May 12, 2005, the tribunal ordered the Argentine Government to pay the investor, CMS Gas Transmission Company, $133.2 Million (US) plus interest. Although the tribunal took issue with the valuation of CMS's assets put forward by the company's lawyers, it did award a sum which it held to represent the company's actual damages, including lost profits through the year 2027.

The ruling is the first to be handed down in a series of claims – totaling many billions of dollars - against Argentina which have been brought by foreign investors since 2001.

The ICSID tribunal consisted of an appointee of CMS, The Hon. Marc Lalonde, a former Canadian politician, who has served terms as Federal Minister of Finance, Health and Justice; Argentina's appointee, Judge Francisco Rezek, a member of the International Court of Justice, and a former Foreign Minister of Brazil; and Professor Francisco Orrego Vicuna, a professor of international law at the University of Chile, who served as President of the tribunal.

CMS, a minority shareholder in Argentine firm Transportadora de Gas del Norte (TGN),

filed its claim at ICSID in 2001. Initially, the firm objected to a freeze on contractually agreed tariff adjustments which had been intended to increase gas prices adjusted in line with a US inflation index.

Subsequently, the investor would also object to a series of emergency measures adopted in early 2002 by Argentine authorities in response to that country's growing financial crisis. Among these emergency measures, Argentina had ended the official 1-to-1 peg between the Argentine Peso and the US Dollar, setting in motion a series of Peso devaluations. The government also decreed that periodic adjustments of prices and tariffs according to foreign inflation indices – an arrangement which had been prescribed in many utility contracts - was to be abolished altogether.

CMS and other investors in Argentina objected to these measures, noting that their revenues were now being paid in (increasingly devalued) Pesos, with no recourse to raise prices in order to stem growing losses.

For its part, Argentina has long contended that it would have been impracticable to permit utility rates to soar – so as to appease foreign investors – at a time when unemployment and social unrest was rife. The government has insisted that it will negotiate gradual tariff increases with privately-owned public utilities provided that international treaty claims are withdrawn; to date, however, only a small handful of claimants have withdrawn their arbitral claims.

In its recent ruling, the ICSID tribunal hearing the CMS claim held that Argentina's actions, as they affected the CMS firm, had violated several provisions of the US-Argentina BIT, including the treaty obligation to provide fair and equitable treatment to foreign investors.

The tribunal also held that Argentina – by virtue of its breach of two contractual stabilization clauses, which should have operated so as to insulate the investment from tariff freezes and unilateral changes to the contract terms – had thereby violated the so-called umbrella clause of the US-Argentina BIT, a provision obliging the countries to respect "any obligation it may have entered into with regard to investments".

Notably, however, the tribunal rejected the investor's contention that it had suffered an "indirect" or "regulatory" expropriation of its investment. On this point, the tribunal was convinced that the investor's enjoyment of the property had not been effectively neutralized, and that the investor's continued ownership and control of its investment meant that there had been no "substantial deprivation".

One lawyer who is bringing a number of separate investment treaty claims against Argentina on behalf of energy industry clients commended the CMS ruling in an interview with INVEST-SD. Doak Bishop, a Houston-based Partner with the law firm King & Spalding, thinks that the CMS award may have a "persuasive" impact on other tribunals which are currently examining claims against Argentina. "This (award) will set a tone for those other cases," he says.

Bishop has several claims pending before ICSID tribunals which contain several of the same arbitrators who presided over the CMS case. Bishop did express the view that there may be additional arguments for holding that Argentina is guilty of an expropriation of foreign owned assets. He argues that a finding of expropriation could arise where there has been an "abrogation or repudiation of contractual rights", even where "control" of the assets has not been deprived.

For its part, Argentina is vowing to challenge the CMS award. Gabriel Bottini, a lawyer with the Argentine Attorney General's office says that "we are planning to initiate the annulment proceeding at ICSID." He declined to elaborate on Argentina's specific criticisms of the award out of a desire not to telegraph the legal arguments which will be tabled in the annulment proceeding.

