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1. Challenge to Arbitrator Schwebel rejected by Belgian court, Poland seeks appeal,
By Luke Eric Peterson

In a ruling handed down on Dec.22nd, 2006, a Belgian court has rejected a bid by the Government of Poland to challenge a prominent international arbitrator on the grounds that he lacks the requisite impartiality to preside as arbitrator in an investment treaty dispute between Poland and the Dutch insurance company Eureko.

As was earlier reported in ITN, Poland mounted its challenge to Judge Stephen Schwebel following the release in mid-2005 of the three-member tribunal's partial award on liability in the Eureko arbitration. In a split 2-1 ruling, Poland was held to have breached provisions of the Netherlands-Poland bilateral investment treaty (BIT), after reversing course on a decision to privatize a leading national insurance company.

At the heart of Poland's challenge of Judge Schwebel was a concern about the close working relationship between Judge Schwebel and the law firm Sidley Austin; the US-based firm is acting against Poland in an unrelated, but ongoing, investment treaty arbitration brought on behalf of the US-based Cargill Corporation. An earlier press report in the American Lawyer Magazine had suggested that Judge Schwebel was a member of the legal team representing Cargill in that ongoing arbitration against Poland; however,

this report was later retracted by the American Lawyer Magazine.

Although Judge Schwebel has worked as co-counsel alongside Sidley Austin on other investment treaty cases (for e.g. representing the French firm Vivendi, as well as the Government of Turkey, in two ongoing ICSID arbitrations), he insisted that he had no involvement in Cargill's arbitration claim against Poland. However, the Polish Government challenged Judge Schwebel's role as arbitrator in the Eureko arbitration, alleging that it had "legitimate doubts" as to his impartiality for purposes of presiding over an investment treaty arbitration against Poland.

In a ruling handed down last month, the Belgian Court of First Instance rejected Poland's bid to have Judge Schwebel removed from the Eureko arbitral tribunal, declaring the challenge unfounded. The Belgian Court held that no evidence had emerged which linked Judge Schwebel with the representation of Cargill by the law firm Sidley Austin; the Court noted that the fact that Judge Schwebel's personal law practice was premised in the same building as Sidley Austin's law firm, was deemed insufficient as a reason for doubting his impartiality or independence to preside as arbitrator over a case involving Poland.

Following on the heels of the Belgian Court's rejection of Poland's challenge to Judge Schwebel, Poland filed papers last week in a bid to appeal the lower court ruling.

Poland's Treasury Department has publicly insisted that the Belgian Court of First Instance ignored pertinent facts which are alleged to demonstrate Judge Schwebel's close working relationship with the Sidley Austin law firm, on various matters, leading Poland to have legitimate doubts as to Judge Schwebel's impartiality.

In a new twist, Poland also takes issue with Judge Schwebel's collaboration with the Sidley Austin law firm in a different ongoing investment treaty arbitration (Vivendi v. Argentina) where, as co-counsel, Judge Schwebel and Sidley Austin relied in their written legal arguments on the arbitral award rendered in the Eureko case (an award co-authored by Judge Schwebel). Poland asserts that this new fact further supports its earlier-expressed doubts as to Judge Schwebel's independence and impartiality. In comments reported in the Polish press, Deputy Treasury Minister Pawel Szalamacha, has said that "The conflict of interests is obvious" in Poland's view.

ITN can report that the Government of Argentina had voiced a related objection to the use by Judge Schwebel and Sidley Austin of legal arguments which were premised, in part, upon an arbitral award from the Eureko case which had been co-drafted by Judge Schwebel during the same period when the Vivendi v. Argentina arbitration was itself ongoing.

Argentina is understood to have raised concerns about the ability of an arbitrator to draft an arbitral award in one proceeding (and to make an interpretation of standard investment treaty obligations such as those on fair and equitable treatment), without giving any consideration (either consciously or unconsciously) to how that legal ruling might impact

upon another case in which that same arbitrator was acting as counsel on behalf of a foreign investor and advancing a particular interpretation of investment treaty obligations such as those on fair and equitable treatment.

