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Arbitration Watch:
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1. World Bank President will rule on Chile's effort to disqualify tribunal in ICSID case,
By Luke Eric Peterson and Damon Vis-Dunbar

It will fall to the World Bank President, Paul Wolfowitz, to rule on an extraordinary effort by the Chilean Government to disqualify the entire tribunal in an epic investment arbitration battle at the International Centre for Settlement of Investment Disputes (ICSID).

The arbitration pitting Mr. Victor Pey Casado and the Salvador Allende Foundation against the Republic of Chile has been wending its way through the corridors of ICSID for more than eight years now.

The dispute is a noteworthy one, tracing its roots to the 1973 coup which overthrew the government of socialist President Salvador Allende. Mr. Pey claims ownership of a Chilean newspaper, El Clarin, which was seized and later formally expropriated by the dictatorship of General Augusto Pinochet, on account of the paper's sympathies with the Allende Government.

Mr. Pey fled Chile in 1973 and returned to Spain, the place of his birth, after a brief interlude spent in Venezuela. He alleges that he is the rightful owner of El Clarin, and seeks more than $500 Million (US) in compensation under the terms of a bilateral investment treaty which came into force between Spain and Chile in 1994. Mr. Pey has assigned 90% of his claim against Chile to the Salvador Allende Foundation, a non-profit group established in 1990 to promote freedom of the press and democratic values in Spanish speaking nations.

Chile contests Mr. Pey's ownership claim to the newspaper in question and insists that it has already made a compensation payment to El Clarin's rightful owners. The ICSID case turns on a number of legal issues including sharp disagreement between the parties as to whether Mr. Pey should be considered a Chilean national, and, as such, ineligible to seek ICSID arbitration against his "home" state.

As yet, the tribunal has not reached a decision on its competence to examine the merits of Mr. Pey's claim. A long-awaited jurisdictional decision was pushed some further distance towards the horizon thanks to the recent move by Chile to challenge the tribunal members.

On August 23rd, Chile applied to ICSID in a bid to disqualify the three member arbitration tribunal. Chile's party-appointed arbitrator, Mr. Galo Leoro Franco, voluntarily resigned his position shortly after Chile filed this request – although this came after ICSID had suspended the operations of the tribunal so as to deal with Chile's request. As such, Mr. Franco's resignation will be considered after ICSID has made its ruling on Chile's request.

Meanwhile, the remaining arbitrators, Mr. Mohammed Bedjaoui, and Pierre Lalive have dug in their heels against Chile's request, and the ICSID secretariat is now gathering arguments from each party to the arbitration, along with the two remaining arbitrators, as a prelude to ruling on the disqualification request.

Once those written arguments have been filed, the Chairman of ICSID's Administrative Council, World Bank President Paul Wolfowitz will have thirty days in which to rule on Chile's request.

Chile's move to challenge the tribunal has raised eyebrows, with counsel for Mr. Pey suggesting that the challenge was launched in order to preempt an imminent ruling in favor of the claimant. In a September 30 letter to ICSID, seen by this newsletter, counsel for Mr. Pey argue that Chile's challenge appears to have been motivated by a recent announcement of the tribunal "d'un project de resolution" and of plans to meet for deliberations in September of 2005.

For its part, Chile has argued that a final ruling in the case was far from imminent, and that the primary reason for its challenge was in fact, what it calls the "glacial pace" of the arbitration proceedings, and consequent doubts as to when the dispute might be resolved by the tribunal.

Indeed, in a memorandum filed with the ICSID secretariat on September 16th, Chile's Energy and Economy Minister, Jorge Rodriguez Grossi pointed to the unprecedented length of the proceedings to date – some twenty-five months since a hearing on jurisdiction and merits was held in May of 2003 - and expressed his doubts as to whether the tribunal was near to issuing a decision.

(Also aggravating the length of the proceedings, in Chile's view, had been an earlier move by counsel for the claimant to disqualify an original member of the tribunal, Francisco Rezek. This move came in March of 2001, some ten months after hearings on jurisdiction in the case, at a time when Chile alleged that the tribunal was nearing a decision on jurisdiction. Following the claimant's challenge, Mr. Rezek resigned his position on the tribunal, while registering his disagreement with the claimant's reasoning for his proposed disqualification. A new President of the tribunal, Mr. Lalive, was nominated in April of 2001, and the parties were obliged to reargue their positions and to hold new hearings on jurisdiction. In 2002, the newly constituted tribunal indicated that it would join Chile's jurisdictional objections to an examination of the merits of the case.)