In its pleadings before the CMS tribunal Argentina had advanced various arguments in defence of its claim, including that it was not guilty of treaty violations, and if such violations were found, that they might be excused on account of the existence of a state of necessity or state of emergency in Argentina. In Argentina's view, its actions had been necessary in order to avert an imminent economic and social collapse as the financial crisis gathered force.

However, the CMS tribunal rejected Argentina's arguments based on an alleged state of necessity – as defined under customary international law – as well as its contentions that its actions could be excused under the general exceptions provisions of the treaty, which permit parties to take measures "necessary for the maintenance of public order … or the protection of its own essential security interests."

Observers now expect Argentina to pursue a two-pronged strategy which will include efforts to annul the CMS award at ICSID – a limited process designed to address perceived procedural flaws in the arbitration – as well as to challenge the validity of the award in Argentine courts.

Carlos Alfaro, an Argentine lawyer practicing in New York, and Chairman of the Argentine-US Chamber of Commerce in New York, told INVEST-SD that he expects Argentina may be successful in challenging the awards in the Argentine courts – something which would not undo the international validity of the awards, but which could hinder efforts by investors to collect on the awards in Argentina.

He says that, politically, Argentina, "cannot accept the enforcement of these arbitration awards because the consequences, from an economic point of view, will be extremely harsh … (and could have implications for) the social stability of the country."

"So, the government has no options other than to dispute the validity of these awards in Argentina, or at least to delay in such a way as to force the winners of these awards to negotiate," he adds.

Alfaro, whose firm has advised foreign investors operating in Argentina, remains optimistic that many companies will ultimately withdraw their treaty claims, in order to reach more amicable settlements with Argentina. As economic conditions improve in Argentina, he thinks many of these companies will prefer to remain in Argentina and to come to terms with the government, rather than litigate and retreat from the country altogether.

Alfaro also predicts that the recent CMS decision could serve as a cautionary lesson for other developing countries contemplating investment treaty commitments. He says that when Argentina began signing a multitude of such treaties in the 1990s, no one anticipated that the treaties might operate so as to "compromise decisions of public policy". Alfaro adds: "I think the Argentine cases will set an example in future, and very few developing countries will accept these arbitration procedures."

Sources:

INVEST-SD Interviews

CMS Gas Transportation Company v. Argentine Republic, Award of May 12, 2005, available on-line at:
http://ita.law.uvic.ca/documents/CMS_FinalAward_001.pdf

3. ICSID tribunal OKs amicus intervention in water case, but hearings to remain closed, By Luke Eric Peterson

An investment treaty tribunal presiding over a controversial water services dispute has signaled its willingness to entertain the possible participation of nonparties as amicus curiae (friends of the court) in that arbitration.

In an Order dated May 19, 2005, and seen by INVEST-SD, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) ruled that it has the power to entertain legal briefs from interested civil society groups, in a pending ICSID arbitration between Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic.

The ruling marks the third time where an investment treaty tribunal has ruled that it has the power to entertain legal arguments from interested non-parties. It marks the first time, however, that an ICSID tribunal has so ruled; in two earlier instances, tribunals operating under the UNCITRAL rules of arbitration have reached similar rulings.

The Aguas Argentinas arbitration arises out of claims by French, Spanish and UK-based shareholders of a water and sewage concession in metropolitan Buenos Aires alleging that Argentina has violated the terms of bilateral investment treaties with France, Spain and the UK. The case is still at the jurisdictional stage, with a ruling expected in the

coming months.

In seeking to intervene in the case, a collection of Argentine and US-based non-governmental organizations argued in a letter to the tribunal that the case is likely to raise issues of public interest, including ones related to consumer protection and human rights. In its order dated May 19th, the Aguas Argentinas tribunal conceded that the case "potentially involved matters of public interest."

The tribunal added: "The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve."

The tribunal also observed that the acceptance of amicus submissions not only had the potential to inform the legal proceedings, but that it "would have the additional desirable consequence of increasing the transparency of investor-state arbitration" – which might promote greater public acceptance and understanding of the arbitration process.