ITN understands that Argentina did not allege that Judge Schwebel had acted improperly in the Eureko matter in his capacity as arbitrator, but rather that a reasonable observer might infer that anyone playing the role of arbitrator and counsel simultaneously in such circumstances might be dogged by an "appearance" of possible bias. Judge Schwebel is understood to have denied this assertion on the part of Argentina.

A formal request was made by Argentina, calling for any references to the Eureko arbitral award to be stricken from Vivendi's legal briefs in the Vivendi-Argentina arbitration.

ITN can report that the Vivendi tribunal declined to make such an order at that time; ruling, instead, that the question as to whether Judge Schwebel's role as arbitrator in the Eureko case, while co-counsel in the Vivendi case, should impact upon the weight to be given to the Eureko award, was a question best reserved for a later stage of the proceedings (i.e. the oral hearings or post-hearing briefs).

The Vivendi proceeding remains ongoing and the hearing transcripts and legal pleadings are not a matter of public record. However, ITN could find no evidence that the authority of the Eureko award was raised again by Argentina during the oral hearings last year; or that Vivendi's legal team discussed the Eureko award during those oral hearings.

As for the Government of Poland's renewed challenge in the Eureko v. Poland matter, it remains unclear whether the Eureko arbitration proceedings will remain in abeyance, whilst the Belgian courts consider whether to accept, and later to examine, such an appeal.

If, and when, the Eureko arbitration proceeding resumes, the tribunal's next task will be to quantify the damages owed by Poland to Eureko for violating the terms of the Netherlands-Poland bilateral investment treaty. Eureko had been seeking more than $1 Billion in compensation for its thwarted bid for the PZU insurance company.

2. Analysis: Arbitrator challenges raising tough questions as to who resolves BIT cases, By Luke Eric Peterson

As international investment treaty arbitrations between foreign investors and their host governments continue to proliferate, the thorny issue of who is qualified to resolve such disputes remains a subject of considerable debate.

As regular readers of ITN will be aware, there is no permanent international court or tribunal charged with the interpretation of investment treaties. A typical feature of arbitration as a method of dispute resolution is that it provides the parties with a meaningful role in selecting the persons who will resolve a given dispute.

There are multiple sets of arbitration rules used to govern investment treaty disputes, and these rules differ as to the qualifications required of arbitrators. Generally speaking, however, the rules demand that arbitrators be impartial and independent.

If there are doubts as to an arbitrator's impartiality or independence, a party may challenge that arbitrator.

One traditional ground for such a challenge has been an alleged conflict of interest, for example where an arbitrator is alleged to have financial interests in the matter in dispute, or where that arbitrator has other ties to one of the disputing parties (for e.g. he or she may have provided legal or professional services to one of the parties).

Another emerging ground involves what are sometimes called "issues" conflicts, where an arbitrator's publicly-stated views on a particular subject are alleged to render him or her less than impartial for purposes of arbitrating a particular dispute. As yet, there are no clear guidelines as to what constitutes an actual "issues" conflict. There is growing debate amongst arbitration practitioners and observers as to how and where to draw the line.

Yet another strain of challenges raise questions as to whether, or under what circumstances, an individual can serve as counsel in one or more investment treaty arbitrations and as arbitrator in or more other investment treaty arbitrations during the same time period.

At its most general, this type of challenge appears rooted in a skepticism that a single individual can have the requisite impartiality – or appearance of impartiality - to be arbitrator in disputes where legal questions arising (for example, how to interpret basic treaty obligations owed to foreign investors) could have knock-on implications for other cases in which that arbitrator is acting as counsel on behalf of other parties.

According to Loretta Malintoppi, a Paris-based lawyer who has undertaken research on arbitrator conflicts for the International Law Association, investment treaty arbitration is susceptible to this type of alleged conflicts in a way that international commercial arbitration is not.

