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Arbitration Watch:

1. Bechtel subsidiary wins arbitration with Indian state of Maharashtra,
By Luke Eric Peterson

A tribunal at the International Chamber of Commerce (ICC) has handed down an award for \$125 Million (US) in favor of a Mauritius subsidiary of US-based Bechtel Enterprises, in that firm's long-running legal dispute with Indian authorities.

The ICC arbitration is one of a large number which have been mounted in relation to the collapse of the Dabhol Power Corporation (DPC).

Along with General Electric and Enron, Bechtel had partnered to develop what was to be "the largest privately owned independent power project in the world", according to the ICC tribunal. The DPC was to build two power plants which would supply electricity, under the terms of an exclusive Power Purchase Agreement (PPA), to a state electricity board set up in the Indian province of Maharashtra.

Although the project was supported at the outset by the then-governing Indian Congress Party, it fell on harder times following the election of parties which were sharply opposed to the project, and what they viewed as its highly-priced electricity.

During the late 1990s, the project ground to a stop, but was revived following a renegotiation of the underlying agreements. Several years later, the project came to a permanent halt when the Maharashtra State Electricity Board fell behind in power payments, and ultimately ended them altogether in early 2001.

The DPC fell into receivership, and since then the Dabhol project has devolved into a morass of international arbitration and national litigation - much of the latter intended to enjoin the various international arbitrations.

At issue in this particular ICC arbitration were claims by Bechtel subsidiary, Energy Enterprises Mauritius Company (EEMC) and General Electric subsidiary, Capital India Power Mauritius I, that various Indian entities were liable under the DPC Shareholders Agreement for breaches and damages.

From the outset, the Indian entities declined to cooperate with the ICC tribunal, and secured an injunction in Indian courts against the arbitration. The tribunal, whose jurisdiction arose out of the shareholders agreement, did not defer to this injunction, although it conducted its proceedings in a manner which sought to compensate for the failure of the Indian parties to plead their case before the tribunal. In particular, the tribunal noted that it had subjected the claims to "a degree of heightened scrutiny that was required, in its view, because of the failure of the Respondents to appear and controvert them."

In view of the Indian injunction - which is still being appealed in the Indian courts - General Electric's subsidiary announced at the first arbitral hearing that it wished to desist with its claim so long as the

injunction was in force.

Thus, the tribunal's award issued on April 27, 2005 ruled only on the claims by Bechtel subsidiary EEMC.

And, in its award, the tribunal found the state of Maharashtra, along with its State Electricity Board and another local entity, liable for various breaches of the shareholders agreement. Indeed, the tribunal found that the cumulative breaches "operated as a total expropriation of the Claimant's investment in the Project, and resulted in depriving Claimant of its fundamental rights in the Project and the entire benefit of its investment therein."

An award of more than \$125 Million (US) was levied, which included some \$93 Million for Bechtel's lost equity investment in the project, \$2.4 Million in lawyer's fees to mount the arbitration, other small costs, and interest on all of the losses. Arbitrators for the case were James H. Carter, Louis A. Craco and Jonathan Rosner.

In addition to this ICC arbitration, the Dabhol Power Project has spawned a wide range of international arbitration.

Various commercial arbitrations were reportedly launched by different stakeholders in the Dabhol project, however the status of these claims remains unclear - as they have been the subject of various injunction efforts.

Meanwhile, a number of lenders to the project have filed arbitration claims under various bilateral investment treaties with India. (See: "European Banks move to BIT arbitration against India in Dabhol dispute", INVEST-SD News Bulletin, Dec.17, 2004, available on-line at: http://www.iisd.org/pdf/2004/investment_investsd_dec17_2004.pdf)

The Government of the United States has filed a state-to-state arbitration against India, seeking to recoup some \$110 Million (US) which was disbursed to GE and Bechtel subsidiaries under the terms of an insurance contract with the Overseas Private Investment Corporation (OPIC). (See: "US Government mounts arbitration against India over failed power plant project", INVEST-SD News Bulletin, Nov. 29, 2004, available on-line at: http://www.iisd.org/pdf/2004/investment_investsd_nov29_2004.pdf)

Dutch and Mauritian subsidiaries of Bechtel and General Electric have been reported to have mounted separate investment treaty claims under investment treaties concluded by India with Mauritius and the Netherlands.

In keeping with the common practice in international arbitration, none of these proceedings are known to be open to the public or the media.

