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Arbitration Watch:
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1. ICC nixes Argentina's bid to disqualify arbitrator in financial crisis case,

A long-running effort by the Argentine Government to disqualify an arbitrator presiding over three separate investment treaty arbitrations has been dealt another set-back following a December ruling of the International Chamber of Commerce's International Court of Arbitration.

In a letter dated December 16, 2005, the ICC indicated that it had rejected Argentina's challenge of Dr. Andres Rigo Sureda, President of the arbitral tribunal in an UNCITRAL arbitration between UK-based energy company National Grid and the Argentine Republic.

The ICC had been called upon to rule on the challenge thanks to a request by the Permanent Court of Arbitration (PCA), which serves as "appointing authority" in the National Grid case (i.e. the institution designated by agreement of the parties to appoint arbitrators in the event that the parties fail to do so, as well as to designate a body to handle challenges to arbitrators)

Argentina's challenge to Dr. Rigo first began in late 2003, when Argentine lawyers took the decision to challenge Dr. Rigo's role in the National Grid case, as well as in two ICSID-based arbitrations: Azurix v. Argentina and Siemens v. Argentina.

At the heart of Argentina's challenge was the fact that Dr. Rigo's (then) law firm had appointed as arbitrator in a separate investment arbitration, between Duke Energy and Peru, an individual, Dr. Guido Tawil, who also served contemporaneously as counsel to a number of multinational companies which were suing Argentina in the aftermath of its financial crisis. Of particular concern, was that Dr. Tawil acted as counsel to the investor in the two ICSID arbitrations presided over by Dr. Rigo (the Azurix and Siemens cases); while not questioning Dr. Tawil's role, Argentine lawyers expressed a concern that Dr. Rigo might lack "independent judgment" to arbitrate over a matter brought by Mr. Tawil - at the same time that Dr. Tawil was sitting in a quasi-judicial capacity (as arbitrator) in a matter which Dr. Rigo's colleagues at Fulbright & Jaworski were arguing.

Both Dr. Tawil and Dr. Rigo – although bound by varying requirements of confidentiality – are understood to have objected to Argentina's challenge.

Argentina's bid to have Dr. Rigo removed from the tribunal of the two ICSID arbitrations ran aground in the Spring of 2005. In the arbitration between Argentina and US-based water company Azurix, the two remaining members of the arbitral tribunal unanimously rejected Argentina's challenge in March of 2005. However in the second case between Argentina and the German firm Siemens, the two remaining arbitrators split on the question of Dr. Rigo's independence, and the matter was handed to the Chairman of ICSID's Administrative Council for resolution.

In light of Dr. Rigo's former employment with the World Bank, the ICSID Chairman then passed the challenge to a non-World Bank institution, the Dutch-based Permanent Court of Arbitration (PCA), for a decision.

In April of 2005, the PCA formally dismissed the Argentine challenge in the Siemens case, clearing the way for the ICSID arbitration to resume. (Hearing on the merits of the case were held later in 2005 and an award in the case is expected sometime this year).

For their part, Argentine government lawyers denounced the PCA ruling, particularly the failure by the PCA to indicate the legal reasons for the rejection of the challenge. (In its customary fashion, the PCA announced only its ruling, not the reasoning for that ruling)

There being no further recourse for challenges to arbitrators in ICSID arbitrations, Argentina then turned its focus to its parallel effort to have Dr. Rigo disqualified in the third UNCITRAL arbitration, with the UK-based National Grid company.

The remaining tribunal members handed the challenge to the Paris-based ICC for resolution.

Meanwhile, Argentina, mindful of its recent experience with the PCA, petitioned the ICC to provide written reasons to accompany whatever decision it reached in the challenge proceeding.

However, on December 16th, 2005, the ICC issued a one-sentence letter to the parties and arbitrators in the case, informing them that they had rejected Argentina's bid - without elaborating on the reasons why it had rejected the challenge.

An Argentine government lawyer who spoke with ITN about this latest development, expressed disappointment with the outcome, and, in particular, with the fact that the reasons for the decision are not disclosed to the parties. Characterizing this as a "breach of due process", the lawyer noted that Argentina was reviewing its legal options.