While stressing that she takes no position on any pending challenges to arbitrators which are currently ongoing, Malintoppi, who is Of Counsel with the Paris Office of the English law firm Eversheds, notes that, in contrast to commercial arbitration, where the legal issues are often grounded in unique contractual or legal instruments, investment treaty disputes may raise many of the same types of legal questions (for e.g. jurisdictional requirements under treaties, definitions of standard BIT obligations such as Fair & Equitable Treatment or National Treatment, etc.) As a result, investment arbitration has witnessed challenges which are targeted at the dual-role adopted by arbitration practitioners (i.e. serving as arbitrator and counsel simultaneously, albeit in parallel cases).

Some critics have questioned whether the commercial-arbitration-model is wholly appropriate for investment treaty disputes, which involve sovereign governments, potentially significant matters of public interest, and recurring questions of international law interpretation (requiring arbitrators to interpret both international treaties and customary international law).

Judge Thomas Burgenthal, a US-appointed member of the International Court of Justice, and occasional investment treaty arbitrator, in a widely-circulated after-dinner speech to a Geneva conference last year, argued that lawyers ought to choose whether to practice as arbitrators or counsel in investment treaty arbitrations, "and be held to the choice they have made, at least for a specific period of time."

Burgenthal explained that this choice is necessary, "in order to ensure that an arbitrator will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel."

The International Institute for Sustainable Development (IISD), publishers of the ITN newsletter, have voiced occasional concerns about the potential for conflicts where individuals "wear more than one hat" in the arbitration world. Howard Mann, Senior International Law Advisor to IISD, argues that "The standard for conflict of interest is not simply that an actual conflict of interest must be sanctioned, but that the appearance of conflict must be prevented in order to promote the integrity of the judicial process."

Mann adds that "A person acting as counsel in one case has a duty to that client to protect and promote their interests. But acting as an independent arbitrator in another case may require them to take a diametrically opposite interpretation of the law that they must plead for their client. Is it even possible to meet both obligations in such circumstances?"

Mann advises that arbitrators ought not to be placed in situations where they may have to rule on legal issues which could help or hinder their other clients.

Loretta Malintoppi, in her work for the ILA on challenge-issues, says that she has heard anecdotal reports that some individuals are beginning to make a conscious choice to practice either as an arbitrator, or as counsel to investors or states. This type of choice pre-empts some challenges which may arise. But Malintoppi notes that many practitioners, particularly younger lawyers, may be reluctant to self-designate themselves as one or the other. Malintoppi says that this reluctance may stem from various reasons, including a concern that a single line of activity might yield insufficient work opportunities in future, or a more general conviction that there is no inherent problem with wearing "two hats" in this field.

Malintoppi adds that arbitration lawyers also express fears that the talent-pool of available arbitrators and arbitration counsel could be diluted dramatically if more-experienced lawyers have to choose one exclusive role.

Indeed, a view expressed by some arbitration lawyers is that arbitration, at its very essence, is a party-directed form of dispute resolution where the parties should be able to choose the persons who arbitrate a given dispute. For this reason, parties should be free to select someone who has experience both as arbitrator and counsel, as that person might bring greater experience, expertise, and prestige to the task.

Todd Weiler, a Canadian lawyer, who has practiced as counsel in numerous investment treaty arbitrations, and as arbitrator in at least one such case, tells ITN "that to the extent problems exist in the area of professionals wearing multiple hats, they are not demonstrative of a systemic flaw in the practice."

Weiler cautions against viewing arbitrators as if they were judges on a permanent court. He argues that individuals acting as arbitrators are professionals offering a private service - not officials performing a public service – and that there should be no bright-line prohibition against individuals practicing as arbitrators and counsel contemporaneously.

For the moment, the practice of lawyers operating as both counsel to clients and arbitrators remains widespread in the investment treaty arbitration context. While challenges to arbitrators occasionally attract a great deal of publicity and discussion, there are numerous instances where international lawyers are working as arbitrators in some investment treaty disputes and as counsel in others.

WHO DECIDES CHALLENGES?

In those cases where a challenges is mounted against an arbitrator – be it in relation to a traditional conflict of interest, a so-called issues conflict, or some other type of alleged conflict - the question of who shall decide upon the merits of that challenge comes into view.