Following the May 2003 hearings on jurisdiction and the merits, the parties commenced what would become a lengthy vigil, as they awaited a decision from the tribunal.

According to papers filed by Chile with ICSID, counsel for Mr. Pey inquired in August of 2004 as to when an award might be rendered in the case, pointing to the length of time that had passed since the hearings and to the fact that the claimant was now 89 years of age.

For its own part, Chile was bristling at the length of time which had elapsed without any ruling from the tribunal, and at periodic requests from ICSID for further funds to pay the arbitrators and to support their legal research work. In a memorandum submitted to ICSID on November 8, 2005, in support of its bid to disqualify the tribunal, Chile lamented the "astounding figure of US $2,260,000" which had been spent by the parties to date on arbitrator fees and administrative expenses related to the long-running arbitration. (This figure is in addition to legal fees paid by the parties to their respective legal counsel for representation in the case).

Added to these complaints about the length and cost of the proceedings, and the alleged incapacity of the tribunal to perform its duties in a timely manner, are additional arguments for the disqualification of Messers Bedjaoui and Lalive.

It should be noted that both Mr. Lalive and Mr. Bedjaoui are understood to have rejected all of Chile's various grounds for their disqualification. While ITN contacted both arbitrators for comment on Chile's disqualification request, neither responded to these requests. Under ICSID rules, arbitrators are limited in their ability to comment or discuss arbitrations over which they are presiding.

In the case of Mr. Bedjaoui, Chile has argued that his recent appointment as Foreign Minister of Algeria offers an additional ground for his disqualification. In its filings with ICSID, Chile has alleged that Mr. Bedjaoui's continuing service as an arbitrator could conflict with Algerian law – a claim apparently denied by Mr. Bedjaoui – as well as pose diplomatic complications for Chile's foreign relations with Algeria. Counsel for Mr. Pey have rejected such arguments, contending that there is nothing in the ICSID rules to bar a politician from serving as an arbitrator under such circumstances.

At the same time, Chile has also raised questions about Mr. Lalive's health. Mr. Lalive, who began practicing law in Switzerland in 1951, and who was for many years a Professor at the University of Geneva until his retirement in 1993, is a senior arbitrator of long experience.

Chile has requested of ICSID that "an inquiry be made as to the health status of Mr. Lalive". As part, of this request, Chile seeks to determine whether health issues have impeded the performance of Mr. Lalive's duties, and whether they might impede his future service as an arbitrator.

ITN understands that Mr. Lalive has rejected any suggestion that he be disqualified on health grounds, and that he has further objected to the "delayed and manifestly abusive character" of Chile's line of inquiry about his health.

Indeed, the timing of Chile's challenge to the tribunal - coming as it did on the eve of a proposed meeting of the tribunal in New York City in September of 2005 to deliberate over a draft decision in the case - has been a cause of consternation for the claimant, Mr. Pey. Lawyers for Mr. Pey have characterized Chile's challenge to the tribunal as an effort to avert an imminent (and unfavorable) ruling in the case. Indeed, in a November 8th letter to the ICSID Secretariat, counsel for Mr. Pey encourage the tribunal to take into account Chile's "bad faith" in making its challenge at this particular juncture.

For its part, however, Chile claims to have interpreted a request by ICSID for a further $500,000 to support the tribunal's work into the autumn of 2005, as an open-ended mandate of sorts, and a signal that the tribunal was not nearing an end to its lengthy and expensive work.

A decision on Chile's request is expected some time early in the new year.

2. Lebanon hopes for settlement with France Tel after failing to overturn BIT award, By Luke Eric Peterson

In a public statement issued last month, Lebanon's Telecommunications Minister

Marwan Hamadeh announced that his country would offer France Telecom $96 Million to settle its dispute with the French firm.