Sources:

INVEST-SD Interviews

"Bechtel wins arbitration order", Financial Express (India), May 4, 2005

"Arbitration tribunal rules for Bechtel in India's Dabhol Power Project", Bechtel news release, May 3, 2005

ICC International Court of Arbitration Case No. 12913/MS, Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company vs. Maharashtra Power Development Corporation Limited, Maharashtra State Electricity Board, and The State of Maharashtra, Final Award of April 27, 2005

2. French insurance firm alleges Cambodia violated investment treaty,
By Luke Eric Peterson

According to local press reports, a French-owned insurance company operating in Cambodia has lodged a complaint with the Cambodian Government alleging violations of the France-Cambodia bilateral investment treaty suffered in October of 2004

Philippe Lenain, head of Indochine Insurance, alleges, in a report by Agence France Presse, that the Government "brutally" closed his Cambodian operations, seizing his passport, and freezing the firm's bank accounts.

The alleged expropriation last year came close on the heels of plans announced by French insurance giant Macif and the French Development Agency to take significant equity stakes in the small insurance company, and to branch into life insurance offerings in the nascent Cambodian market.

Instead, Agence France Presse reports that Mr. Lenain alleges that his insurance operation has been destroyed, and has requested \$4 Million Dollars (US) in compensation from the Cambodian Finance Ministry.

Sources:

"French boss of closed insurance firm demands compensation: report",
Agence France Presse, Phnom Penh April 15, 2005

"French Insurer takes majority share in Cambodian company", The Star
(Malaysia), Sept.17, 2004, available on-line at:
<http://biz.thestar.com.my/news/story.asp?file=/2004/9/17/business/20040917151339&sec=business>

3. Algerian dam construction case lands back on ICSID docket,
By Luke Eric Peterson

An investment treaty arbitration related to the construction of a dam providing potable water for the city of Algiers has landed back on the docket of the International Centre for Settlement of Investment Disputes (ICSID)

An earlier tribunal ruling declared a claim filed by Italian company Consortium Groupement LESI - Dipenta in relation to the Taksebt Dam construction project to be inadmissible.

According to a source familiar with the dispute, an ICSID tribunal ruled that it had jurisdiction under the Italy-Algeria bilateral investment treaty to examine the consortium's claim. However, the claim was ultimately ruled "inadmissible" on the grounds that the consortium did not have standing to bring the claim.

In a decision dated January 10, 2005, the tribunal held that the two firms which were signatory to the investment contracts - Lesi S.p.A. and Astaldi S.p.A. - were the appropriate claimants.

Accordingly, the two Italian firms proceeded to file their own claim with ICSID, and the Centre registered that claim in March of this year.

Sources:

INVEST-SD Interviews

4. US firm withdraws case against Argentina, various others still proceeding,
By Luke Eric Peterson

A US-based investor, Pioneer Natural Resources, has agreed to withdraw its bilateral

investment

treaty (BIT) claim at the International Centre for Settlement of Investment Disputes (ICSID), in a move signaled by the company on March 30th, and confirmed by a source in the Argentine Justice Ministry this week.

The energy firm had lodged an initial claim for \$80 Million (US) - with the prospect of claiming up to \$500 Million (US) - for damages arising out of the Argentine financial crisis and a freeze on utility tariff rates.

Although the firm has reserved its right to pursue local remedies in Argentina, it has agreed to withdraw its claim before ICSID. That claim had been registered by the Centre in mid-2003, but the parties never moved to constitute an arbitral tribunal.

The claim is the second against Argentina to be dropped in recent months. As was reported in a recent edition of this News Bulletin, Spanish firm Gas Natural agreed to abandon its claim at ICSID, and to pursue a negotiated settlement. The Spanish firm is the majority shareholder in the Argentine firm Gas Natural BAN.

A minority shareholder in that same company, US-based LG&E is still pursuing a claim at ICSID under the US-Argentina (BIT). Hearings on the merits in that case have been concluded, and an arbitral award could be rendered at any time.

Argentina still faces upwards of 30 other claims at the ICSID facility - almost all of which relate to its financial crisis and its aftermath - along with 3 separate BIT claims proceeding under the UNCITRAL rules of arbitration. One of those latter UNCITRAL claims is temporarily suspended while the tribunal considers a challenge to the Chairman of the tribunal.

In the case of National Grid v. Argentine Republic, Argentina is seeking to challenge Dr. Andres Rigo Sureda as Chairman. Dr. Rigo is serving along with Mr. Eli Whitney Debevoise and Prof. Alejandro Garro as arbitrators in that case.

As reported in earlier editions of this News Bulletin, Argentina's efforts to challenge Dr. Rigo in two ICSID arbitrations were ultimately rejected (see references below).