Thanks to the decentralized nature of this form of arbitration, and the multitude of different procedural rules and forums which may be used, it can fall to a range of persons or bodies to resolve such challenges. For example, in arbitrations governed by the ICSID Convention, the two-remaining members of a tribunal will be called upon to determine whether the challenge ought to be upheld. In the event that the two members reach differing views, the matter is then handed on to the Chairman of the ICSID Administrative Council (the World Bank President) for a final decision.

(For an example of an arbitrator-challenge pursued in an arbitration taking place under the ICSID rules, see ITN's earlier reporting: "ICSID tribunals diverge over independence of arbitrator to hear Argentine claims", March 4, 2005, available on-line at: http://www.iisd.org/pdf/2005/investment_investsd_mar24_2005.pdf and "ICSID rejects challenge to lead arbitrator in Siemens case; Argentina rips decision", April 27, 2005, available on-line at:
http://www.iisd.org/pdf/2005/investment_investsd_april27_2005.pdf)

By contrast, in arbitrations using the UNCITRAL procedural rules, there may be a role

for national-level courts to pass judgment on such challenges. In the first instance, the two-remaining members of a tribunal may offer an informal opinion as to whether the third member of their tribunal ought to resign. However, such challenges are typically resolved by the so-called appointing authority (the body which has been designated by the parties to handle appointment of arbitrators in instances where the parties to an arbitration are unable to agree on such appointments). Beyond this appointing authority, however, lies the prospect of recourse to the domestic courts of the place of arbitration (every international arbitration is sited in a particular country for legal purposes).

(For an example of an arbitrator-challenge pursued in an arbitration taking place under the UNCITRAL rules, see ITN's earlier reporting on the Telekom Malaysia v. Ghana case at: http://www.iisd.org/pdf/2005/investment_investsd_mar24_2005.pdf)

3. ICSID Tribunal rejects Egypt's objections to jurisdiction in Shepheard Hotel dispute, By Fernando Cabrera Diaz and Luke Eric Peterson

A tribunal at the World Bank's International Centre for Settlement of Investment Disputes (ICSID) has ruled on objections to its jurisdiction in a dispute brought by the Danish group Helnan International Hotels. The tribunal rejected several objections raised by Egypt, most notably that the claim fell beyond the temporal scope of the Denmark-Egypt Bilateral Investment Treaty (BIT).

On Helnan's account, various agents of the Egyptian State conspired to downgrade the Shepheard Hotel in Cairo from five-star status to four-star status, as a prelude to terminating the Danish company's operation and management contract. Helnan alleged that the Government carried out this scheme with the ultimate intention of privatizing the Shepheard Hotel.

Helnan's operating contract was originally signed between the Scandinavian Management Company (Scandinavian) and the Egyptian Hotels Company (EHC) in September of 1986. Under the agreement, Scandinavian was to manage and operate the hotel on behalf of EHC for a period of 26 years.

As a result of a merger, in March of 2000 The Egyptian Company for Tourism and Hotels (EGOTH) took over EHC's rights and obligations. In October of 2002, EGOTH and Helnan International Hotels (Helnan), the successor to Scandinavian's interests in the Shepheard, added an annex to their original agreement. This annex stipulated that EGOTH could sell the Shepheard as part of Egypt's privatization program, as long as the sale was done under terms that respected Helnan's rights.

In September of 2003, the Shepheard Hotel was inspected by the Ministry of Tourism and downgraded from 5 to 4 star status. Shortly thereafter, EGOTH took the Danish firm to arbitration at the Cairo Regional Center for International Commercial Arbitration, alleging that this status downgrade placed Helnan in breach of its contractual obligations.

Ultimately, Helnan was ordered by an arbitral tribunal to hand over control of the Shepeard Hotel in return for compensation in the amount of 12.5 million EGP.

The Danish firm turned to Egyptian courts in an effort to block enforcement of this arbitration award, at the same time as it filed for arbitration at ICSID pursuant to the Egypt-Denmark bilateral investment treaty, alleging that Egypt was in breach of its obligations to protect Helnan's investment in the Shepheard Hotel.