While ruling that it has the power to entertain legal briefs, the tribunal chose to set out a procedure whereby interested interveners will need to petition the tribunal for leave to make such submissions. As part of this screening process, the tribunal will assess the bona fides and expertise of the would-be interveners and make a determination as to whether they should be given leave to submit a legal brief in the case. As the tribunal noted, such an approach is in keeping with that adopted by earlier investment treaty tribunals, as well as the World Trade Organization's dispute settlement process.

In relation to a separate request by the various petitioners, the tribunal rejected a bid to have the arbitral hearings opened to the public. The tribunal noted that the ICSID rules expressly require the consent of both parties to an arbitration for such a move, and while the Argentine Government had signaled its support for open hearings, the claimant investors did not.

A third request by the petitioning non-governmental organizations – that all documentation related to the case be disclosed to the public – was deferred by the tribunal for the time being. Observing that the ICSID rules presented certain constraints, the tribunal elected to wait to address the request "until such a time as it may grant leave to a particular nondisputing party to file an amicus curiae brief".

The Co-Director of an Argentine-based NGO, Asociación Civil por la Igualdad y la Justicia (Civil Association for Equality and Justice), seeking to intervene in the Aguas Argentinas case has hailed the tribunal's order. Gustavo Maurino, of ACIJ told INVEST-SD: "We think the ruling was a wise one and will be a very useful precedent for

similar cases. We are confident that the rules that have been established will allow our participation as amicus curiae."

Maurino did express concern, however, that the investor's opposition to open hearings and to the disclosure of legal documents in the case – and the consequent failure by the tribunal to address the question of access to documents - could serve to constrain the ability of petitioning groups to draft their own legal briefs. In two earlier cases where outside groups were granted a right to submit amicus curiae briefs, the parties to the respective arbitrations had given their consent to the release of all legal documents and to permit the public to attend the oral hearings. (Note: the International Institute for Sustainable Development, publishers of this news bulletin, acted as an amicus curiae in one of those two earlier arbitrations, a NAFTA dispute between the Canadian Methanex Corporation and the US Government).

4. Telekom Malaysia and Ghana look to settle UNCITRAL arbitration,
By Luke Eric Peterson

Telekom Malaysia (TM) and the Government of Ghana have reportedly reached a deal which should bring an end to an investment treaty arbitration launched in 2002.

In a statement earlier this month, the Malaysian firm said that the Government had agreed to pay an undisclosed sum over a period of two years, after which the Government would acquire TM's minority stake in Ghana Telecom, the country's national telecoms company.

TM turned to arbitration under the terms of the Malaysia-Ghana bilateral investment following a dispute with the Government over its shareholding in Ghana Telecom. The arbitration had been proceeding in-camera under the UNCITRAL rules of arbitration at the Permanent Court of Arbitration in the Hague.

The dispute attracted some public attention last autumn, when Ghana mounted a successful effort to force one of the three presiding arbitrators to choose between his arbitral role and his work as counsel for another client in a separate investment treaty matter. That arbitrator subsequently resigned as counsel to the Italian construction firm, RFCC Morocco, in the separate matter. (See "Dutch court finds arbitrator in conflict due to role of counsel to another investor", Investment Law and Policy News Bulletin, Dec.17, 2004, at: http://www.iisd.org/pdf/2004/investment_investsd_dec17_2004.pdf)

Sources:

"Telekom Malaysia, Ghana govt settle dispute over Ghana Telecom", AFX International, May 10, 2005

"Telekom and Govt of Ghana settle dispute", Malaysia Economic News, May 9, 2005

5. Businessman uses Dutch BIT to sue Vietnam for losses,
By Luke Eric Peterson

A Dutch-Vietnamese businessman, Mr. Trinh Vinh Binh has brought a claim against the Vietnamese Government under the Netherlands-Vietnam bilateral investment treaty.

Mr. Vinh Binh held various real-property investments in Vietnam, including a food-processing operation, in the early 1990s. He claims that local authorities confiscated his assets, and jailed him for alleged bribery and violation of land administration rules, all in violation of the Dutch-Vietnamese investment protection treaty.