The settlement comes some months after a ruling in favor of France Telecom in an arbitration under the France-Lebanon investment protection treaty. The tribunal operating under the UNCITRAL rules of arbitration handed down a $266 Million award in favor of France Telecom on February 22 of this year. (The tribunal consisted of Paris-based Professor Bernard Audit, Lebanese lawyer Antoine Akl, and Canadian lawyer Marc Lalonde.)

To date, France Telecom has not issued a public statement as to whether it will accept the settlement offer, which would see the Lebanese Republic pay $96 Million across three years. When contacted last week, a company spokesman indicated that he would investigate the matter, but has yet to return ITN's call.

For the Lebanese Government, settlement of the dispute would lift an albatross from its neck. The $266 Million award has compounded the dire financial situation which the government inherited from the former Syrian-backed regime which fell earlier this year. According to a source familiar with the case, a Lebanese effort to overturn the arbitral award through a challenge to a Swiss court has failed. While a decision is understood to have been reached, it had not been published on the court's website at press time.

Apart from the France Telecom arbitration, Lebanon is known to have lost another earlier investment treaty-based arbitration. According to a source in Lebanon, the earlier case saw an Egyptian investor successfully claim for damages under the Egypt-Lebanon bilateral investment treaty. ITN is in the process of investigating this earlier dispute.

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ITN interviews

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"L'Etat va Regler 96 millions de Dollars a Cellis pour solde de tous comptes", L'Orient le Jour, 18 Novembre, 2005

3. Nomura and Czech Republic await decision on liability,
By Damon Vis-Dunbar

The Japanese Bank Nomura and the Czech Republic are bracing themselves for a decision on liability as Nomura seeks some $1.5 Billion US in damages for breach of a Dutch-Czech bilateral investment treaty (BIT).

Hearings on liability were heard last April, and while the possibility of a settlement has not been discarded, both sides expect a decision shortly. That decision would open up two possibilities: either the arbitration comes to a close, or the tribunal moves on to a determination of compensation owed to Nomura..

Nomura's Dutch subsidiary, Saluka Investments BV, brought the claim to arbitration under the Dutch-Czech BIT in 2001 alleging expropriation and breach of the fair and equitable treatment provision, three years after it had purchased a 46 percent stake in the Czech Bank Investicni a Postovni Banka (IPB).

In the lead up to the arbitration proceedings, a large number of non-performing loans, which threatened all Czech banks at the time, had brought IPB to the brink of bankruptcy.
Nomura alleges that state aid funneled to competitor banks, but denied to IPB, led to the bank's insolvency.

In 2000, IPB was placed under forced administration, and soon after transferred to the Czech Bank Ceskoslovenska Obchodni Banka (CSOB), in an agreement between IPB's administrator, CSOB, and the Czech Finance Department.

A counter-claim by the Czech Republic for $8 Billion US alleging asset-stripping by the Japanese company was denied jurisdiction in the BIT arbitration. A separate contractual arbitration was then commenced by the Czech Republic in order to pursue this claim against Nomura; a merits hearing in that Swiss-based contractual arbitration is slated for March 2006.

Meanwhile, earlier this month, Czech police brought criminal charges against a former representative of Nomura, alleging insider trading during the two-year period prior to IPB's forced administration.

Sources:
ITN interviews

4. Gas Natural suspends case against Argentina, LG&E stays course,
By Damon Vis-Dunbar

Proceedings between the Spanish energy firm Gas Natural and the Republic of Argentina at the International Centre for the Settlement of Investment Disputes (ICSID) have been suspended at the request of both parties. However, a permanent settlement of the arbitration may hinge on the decision of a US company to terminate its own arbitration against Argentina – a move the U.S. investor is reluctant to take.

Both Gas Natural and LG&E are shareholders in Ban S.A., a natural gas distributor in

Argentina, which has reached an initial agreement with the Argentine government to hold a tariff review in the summer of 2006. But as a condition of that agreement, Argentina is asking Ban S.A.'s two shareholders to suspend their arbitrations at the ICSID facility.

While Gas Natural has agreed to suspend its proceedings, LG&E has so far refused. The LG&E case was one of the first to be filed against Argentina at ICSID, and hearings on the merits were held some months ago; as such, a decision is thought to be imminent in that case.