Egypt objected to ICSID's jurisdiction, including on the grounds that the dispute fell outside the temporal scope of the investment treaty. According to Egypt, the dispute began before the Denmark-Egypt BIT entered into force on January 29, 2000.

Thanks to Article 12 of the BIT which expressly states that the BIT shall "not be applicable to divergences or disputes, which have arisen prior to its entry into force", Egypt argued that a "divergence", if not a "dispute", had arisen prior to 2000 and should preclude Helnan's ability to turn to ICSID.

To bolster this defence, Egypt cited a letter sent by Helnan to ICSID, wherein the claimant observed that "the origins of this dispute date as far back as 1993, at which point Egypt - in a coordinated effort with EGOTH - embarked on a coordinated strategy to terminate prematurely the Management and Operation Contract of 1986…"

Helnan, for its part, countered that facts post-dating January 29, 2000 had led to the filing of the ICSID arbitration. In particular, the company argued that the catalyst for the present dispute was the downgrading of the Shepheard Hotel which occurred only in September of 2003, well after the entry into force of the Denmark-Egypt BIT.

In a Decision on Jurisdiction dated October 17, 2006, the tribunal acknowledged that a "divergence" for purposes of the treaty was different from a "dispute". On the tribunal's reasoning, different views in a matter become a "divergence" when the parties are mutually aware of their disagreement; a matter crystallizes into a "dispute" once one of the parties seeks to have the "divergence" resolved.

On the facts of the case, the tribunal noted that the two parties had modified the terms of their contract - adding an annex in 2002 – and, as a consequence, any "divergences" that had arisen prior to 2002 could not be the same as those that crystallized into the "dispute" which was later submitted to ICSID. The tribunal felt that the "divergences" that crystallized into the current "dispute" occurred after the renegotiation of the contract in 2002 – and as such fell under the scope of the Egypt-Denmark Bilateral Treaty.

After dispending with this jurisdictional objection, the tribunal would go on to consider, and ultimately reject, a different objection raised by Egypt: that the dispute submitted to ICSID was a purely contractual dispute being dressed up as a treaty claim. The tribunal held that at the present stage all that was needed was a prima facie case against Egypt; in other words allegations, that if proven true, would amount to a case of alleged treaty breach by Egypt.

Having found a prima facie case against Egypt the tribunal felt it did not have to rule at this point as to whether EGOTH was actually an agent of the Egyptian State for purposes of responsibility under international law. Nevertheless, the tribunal noted that EGOTH is under the "close control" of the Egyptian State, and was an active participant in the privatization of the tourism industry on behalf of the Egyptian State.

Now that the tribunal has upheld its jurisdiction, the dispute will move to the merits phase. Sitting on the tribunal are Yves Derains (Chairman); Professor Rudolf Dolzer, appointed by Egypt; and Mr. Michael Lee, appointed by the claimant.

Egypt has faced a relatively large number of foreign investment disputes at ICSID, including at least eight bilateral investment treaty disputes. Currently, the Egyptian Government remains involved in three additional pending arbitrations at the Washington-based disputes Centre, including another dispute related to a resort development, a dispute related to the dredging of the Suez Canal, and a claim involving a US-owned textile enterprise.

As was reported by ITN, Egypt recently prevailed in a dispute brought by several US investors in the Egyptian cotton industry; a separate ICSID tribunal held that Egypt had not committed discrimination contrary to the US-Egypt BIT. (See: "Egypt prevails in ICSID dispute with American investors over alleged discrimination", ITN, Dec.1, 2006, http://www.iisd.org/pdf/2006/itn_dec1_2006.pdf)

4. Stockholm arbitration rules revised; no further transparency, but consolidation added,
By Luke Eric Peterson and Fernando Cabrera Diaz

After months of consultations the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has adopted a revised set of rules on arbitration. Currently, the SCC rules are used to arbitrate a wide range of commercial disputes, including a small number of international investment treaty disputes.

