

Investment Law and Sustainable Development Weekly News Bulletin, Oct.18, 2002

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Arbitration Watch:

1. New investor-state disputes launched at ICSID in recent months:

i. Champion Trading Company and others v. Arab Republic of Egypt (Case No. ARB/02/9)

Subject Matter: Cotton processing and trading enterprise

Date Registered: August 8, 2002

Status of Proceeding: Pending (Tribunal not yet constituted)

ii. IBM World Trade Corp. v. Republic of Ecuador (Case No. ARB/02/10)

Subject Matter: Informatic services contract

Date Registered: September 6, 2002

Status of Proceeding: Pending (Tribunal not yet constituted)

iii. Enrho St Limited v. Republic of Kazakhstan (Case No. ARB/02/11)

Subject Matter: Energy enterprise

Date Registered: September 6, 2002

Status of Proceeding: Pending (Tribunal not yet constituted)

iv. JacobsGibb Limited v. Hashemite Kingdom of Jordan (Case No. ARB/02/12)

Subject Matter: Construction project

Date Registered: September 17, 2002

Status of Proceeding: Pending (Tribunal not yet constituted)

(Source: www.worldbank.org/icsid/cases/pending/htm)

2. NAFTA chapter 11 Tribunal reaches decision in dispute between the Mondev corporation and the United States

Mondev International Ltd., a Canadian real-estate developer, launched a claim in an effort to recoup losses which allegedly arose from a Massachusetts state court ruling, and from Massachusetts state law. The investor claimed violations of the NAFTA's investment provisions on National Treatment, minimum standards under international law and expropriation without compensation. The Tribunal released its Award on October 11, 2002, and the US government has claimed vindication on all counts.

For a copy of the Award, see the US State department's website:

<http://www.state.gov/s//c3758.htm>

3. New Research on "Fair and Equitable Treatment" & NAFTA Chapter 11

An article in the latest edition of the journal of World Investment (August 2002) tackles this vexing subject:

See: Patrick Dumberry, "The Quest to Define 'Fair and Equitable Treatment' for Investors under International Law—The Case of the Nafta Chapter 11 Pope & Talbot Awards",

http://www.wernerpubl.com/frame_inves.htm

NEGOTIATIONS WATCH:

1. Thai cabinet approves framework for trade pact with US & Bangkok

Thailand's cabinet approved Tuesday a draft framework agreement on trade and investment cooperation between the kingdom and the United States, which will pledge to cooperate and coordinate not only toward a possible bilateral free trade agreement, but also efforts to advance global multilateral trade liberalization. The cabinet empowered Thai Commerce Minister Adisai Bodharamik to decide final wording in the draft framework pact before signing it with his U.S. counterpart Robert Zoellick, U.S. Trade Representative, when they are to meet on sidelines of the ministerial meeting of the 21-member Asia-Pacific Economic Cooperation (APEC) forum in Lao Cabos, Mexico on Oct. 23-24. "The minister is authorized to revise wording in the framework agreement, with no major impact on the principle of the agreement," a cabinet resolution stated.

The draft agreement said Thailand and the U.S. agreed "to cooperate and coordinate, as appropriate, to liberalize trade and investment relations between the two countries at the bilateral, regional and multilateral levels including, as appropriate, their efforts to advance the Doha Development Agenda." By the framework, the two countries will set up a Joint Council on Trade and Investment to be co-chaired by the Thai commerce minister and the U.S. trade representative and to regularly meet to oversee and review implementation of the agreement. Kyodo News International, Inc.

(Source: Kyodo News International, Inc., Oct. 15, 2002)

2. Kazakh Lawmakers Reject Investment Protection Bill

Kazakhstan's upper chamber of parliament late Monday blocked a bill giving equal rights to local and foreign investors, and returned it to the lower house of parliament, or Majilis. The new bill was drafted by the government last year with a view to granting domestic investors the same privileges as their foreign counterparts in a move to boost homegrown ventures. The parliamentary press service said that senators rejected an article in the bill allowing cuts in custom duties for foreign investors and guaranteeing the inviolability of contracts.

Source: Dow Jones

3. JICA, WTO to co-host investment seminar for African Nations

The Japan International Cooperation Agency (JICA) and the WTO will co-host an investment seminar in Geneva for 21 English-speaking African nations in December, trade sources said Wednesday. The seminar is part of Japan's efforts to pave the way for WTO ministers to reach an agreement during their meeting in Cancun in September 2003 to launch multilateral negotiations for creating cross-border investment rules. Japan has strongly called for developing countries to support the establishment of multilateral investment rules under the WTO, but India and many developing nations are opposed to backing them. They argue it would embroil them in WTO dispute settlement cases that could force them to adopt drastic legal reforms.

As a way to help reduce the presence of the Japanese government at the planned seminar, Tokyo has decided to have the JICA, a special corporation set up by the government to implement Japan's aid for developing nations, co-host the event with the WTO, according to the sources. At the seminar, experts and representatives from the African nations will discuss the relationship between trade and investment. A similar seminar is also being considered for French-speaking African nations, the sources said.

The WTO ministers are scheduled to decide on "modalities" of negotiations for international investment rules at the fifth WTO ministerial meeting in Cancun. A declaration issued at the end of the previous ministerial meeting in Doha in November 2001 stopped short of calling for an immediate launch of talks on investment rules but called for starting them after the Cancun

meeting "on a basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations."