One possibility would be to turn to a domestic court, as was done by the Government of Ghana in a 2004 effort to challenge an arbitrator in an investment treaty arbitration with the Malaysian firm, Telekom Malaysia. In that arbitration, Ghana turned to the Dutch courts after its challenge to a presiding arbitrator had been rejected by the Secretariat of the Permanent Court of Arbitration (PCA).

Ghana's move was rewarded when the Dutch Court issued a detailed ruling, diverging from the PCA ruling, and obliging the challenged arbitrator to choose between his arbitral appointment in the Telekom Malaysia arbitration and his service as counsel to an investor in a separate ongoing investment treat dispute.

Sources

ITN interviews

"ICSID rejects challenge to lead arbitrator in Siemens case; Argentina rips decision", Investment Law and Policy News Bulletin, available on-line at: http://www.iisd.org/pdf/2005/investment_investsd_april27_2005.pdf

"ICISD tribunals diverge over independence of arbitrator to hear Argentine claims", Investment Law and Policy News Bulletin, available on-line at: http://www.iisd.org/pdf/2005/investment_investsd_mar24_2005.pdf

"Dutch Court finds arbitrator in conflict due to role of counsel to another investor", ITN, Dec.17, 2004, available on-line at: http://www.iisd.org/pdf/2004/investment_investsd_dec17_2004.pdf

2. UNCTAD study provides new data on incidence of investment treaty arbitration,

By Luke Eric Peterson

Research undertaken for the UN Conference on Trade and Development (UNCTAD) by the Editor of this newsletter, finds that international arbitrations under investment protection treaties did not tail off in 2005, even as the number of investor claims directed against the Argentine Republic dwindled.

Claims by foreign investors against Argentina in the aftermath of that country's financial crisis appear to have peaked in 2003, when such cases accounted for 20 of 43 known investment treaty arbitrations worldwide. In 2004, an additional 8 cases were brought against Argentina, but these claims accounted for a much smaller share of the 42 known cases launched that year. By 2005, the volume of Argentine cases declined further - accounting for only 5 of 42 known arbitrations - while the overall number of such claims held steady at 40+ for the third year running.

While investment protection treaties have been negotiated since the late 1950s, it is only recently that the agreements have given rise to a large volume of international arbitrations between foreign investors and states. Notably, more than two-thirds of all known investment treaty claims have been launched in the period since the beginning of 2002 – a stark reminder that this form of litigation is still in its infancy. As such, many of the claims chronicled by the UNCTAD survey are still ongoing - with their policy consequences for the defendant governments still to be determined.

The UNCTAD data, which were released in a research note in late December 2005, were based on a review of published materials (including back issues of the ITN newsletter), as well as a series of interviews with 75 legal practitioners. While the UNCTAD figures offer the most comprehensive figures to date on the incidence of investment treaty arbitration, they necessarily fail to capture some portion of the litigation universe. As readers of this newsletter will know, some unknown proportion of investment treaty arbitrations occur without disclosure by the parties involved.

While all arbitrations at the World Bank's arbitration facility, the International Centre for Settlement of Investment Disputes (ICSID) – whether treaty-based or arising out of contracts - are registered on a public docket, investment treaty claims brought pursuant to other arbitral rules can go unpublicized. While the UNCTAD research tallied (and in some cases, uncovered) 70 treaty arbitrations brought under UNCITRAL or ad-hoc rules of arbitration, it remains unknown how many other ad-hoc or UNCITRAL cases have been brought without publicity. There is no central registry of such cases.

The UNCTAD research was more successful in putting numbers – if not names – on the volume of treaty-based cases handled by two commercial arbitration institutions, the International Chamber of Commerce and the Stockholm Chamber of Commerce. According to figures provided by those institutions they have handled 4 and 13 investment treaty-based cases respectively. However, it should be noted that the Stockholm figures provide only a partial account of that institution's treaty-based cases,; Chamber staff have examined all claims dating back to 2001, but only a select number of cases predating 2001. In due course, the Stockholm Chamber is expected to review all of its case files, in an effort to quantify all treaty-based claims registered there.

In global terms, the latest UNCTAD research confirms that at least 219 investment treaty arbitrations have been initiated worldwide since 1987 – with an unknown number of additional claims flying under the radar.