Counsel for Mr. Vinh Binh, Tom Johnson of the Washington office of law firm Covington Burling, confirms that the claim was filed in 2003 under the UNCITRAL rules of arbitration. A tribunal has been constituted to hear the claim, however Mr. Johnson declined to reveal the names of the tribunal members, citing concerns about confidentiality. The seat of arbitration is Stockholm, Sweden.

According to a recent Vietnamese press report, Mr. Vinh Binh is seeking some $100 Million (US) in compensation.

Sources:

INVEST-SD Interviews

Negotiation Watch:
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6. Euro Commission criticizes UK position on developing countries and liberalization,
By Luke Eric Peterson

According to press reports in the UK, the European Commission has criticized the UK Government's position on proposed European Union-led Economic Partnership Agreements (EPAs) with developing countries.

As was earlier reported in this news bulletin, the UK Government had urged that so-called EPAs, currently under negotiation with African, Caribbean and Pacific countries, not be used as vehicles for forced liberalization, including in the area of investment. (See "UK departments urge EU not to force investment talks on Africa, Caribbean and Pacific", Investment Law and Policy News Bulletin, March 24, 2005, at: http://www.iisd.org/pdf/2005/investment_investsd_mar24_2005.pdf)

In a document leaked this month to the Guardian newspaper, EU trade officials have

labeled the UK Government's new position "a major and unwelcome shift" and noted that EU Trade Commissioner Peter Mandelson (a close confidante of British Prime Minister Tony Blair) would "press the UK for a revised UK line".

A European Commission briefing note, also leaked to the newspaper, accused the UK Government of capitulating to NGO pressure in formulating its new position paper on the EPA negotiations: "The paper was drafted ... following strong lobbying by the UK NGO community and the publication of the UK Commission for Africa report ... the UK set up this commission to review African development in advance of the UK G8 and EU presidencies. The drive for a commission came from celebrities and NGOs who are now pressing for UK action."

In terms of the potential investment-related content of the proposed EPAs, most European governments already have extensive series of bilateral investment protection treaties with various African, Caribbean and Pacific countries. By and large, these treaties are instruments for the protection of approved investments in the given countries; such treaties do not mandate liberalization of investment (for e.g. requiring rights of entry of establishment in given sectors). Concerns voiced by the UK Government, the Tony Blair-convened Commission for Africa, and different non-governmental groups have centred upon the prospect that EPAs might be used as a vehicle for forcing developing countries to open protected sectors to foreign investment or ownership.

Sources:

"EU move to block trade aid for the poor", By Larry Elliott, The Guardian, May 19, 2005, available at:
http://www.guardian.co.uk/guardianpolitics/story/0,,1487141,00.html

"Blaming Brussels, By Simon Jeffrey, The Guardian, May 19, 2005, available at:
http://www.guardian.co.uk/analysis/story/0,,1487890,00.html

Briefly noted:

7. ICSID registers claim by Norweigian firm against Lithuania

According to a report in the Lithuanian press, Norweigian company, Parkerings-Compagniet AS, is seeking some $50 Million (US) from the government of Lithuania in a pending ICSID arbitration over a dispute arising out a monopoly public parking concession granted by the city of Vilnius.

The claim - which alleges breaches of the 1992 Norway-Lithuania bilateral investment treaty - was registered by ICSID earlier this month. According to the local press report,

the firm and municipality each accused the other side of contractual breaches. In March of 2004, local authorities terminated the contract and handed the concession to a local company. The foreign investor resorted to ICSID arbitration following cancellation of the contract.

Sources:

"Norway's Parkerings-Compagniet claiming EUR 37 MLN in damages from Lithuania", Baltic News Service, May 25, 2005

8. Head of Environmental NGO praises outgoing ICSID official on transparency

On the occasion of the pending retirement of Antonio Parra, Deputy Secretary General of the International Centre for Settlement of Investment Disputes (ICSID), Daniel Magraw, Executive Director of the Washington-based Center for International Environmental Law offered remarks at an ICSID event praising Mr. Parra's tenure at the ICSID facility, including his efforts to promote greater transparency and openness at the Washington-based arbitration facility.

A copy of Magraw's speaking notes are available at:
http://www.ciel.org/Announce/Magraw_ICSID_2May05.html

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