(Source: Kyodo News International, Inc., Geneva, Oct. 17, 2002)

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1. A Second Research Report Warns Canadian Health Commission on Conflicts with International Trade/Investment Rules.
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3. "Brazil and India Argue for Flexibility for Developing Countries via Investment Agreements Amendments" (Reprint)

Arbitration Watch:

1. Methanex may proceed with its NAFTA claim against United States

The Canadian-based Methanex corporation may proceed with its NAFTA chapter 11 claim against the US government, despite being handed a partial set-back in an August 5th interim ruling on jurisdiction by the Tribunal. According to reports from Reuters, Methanex's CEO told a conference call of analysts that "We think we have a great case". The company which has been claiming compensation following California's ban on the controversial gasoline additive MTBE, is expected to zero in on the argument which alleges that California Governor Gray Davis entered into an alleged secret deal with Archer Daniels Midland (ADM), a producer of ethanol and a contributor to Gov. Davis's campaign.

Methanex has until the first week of November to signal that it will proceed with the case. The IISD has intervened as an amicus curiae in the Methanex case (for more information see: http://www.iisd.org/trade/investment_regime.htm)

(Sources: "Methanex to file new NAFTA case on Calif MTBE ban" by Allan Dowd, Reuters, 23/10/2002)

2. Warren Christopher steps down as Arbitrator in Methanex case

In another important development in the NAFTA arbitration between the United States and the Canadian-based Methanex Corporation, former US Secretary of State Warren Christopher has stepped down from his position as the US-appointed arbitrator in that case. The Methanex Corporation had argued that Mr. Christopher's involvement as the Senior Partner of a California law firm which is representing the Californian government in an unrelated litigation matter, compromised his independence and impartiality. Although Mr. Christopher rebutted these claims - insisting that he has no personal involvement in the defence of the government of California in this unrelated litigation - he agreed, nevertheless, to step down.

The US government has selected Prof. Michael Reisman of the Yale University Law School to replace Mr. Christopher on the Tribunal. Information about Mr. Reisman, an expert in international commercial arbitration, can be found at:

<http://www.law.yale.edu/outside/html/faculty/wmr3/profile.htm>

(Sources: correspondence between Methanex Corporation and the Arbitration Tribunal available at www.NAFTAclaims.com; Office of Mr. Warren Christopher)

3. Damages Awarded Against Canada in S.D. Myers NAFTA Dispute

In November of 2000 the Government of Canada was found by a NAFTA Arbitration Tribunal to have violated the NAFTA's provisions on national treatment and minimum international standards of treatment, when it forbade the trans-boundary shipment of toxic waste to the US for processing. On October 21, 2002 the Tribunal finally handed down damages in the Myers case. The Canadian Government has been ordered to pay some \$8.2 million (US) to Ohio-based S.D. Myers Inc.

A copy of the Award on damages can be found on the website of Appleton & Associates, the firm which represented S.D. Myers: <http://www.appletonlaw.com/4b2myers.htm>

(Sources: Appletonlaw.com; "Feds fined under NAFTA for PCB export ban", The Toronto Star, Oct.21, 2002, www.thestar.ca)

NEGOTIATIONS WATCH:

1. A Second Research Report Warns Canadian Health Commission on Conflicts with International Trade/Investment Rules.

On the heels of the recent report by Canadian Lawyer Jon R. Johnson to the Romanow commission on the future of Health Care in Canada (see INVEST-SD bulletin, Oct. 11, 2002), a second research consortium has tabled a report to the Commission. In the report, the team of researchers argues that Canada's health care system is "not fully protected from international trade agreements" and they call upon the Canadian government to take certain public reforms of the Medicare system before the danger of trade-threats becomes too great.

A press release and a free PDF copy of the Report "Putting Health first" is available on the website of the lead research organization, the Canadian Center for Policy Alternatives: www.Policyalternatives.ca

2. South Korea Negotiates its First Free Trade Agreement with Chile, but Fails to Come to Terms on Investment Issues.

The Governments of Chile and South Korea reached a trade agreement which will cover many goods traded between the two nations, however the two sides could not come to an agreement on investment issues. The South Korean negotiators ultimately agreed to abide by the current Chilean rules restricting foreign investment in that country. The treaty is expected to come into effect as soon as 2003, pending approval by the Korean Cabinet and President.

The two sides will revisit efforts to conclude investment rules at a later date.

(Source: "S Korea, Chile Reach Free Trade Agreement", Dow Jones, October 24, 2002)

3. "Brazil and India Argue for Flexibility for Developing Countries via Investment Agreements Amendments" from Bridges Weekly Trade News Digest (Geneva).

Full text reprinted below:

"In a 9 October submission to the Council for Trade in Goods and the Committee on Trade-Related Investment Measures (TRIMs) (G/C/W/428, available at <http://docsonline.wto.org>), Brazil and India advocate for amending the TRIMs Agreement with in order to incorporate specific provisions that will provide developing countries with the necessary flexibility to implement development policies. Their submission is in the context of the mandated review of the TRIMs Agreement, as referred to in tiret 40 of the Doha Decision on Implementation.

Their paper proposes extending the range of situations in which developing countries are allowed to deviate temporarily from the provisions of TRIMs Article 2 (national treatment). India and Brazil put forward a list of seven instances in which developing countries should be able to use TRIMs, including to 'stimulate environment-friendly methods or products and contribute to sustainable development'. The next meeting of the Council for Trade in Goods is on 8 November."

(Source: ICTSD reporting, www.ictsd.org/weekly/index.htm)