The new Stockholm arbitration rules, which came into effect on January 1, 2007, introduce small changes, rather than a complete overhaul of the earlier rules. According to the Institute, these changes were intended to respond to certain new developments in international commercial arbitration, while at the same time bringing greater clarity to certain provisions that had been subject to some ambiguity.

Most notable among the changes are new provisions on the consolidation of proceedings. The revised rules also attempt to clarify which body within the Stockholm Arbitration Institute – the supervising Board or the permanent legal Secretariat – is responsible for each of the various tasks entrusted to the Institute.

In contrast with the World Bank's International Centre for Settlement of Investment

Disputes, many SCC cases do not involve sovereign states and there is an accordingly greater emphasis given to confidentiality at the Stockholm Arbitration Institute.

Whereas the Washington-based ICSID publicly registers the names of the parties engaged in arbitration at that facility, SCC arbitrations are not similarly disclosed on a public register. While the SCC Secretariat may provide some basic statistical information on treaty-based arbitrations occurring at the venue, most details of these claims remain confidential – unless the parties to a given arbitration desire otherwise. The newly revised SCC rules do nothing to change this situation.

Stockholm arbitration proceedings themselves are generally conducted in-camera. Excerpts from some legal rulings may be published in redacted form by the Institute, for example in the Stockholm International Arbitration Review, but release of full rulings remains in the hands of the parties to such SCC arbitrations.

A 2005 survey of investment treaty arbitration found that a minimum of 13 investment treaty claims had been brought to the Stockholm venue by the end of 2005; further such claims are known to have been brought to the SCC in the period since 2005. Several SCC cases have been the subject of recent ITN investigations, including a series of claims by a Russian investor against Moldova (see: http://www.iisd.org/pdf/2006/itn_feb17_2006.pdf) and a claim by a Latvian electrical contractor against the Ukraine (see: http://www.iisd.org/pdf/2006/itn_april27_2006.pdf).

Marcos Orellana, an Attorney with the Washington-based Center for International Environmental Law observes that the Stockholm Institute "appears to regard secrecy as an element of comparative advantage over other arbitration centers, in order to attract business."

Orellana, whose group has sought to intervene as an amicus curiae (friend of the court) in several known investment arbitrations between investors and their host government, laments that Stockholm proceedings may take place under the radar:

"At a time where the international community and human rights tribunals recognize the linkages between access to information, transparency and democracy, the secrecy shrouding investor-state arbitrations handled by the Stockholm Institute compromises the quality of decision-making, the credibility of the arbitral process, and the ability of civil society to hold governments accountable".

While Orellana calls for the Stockholm Institute to adapt to emerging norms of transparency, others question whether this onus lies with the Institute itself, or with the users of the Institute (i.e. the parties to a given arbitration).

Noah Rubins, a Paris-based arbitration lawyer, who has acted for clients in Stockholm-based arbitrations, notes that Governments freely agreed in certain investment treaties to use commercial venues such as Stockholm or the International Chamber of Commerce to resolve certain investor-state disputes. Rubins claims that Governments did so

"(o)n the understanding that those disputes will be treated procedurally like commercial disputes."

He says that when Governments draft investment treaties they "are free to impose additional disclosure of information or to open hearings to the public, as the United States and Canada have done, and the SCC Rules in no way prevent this. Moreover, neither the SCC Rules nor Swedish law prevents the parties to arbitration from disclosing information about the proceedings, absent express agreement or orders to the contrary. The obligation is only on the SCC itself and the arbitrators."

Ultimately, Rubins says that "public interest groups should use internal measures in the respondent State (like the US Freedom of Information Act) to obtain the information they need, or pressure the States to implement transparency legislation if none exist. That is the more appropriate path to transparency."

CONSOLIDATION OF PARALLEL CLAIMS

While the Stockholm Institute has not altered its rules on confidentiality, one notable change is the inclusion of a provision providing for the consolidation of parallel arbitral proceedings. This new provision (article 11 of the revised rules) allows the Institute's governing Board to consolidate (or merge) multiple arbitral proceedings between the same parties.