Sources:

"ICSID rejects challenge to lead arbitrator in Siemens case; Argentina rips decision", INVEST-SD News Bulletin, April 27, 2005, available on-line at:

http://www.iisd.org/pdf/2005/investment_investsd_april27_2005.pdf

"U.S. Pioneer Withdraws Claim Vs Argentina with ICSID", Latin America News Digest, March 31, 2005

INVEST-SD Interviews

Negotiation Watch:

5. Spain and Colombia ink bilateral investment treaty and double taxation treaty,
By Luke Eric Peterson

The Government of Colombia has concluded new treaties for double taxation and bilateral investment protection with Spain. The bilateral investment treaty (BIT) will supplant an earlier BIT signed between the two countries, which never entered into force.

Colombia has negotiated international investment protection rules in a handful of agreements, however only two have been ratified to date: a BIT with Peru, and a broader free trade agreement with Venezuela and Mexico which contains an investment chapter.

Additional BITs negotiated with the UK, Spain and Cuba during the 1990s never entered into force because they were deemed partially unconstitutional by Colombia's Constitutional Court.

According to a Colombian Government source, the Colombian Constitution at that time permitted expropriation to occur without compensation in exceptional circumstances. As such, the Constitutional Court found fault with these investment treaties for not providing for such an exception.

This same official notes that a protocol was added to the BIT negotiated between Colombia and Peru to ensure conformity with the Constitution, and that treaty subsequently came into force. Likewise, a reservation was entered by Colombia to the free trade agreement with Venezuela and Mexico, in order that Colombia not be obliged to enforce the expropriation provisions of that agreement where it would be unconstitutional for it to do so.

More recently, Colombia's Constitution has been amended so as to remove the possibility of expropriations without compensation. This change has paved the way for the Government to pursue new investment protection commitments, including its recent negotiation of an updated treaty with Spain, as well as an investment chapter in a proposed free trade agreement with the US Government which is under negotiation.

The investment treaty with Spain remains to be approved by the Colombian Congress and submitted for review to the Colombian Constitutional Court before it would enter into force.

Sources:

INVEST-SD Interviews

"Spain, Colombia Sign Double Taxation, Investment Protection Agreements", Latin America News Digest, April 1, 2005

6. UN Cultural Diversity treaty negotiations to tackle trade/investment treaty relationship,
By Luke Eric Peterson

The Paris-based United Nations Economic Social and Cultural Organization (UNESCO) will play host to a third and final round of intergovernmental negotiations later this month on a proposed convention for the protection of the diversity of cultural products and artistic expression.

The draft convention negotiations have been spearheaded by countries seeking to strengthen international protections for cultural diversity.

One of many vexing questions remaining to be worked out by negotiators will be the relationship between the proposed convention and existing and future trade and investment treaties which may apply to cultural industries and which might impose restrictions on government cultural policies.

While the Government of Canada is known to exclude cultural industries from its international investment treaties, most other bilateral investment treaties neglect to do so - thereby raising questions as to whether governments may introduce or impose discriminatory policies designed to favor local cultural products.

As reported in past editions of this News Bulletin, cultural industries have been a flashpoint in certain investment treaty negotiations, with the US Government calling for South Korea to reduce its protection accorded to domestic film products as a condition for obtaining an investment treaty with the United States.

The third round of UNESCO negotiations on the proposed cultural protection convention are slated to take place from May 25 to June 4, with governments looking to agree a "preliminary draft" convention which might be tabled for consideration at an October 2005 General Conference of UNESCO member-states.

Further information about the UNESCO initiative is available on-line at this address:

http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL_SECTION=201.html

7. Germany inks bilateral investment treaty with Afghanistan

According to press reports, the German government has concluded a bilateral investment treaty with Afghanistan. German Economy Minister Wolfgang Clement signed the agreement with Afghan counterpart Hedayat Amin Arsala on Wednesday April 20.

Germany leads all countries in the number of such treaties it has concluded. Indeed, Germany pioneered the modern BIT in 1959, when it negotiated a treaty with Afghanistan's neighbour, Pakistan.

8. ICSID to co-host arbitration conference in June

The Washington-based ICSID facility is to co-host a conference with the International Federation of Commercial Arbitration Institutions (an umbrella body representing all of the world's major international arbitration institutions). The event, slated for June 3, 2005, will explore "key current issues in international arbitration", including arbitrations with state entities and conflicts of interest.

For further information about the conference or to register, please visit:

<http://www.worldbank.org/icsid/conf-060305/main.htm>

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