The facts and contentions in the Gas Natural and LG&E proceedings are essentially the same. Both bought into Ban S.A. in the early nineteen-nineties as Argentina privatized its national gas monopoly, before seeing that investment turn sour during the financial crisis of 2001-2002, when Argentina froze automatic tariff adjustments (which were to have been based on the U.S. Producer Price Index and calculated in U.S. dollars).

Gas Natural claims these actions breached not only its contracts, but also the Spain-Argentina bilateral investment treaty (BIT); meanwhile, LG&E has brought its own claim under the U.S.-Argentina BIT.

During hearings on jurisdiction in the Gas Natural case, Argentina argued that, since Gas Natural and LG&E are shareholders in Ban S.A., and did not hold the gas distribution license directly, they do not qualify as investors. However, this argument was subsequently rejected by the tribunal.

As in the many other cases arising out of the Argentina's financial crisis and brought to ICSID under bilateral investment treaties, Argentina also claims the measures taken to stem the financial crisis were matters of general economic policy and essential to the welfare of the state.

Sources:

ITN interviews

5. Lawyers keep powder dry as Bolivian election looms,
By Luke Eric Peterson

Although Bolivia has been formally warned by a number of multinational companies that the country could face international arbitrations related to the country's new Hydrocarbons law, there has been no move as yet to make good on such threats.

At least eight companies, Repsol, Total, BP, Vintage Petroleum (since acquired by Occidental), Pan-American, Pluspetrol, Tecpetrol, and Exxon-Mobil are known to have triggered the mandatory waiting periods stipulated under bilateral investment treaties with Bolivia.

After these waiting periods elapse, the companies would be free to pursue arbitration over alleged breaches of the treaties. However, despite the fact that the mandatory waiting period has already expired in at least one instance, all the affected companies continue to pursue an amicable settlement with the Government.

In part, this seems due to persisting confusion as to the actual financial impact of Bolivia's new regime for gas and oil investors.

Earlier this year, Bolivia's Congress adopted a new Hydrocarbons law which has had various implications for foreign investors, including a new 32% royalty to be added to the existing 18% royalty rate, as well as a requirement to agree to new operating contracts proposed by government.

However, a six month period in which the migration to new contracts was to take place has since come and gone, without Bolivia's having presented new model contracts to the foreign firms for consideration.

According to a source familiar with the investments of these firms, Bolivia's Congress and Executive are now debating whether to formally extend the six month migration period provided in the Hydrocarbons law, as any significant progress on the question is not possible short term, with national elections looming on December 18th.

This source adds that foreign investors would like to see the proposed contracts – and to assess the overall balance of obligations and entitlements – before making any decision as to whether to move to arbitration. While foreign investors are already paying the new enhanced royalties to Bolivia, it remains unclear, for example, whether new contracts might be crafted so as to minimize the financial impact of this new "tax" – perhaps by allowing for deductions of the royalties from incomes taxes paid to the Bolivian Government.

Negotiation Watch:
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6. Canada-Peru set to sign investment agreement by year's end,
By Damon Vis-Dunbar and Luke Eric Peterson

Canada and Peru expect to conclude an investment treaty in the coming weeks, in what will be Canada's first such agreement based upon its new model foreign investment protection and promotion agreement (FIPA) negotiating template.

Canada had announced that the investment agreement would be signed last June, however that deadline slipped. Among some of the last items to be negotiated has been the question of how to reconcile existing contracts between Canadian foreign investors and the Peruvian government – so called stabilization agreements – with the new bilateral investment treaty, according to a source.

Canada has made clear that its primary purpose for pursuing this investment agreement is the protection of existing investments in Peru, which totaled 1.79 Billion Dollars (CAD) by the end of 2003. It is unclear, however, whether the treaty will apply to past legal disputes which are already in existence between Canadian investors and the Peruvian Government. If the treaty were to apply to such disputes, Canadian investors who are currently suing for breach of a stability agreement might be able to bring additional claims for breach of the various protections written into the new investment treaty.

At least one Canadian company appears to have taken steps which could keep such an option open. Earlier this year, Manhattan Minerals (which has since become Mediterranean Minerals) terminated an arbitration process with Peru over the Tambogrande mining site, professing little hope of victory in the case.