Source:

Latest Developments in Investor-State Dispute Settlement", United Nations Conference on Trade and Development (UNCTAD), International Investment Agreements Monitor, No.4, 2005, not yet available on-line (UNCTAD IIAs website: http://www.unctad.org/Templates/StartPage.asp?intItemID=2310&lang=1)

3. Croatia power board files Energy Charter Treaty arbitration against Slovenia,
By Damon Vis-Dunbar

Croatia's state-owned power board, Hrvatska Elektropriveda d.d. (HEP), has initiated arbitration proceedings against Slovenia at the International Centre for the Settlement of Investment Disputes (ICSID).

A statement from Croatia's Ministry of Economy says HEP seeks some $31.7 Million Euros for unpaid debt stemming from a jointly-owned nuclear power plant. The arbitration claim was recently registered by ICSID's secretariat, a prelude to the creation of an arbitral tribunal to hear the claim.

In an interview with ITN, Zeljko Tomsic, the Croatian Assistant Minister of Economy, said the dispute has been brought to ICSID for a breach of the Energy Charter Treaty (ECT). A plurilateral trade and investment agreement governing the energy sector, the ECT contains investment provisions similar to those found in modern investment treaties.

Tomsic says HEP made an offer to Slovenia last May, in which it sought payment for electricity it alleges Slovenia failed to deliver. "Slovenia didn't respond," Tomsic told ITN.

Slovenia's Economic Minister, Andrej Viznak, said he was surprised by the announcement that HEP was bringing the dispute to arbitration, according to the Slovene Press Agency.

This is one of several disagreements in what has become an increasingly acrimonious relationship between the two countries. The biggest obstacle is a failure to agree on their maritime border, a dispute which has raged since both countries declared independence from Yugoslavia in 1991.

Slovenia joined the EU in May 2004, and Croatia began holding its own membership talks last October. Since then Croatia has repeatedly accused Slovenia of abusing its membership in the EU.

Last November, the Slovenian Economy Minister warned that the dispute with HEP could encourage Slovenia to adopt a harder line on Croatia's bid to join the EU, according to Slovenian press reports.

Sources:

"Economics Minister Surprised at Croatian Arbitration Proposal", Slovene Press Agency, November 12, 2005

"Slovenia Threatens Tougher Stance on Croatia's EU Bid", Global News Wire, November 14, 2005

4. Venezuela dodges arbitration with foreign oil companies; pursues new contracts which would preclude arbitration of future disputes,
By Damon Vis-Dunbar

Despite several foreign oil companies having made noises about bringing Venezuela to international arbitration over mandatory changes imposed on their operating agreements, all 22 foreign operators have acquiesced to a December 31 deadline and taken the first step towards agreeing to less lucrative contracts.

Permanent contracts still need to be negotiated, but the so-called transitional agreements signed by the foreign operators pave the way for Pdvsa, the state-owned energy company, to take over majority ownership of the concessions. Income taxes will rise to around 50 per cent, from the existing 34 per cent, said Rafael Ramirez, Venezuela's energy minister, in an interview with the Financial Times.

As reported earlier in ITN, some of the world's largest oil companies, including Shell and ExxonMobil, said they were keeping an eye on the possibility of initiating arbitration over Venezuela's demand for new contracts. Last summer, a Texas firm, Harvest Natural Resources, went so far as to issue a formal notice of dispute – a step that triggers mandatory consultations before allowing international arbitration under an investment treaty. Subsequently, however, the firm announced that it had agreed to sign a transitional agreement. (See "Conflict on the Horizon: Oil companies in Venezuela consider arbitration", By Damon Vis-Dunbar, ITN, September 6, 2005 at: http://www.iisd.org/pdf/2005/investment_investsd_sept6_2005.pdf).

While it appears that none of the foreign oil companies have resorted to arbitration, they were surely well apprised of this potential legal avenue.

In a publicly-available briefing note, the law firm Freshfields Bruckhaus Deringer, had advised that Venezuela's actions likely breached not only investor contracts, but also international treaties:

"In addition to their contractual rights, foreign investors in Venezuela are also likely to have rights under international law as a result of bilateral investment treaties (BITs) concluded by Venezuela," counseled Freshfields. Indeed, Venezuela is party to some 20 BITs, including treaties signed with the UK, Switzerland and Canada.