Under the new Article 11, a party may ask the Board to add a new claim to a pending proceeding at the Stockholm Institute so long as the proceedings are between the same parties and involve the same legal relationship.

Consolidation of parallel arbitral proceedings is viewed by some as a method of ensuring similar outcomes in similar cases; thereby compensating for one of the perceived weaknesses of international arbitration, namely the scope for divergent or conflicting rulings.

Notably, however, the new changes to the SCC rules do not go so far as to provide for consolidation of disputes where different claimants are arbitrating against the same respondent and in relation to the same factual matter. For example, in the North American context, a consolidation provision contained in the investment chapter of the North American Free Trade Agreement was successfully invoked in 2005 by the United States Government in order to secure the consolidation of three separate investor-state arbitrations which had been initiated against the US by different Canadian forestry companies.

In agreeing to merge the three NAFTA arbitrations into a single proceeding, the presiding consolidation panel cited the importance of reducing the likelihood of "conflicting outcomes" – an inherent danger where multiple tribunals are charged with arbitrating similar or virtually-identical legal claims against a single respondent government.

By contrast, SCC consolidation is available only where the claimants and the respondents to each proceeding are identical.

OTHER CHANGES

Changes have also been made to the procedure for the appointment (Article 13) and challenge (Article 15) of arbitrators under the Stockholm rules. If a party fails to appoint its share of arbitrator(s), the old rules would allow the Institute to make an appointment for that side or appoint the whole tribunal. Under the new rules, the Board shall always appoint the whole tribunal in these cases. According to the Institute this was done to avoid the risk that national courts perceived that the parties were being treated unequally in these situations.

In terms of challenges to arbitrators, the new rules expressly sets out the two grounds upon which challenges may be made; namely, the alleged lack of independence or impartiality, and/or the alleged lack of "qualifications agreed by the parties". The new rules also add that a party may challenge its own party-appointed arbitrator, or an arbitrator whose appointment that party has participated in (for e.g. where the two parties jointly agree on a given arbitrator), for "reasons of which it becomes aware after the appointment was made."

Also of note, changes have been made to the Stockholm rules so that interim measures may be made in the form of a binding award – which provides for greater enforceability under international enforcement conventions. For further information on the full range of changes, see the latest edition of the SCC Newsletter Vol.2, 2006, available at this address: http://www.sccinstitute.com/uk/Newsletters/#

5. Dutch consulting firm K+ VP and the Czech Republic reach settlement,
By Damon Vis-Dunbar

The Dutch firm K+ Venture Partners and the Czech Republic have settled their international dispute following full hearings on the merits held at the end of November.

K+ Venture Partners had been seeking some 4.7 Million Euros in damages for alleged breach of the Netherlands-Czech Republic bilateral investment treaty. However, the terms of the recent settlement have not been released to the public. As part of the settlement agreement, it was agreed that the details would remain confidential.

A Dutch subsidiary of K+ Venture Partners had begun working with the Ministry of Local Development in 1993, as part of a foundation that invested in local businesses using funding from the European Union. The partnership fell apart in 2003 when the Deputy Minister for Local Development, Petre Forman, accused the company of underperforming.

Later, scandal arose when Petre Forman and a number of his colleagues were accused of

misappropriating nearly $10 million US in European Union funds from the Ministry of Local Development.

Counsel for K+ Venture Partners drew a link between the alleged corruption and the termination of the company's contract with the ministry. That connection was denied by the Czech Republic.

The criminal investigation into Petre Forman's alleged corruption is ongoing, and may be one reason why the Czech Republic is keen to keep the details of the settlement under wraps.

The UNCITRAL arbitral tribunal hearing the investment treaty dispute had been comprised of Chairman Klaus Sachs (a partner of CMS Hasche Sigle), Klaus Reichert (of Brick Court Chambers) and Professor Thomas Walde (CEMPLP and Essex Court Chambers).

Sources:

ITN interviews

"Dutch investor sues the Czech Republic over contract lost to alleged corruption", By Damon Vis-Dunbar, Investment Treaty News, February 17, 2006

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