In February of this year, a company spokesperson told Business News Americas, “We're wondering if [the arbitration is] worth the cost. If it was in Canada, we'd probably have more chance [of victory] but in Peru we've probably got no chance.”

However, according to company security filings, the company has reserved the right to re-initiate arbitration over the dispute at any time within the next ten years - so long as it pays an annual fee of $30 000 US to maintain its mining property in Peru. A company spokesman declined to discuss the dispute, or the prospect of reviving its claims after a Peru-Canada investment treaty comes into force.

While Peru could face international arbitrations under the proposed investment treaty with Canada, the converse seems unlikely – at least in the near term. At present, Canada plays host to an exceedingly modest $1 Million (CAD) of Peruvian investment. Nor does the Canadian government expect investment flows to Canada to increase as a result of the proposed agreement, according to statements by Canada’s trade department.

Indeed, Canada cut short an assessment of the environmental impact of the FIPA earlier this year, after an initial study determined the new pact would have little effect on Canada’s environment.*

The assessment did not examine the environmental impact the FIPA may have on Peru, a fact which has drawn criticism from environmental groups.

While both Canada and Peru have expressed confidence that the investment treaty will be concluded by year’s end, neither party was willing to speak on the record about the state of the negotiations, citing a need to keep the talks confidential.

Currently, Peru is party to some 29 investment protection treaties, with virtually all of those agreements dating to the 10 year period during which the country was ruled by President Alberto Fujimori, who came to power in 1990, with plans for widescale economic liberalization of the crumbling Peruvian economy.

A number of Canadian mining companies poured significant investments into the country beginning in the 1990s, in the absence of any investment protection treaty. Recent figures from International Trade Canada indicate that Peru ranks third on the list of countries where Canadian mining companies spend their exploration budgets.

Meanwhile, Canadian firms are also becoming major players in Peru's financial services industry. Last week, a Canadian bank announced that it will invest some $390 Million (US) in order to create Peru's third largest bank. Scotiabank will become the majority shareholder of Banco Wiese Sudameris SAA and Banco Sudameris, and plans to merge the two banks together.

(* Disclosure: the Editor of this newsletter sits on an independent external advisory committee which provides comments and feedback on Canada's Environmental Assessments of trade and investment agreements)

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ITN Interviews

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"Scotiabank buying Peruvian bank", The Globe and Mail, Dec.6, 2005

7. Canada budgets new money for foreign investment treaty negotiation and enforcement, By Damon Vis-Dunbar

Canada earmarked CAD $470 Million for its international trade department in a budget tabled earlier this month.

The so called ‘mini-budget’, came just two weeks prior to the fall of Canada’s minority government. As such, whether the budget is passed hinges on the results of the upcoming election, set for late January.

Some $12 Million, to be spread over five years, could go to launching new free trade and investment agreements and enforcing those already in existence, according to a government statement.

Canada is currently negotiating investment agreements with India and China, and is on the verge of concluding an agreement with Peru (see previous story).

Highlighting the ongoing softwood lumber dispute with the U.S., the government has also vowed to “dedicate more resources to monitoring and enforcing existing agreements – such as NAFTA and the WTO – given increased protectionism in key markets.”

Yet a larger chunk of new money will go to communications designed to attract foreign investment. Observing that “foreign investors perceive Canada as having a less attractive investment environment than most other OECD countries,” the government has dedicated $60 Million to “showcasing Canada to the world”.

“Perceptions often drive behavior, so we need to improve the signals we send to international markets,” states the finance department.

Notably, the Finance Department also signals possible liberalization on the horizon, with potential changes to “(Canada’s) relatively stringent ownership restrictions in telecommunications and transportation.” A telecommunications policy review panel has been asked to provide recommendations, “which may include consideration of foreign ownership limits in the telecommunication sector.”

A plan to review foreign ownership restrictions in the airline sector is also pending, according to the department.

Sources:

“Minister Peterson Welcomes Proposed New Investment in International Commerce and Launches Can-Trade”, Department of International Trade press release, November 14, 2005

“A Plan for Growth and Prosperity”, Department of Finance, November 2005, http://www.fin.gc.ca/ec2005/agenda/agsume.pdf

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