Indeed, government officials have conceded that arbitrations might have arisen as a result of other recent policy moves by the government. In addition to the government's demand for new operating agreements, Venezuela's tax agency has been conducting an audit of foreign oil companies, for which it has already issued bills totaling some $891 Million US for unpaid taxes between 2001 and 2004. Earlier this month, Jose Vielma Mora, the agency's head, said the audit may be expanded, noting that a number of companies have already begun making partial payments.

"We thought we would have to go to international arbitration, but that is not the case," Mora told BusinessWeek in January.

According to observers, resorting to international arbitration might have spelled the end of future business for companies currently invested in Venezuela, at least under the Hugo Chavez regime. For some companies, like Harvest Natural Resources, who have the bulk of their present investments sunk in Venezuela, this prospect was particularly frightening.

"At this point a company's decision process will be different than from a new investment," said James Williams, publisher of the Arkansas-based Energy Economist Newsletter, in a conversation with ITN. "All the money invested in the country to date is a sunk cost."

"That means they will determine if they will have a decent margin from continued operations under the new rules without regard to whether the original investment is ever paid back."

The new joint-venture contracts imposed by Pdvsa and the increased income tax rates come as no surprise to foreign oil companies, since both were flagged in 2001 under a new hydrocarbons law.

That hydrocarbons law provides other hints as to what Venezuela is demanding in the permanent contracts which have yet to be signed by foreign oil companies. A likely sticking point is whether the new operating agreements allow for international arbitration in their dispute resolution clauses.

Freshfields, in its briefing note, observed that previous operating agreements between investors and Venezuela were understood to have dispute resolution clauses providing for international arbitration. However, the 2001 Hydrocarbons Law calls for the following clause to be included in future operating agreements: “Any doubts and controversies of any nature that may arise from the agreement and that may not be amicably settled between the parties, including arbitration in cases permitted by the law on the matter, shall be settled by competent courts of the republic (of Venezuela) pursuant to its laws, and may not give rise to any foreign claims for any reason whatsoever.”

“This clause is dangerously ambiguous,” warned Freshfields, and it is possible “to interpret the clause as an attempt to exclude foreign arbitration clauses altogether.”

Such ‘domestic forum selection clauses’ are not uncommon, adds Professor Christoph Schreuer, Professor of International Law at the University of Vienna. In an interview with ITN, Schreuer said that most tribunals to date have ruled that these clauses refer contractual disputes to domestic courts, “but do not affect the jurisdiction of a tribunal whose jurisdiction is based on a BIT.”

However, Schreuer notes that the clause proposed by Venezuela “is very inclusive and goes further than other domestic forum selection clauses known from decided cases.” Venezuela might argue that such contractual language prevents foreign investors from invoking bilateral investment treaties in an effort to bring claims to an international arbitral tribunal.

“I can envisage arguments for either side and the outcome of this debate seems unclear,” says Schreuer.

The clause contains a number of ambiguities, agrees Andrew Newcombe, Professor of International Trade and Investment Law at the University of Victoria. As the wording currently reads, Newcombe thinks it is unlikely that it would preclude international claims brought by foreign shareholders under investment treaties.

“Presumably, the clause will only be operative between the contracting parties,” Newcombe points out. So, for example, a foreign investor with a shareholding stake, but which was not party to the contracts signed by the operating companies and Venezuela, might remain free to mount an investment treaty claim if their investment in the project suffers harm.

“I think this type of provision has to be much clearer if a government wishes to rely on it as a waiver of investment treaty rights,” adds Newcombe. Indeed, he says that “the extent to which an investor can waive investment treaty rights is itself contested,” and should be treated as a separate question.

Schreuer makes the same point, saying that, he is unaware of a case where a tribunal has had to rule on an explicit waiver by an investor of their right to international arbitration under an investment treaty.

However, Schreuer notes that the issue was raised by one arbitral Tribunal at the ICSID facility in 2003.

A tribunal hearing jurisdictional arguments in an investment treaty dispute between the Swiss-based company SGS and the Republic of the Philippines, held that: "It is doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public interest. Thus the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract."*

In other words, for that particular Tribunal, treaty rights could not waived by an investor. However, a tribunal has yet to face a case where an explicit treaty waiver was at issue, and needed to be interpreted by a presiding arbitral tribunal.

With the question a matter of debate amongst lawyers, Schreuer would leave both Venezuela, and that country's foreign investors, with a word of warning:

"If one were to advise the Venezuelan government one would suggest making the clause clearer. If one were to advise a foreign investor one would say: don't sign it, this can get you in a lot of trouble."

Sources:

*(see: http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf at para. 154).

ITN interviews

"Conflict on the Horizon: Oil companies in Venezuela consider arbitration", By Damon Vis-Dunbar, Investment Treaty News, September 6, 2005

"Venezuela: Proposed measures against oil and gas investors", Freshfields Bruckhaus Deringer, May 2005

"Oil majors accept Venezuela's new terms", The Financial Times, December 15, 2005

"Venezuela tax agency may expand audit", BusinessWeek, January 4, 2006

Negotiation Watch:
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5. Uruguay surprises with ratification of contentious US investment treaty,
By Damon Vis-Dunbar

As protestors burned tires and American flags outside the Legislative Palace, a formerly fractured Uruguayan Congress came together to ratify a recently-amended US bilateral investment treaty (BIT).

Citing an “imperative mandate” from the government’s Executive, and the fact that President Tabare Vazquez had succeeded in convincing the US to change several provisions in the treaty, members of a leftist-coalition government, which had been highly critical of the BIT, acquiesced during the early morning hours of December 28, ensuring that the ratification would be unanimous.

The BIT must be ratified by the US Congress before coming into effect.

President Vazquez inherited the un-ratified treaty from the previous administration of Jorge Batlle after Vazquez took power in 2005. Vazquez had struggled to appease the diverse factions in his coalition government, the Progressive Encounter-Broad Front (EP-FA), many of whom denounced the investment treaty - even after it was amended in several respects in November of last year.

As reported earlier in ITN, those amendments had been criticized as “superficial” by opposition members, as well as by members of Vazquez’s own coalition (See “United States and Uruguay ink revised BIT, opposition to treaty remains”, ITN, Nov.21, 2005 at: http://www.iisd.org/pdf/2005/investment_investsd_nov21_2005.pdf) .

In particular, the changes failed to address concerns about the agreement’s Most Favoured Nation (MFN) clause, which some feared could compromise future integration amongst members of Mercosur, the Southern Cone customs union that includes Uruguay, Paraguay, Argentina and Brazil. A fear expressed by some critics had been that the MFN clause would entitle US investors to any more favourable treatment offered by Uruguay to its Mercosur brethren.

Ratification of the treaty last month – which required support from even the most outspoken detractors in the Communist Party - is a testament to the “skillful control of the (governing) coalition,” said Thomas O’Keefe, president of Mercosur Consulting, a legal consulting firm in Washington D.C.

“(Vazquez) cracked the whip and everyone fell into place,” said O’Keefe. “Who knows how arms were twisted in private.”

The US State Department has hailed ratification of the BIT. In a statement, the Department noted that this marked “an important step forward in our bilateral relations (with Uruguay). It will further strengthen our already excellent trade and investment relationship.”

However, for the US Administration, the ratification comes as a rare piece of good news emanating from Latin America, where the victory by Evo Morales in Bolivian elections last month marked a continued shift leftwards in South American politics.

Morales was elected on a promise to nationalize the country's energy reserves, and his rhetoric bears similarities to Hugo Chavez who has already taken similar steps to exert greater control over Venezuela's oil and gas industry (see related story in this issue).

Sources:

U.S.-Uruguay Bilateral Investment Treaty text:
http://www.state.gov/documents/organization/56650.pdf

"Uruguay aprobo un polemico pacto de inversiones con EE.UU", Clarin, December 29, 2005

"United States and Uruguay ink revised BIT, opposition remains", By Damon Vis-Dunbar, Investment Treaty News, November 21, 2005

"Uruguayan Senate debates U.S. BIT, looks for common Mercosur posture on BITS", By Damon Vis-Dunbar, INVEST-SD News Bulletin, August 22, 2005

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