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Arbitration Watch:
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1. World Bank arbitration facility sees another record year of
investor-state claims,
By Luke Eric Peterson

The year 2003 marked another high water mark for arbitration between
foreign investors and their host governments under international
investment treaties.

The Washington-based International Centre for Settlement of Investment
Disputes (ICSID) finished off the year with 66 cases on its docket. All
but one of these cases are arbitrations between investors and states
(the most recent case to be registered by the Centre is a rare
conciliation proceeding - launched by a Canadian junior energy firm
which claims it was unjustly stripped of its exploration rights in
Niger).

Until the late 1990s, many of the disputes which landed on ICSID's doorstep arose out of arbitration clauses which had been written into contracts between foreign firms and developing countries or similar clauses which were embedded in the national investment laws of many countries. More recently, however, most of ICSID's cases involve alleged violations of investment rules contained in international treaties concluded between two or more governments.

Indeed, of the record 30 arbitrations registered at ICSID in 2003, 29 of these cases stem from treaties such as the North American Free Trade Agreement (whose Chapter 11 deals with investment matters), the Energy Charter Treaty (a multi-country trade and investment agreement governing the energy sector), or a host of bilateral investment treaties (such as the 1991 US-Argentina bilateral investment treaty).

The increasing volume and concentration of treaty-based arbitration at ICSID is a testament, on the one hand, to the startling proliferation of these investment treaties, and on the other, to an increasing interest amongst international lawyers in testing the legal limits of these long-ignored treaties.

While the international community has been unsuccessful in concluding a single global pact which would set common ground rules on foreign investment flows between countries, there has been a steady multiplication of bilateral investment treaties, as well as a series of broader trade agreements, such as US pacts with Chile and Singapore which incorporate state-of-the-art investment provisions.

Virtually all of these treaties share a common feature: they permit foreign investors to detour around the local courts of the host government, and to take their grievances directly to international arbitration panels.

Although ICSID is thought to account for the bulk of such arbitration claims, increasing evidence suggests that several sets of commercial arbitration rules are also being used with increasing frequency where they have been written into investment treaties (see next story).

Sources:

www.worldbank.org/icsid

2. Early investment arbitrations against "improper" use of environmental laws uncovered,
By Luke Eric Peterson

An investigation by INVEST-SD News Bulletin has disclosed a series of international investment treaty arbitrations mounted against Poland, dating back to the mid-1990s, and seeking to challenge the Polish government's alleged misuse of its environmental protection laws to the detriment of a German company.

In 1995, an ad-hoc arbitration tribunal ruled that Poland's treatment of

German-based Saar Papier Vertriebs GmbH had been "tantamount to an expropriation" under the provisions contained in the 1989 bilateral investment treaty (BIT) between Germany and Poland.

Notably, this claim appears to have pre-dated, by several years, similar arbitrations which have been mounted under the North American Free Trade Agreement (NAFTA), and which attracted extensive public scrutiny when foreign investors challenged government measures which were said to have been environmentally-inspired, or related to the protection of public health.

The Saar Papier dispute dates to 1990, when the German firm established a factory in Poland with the intention of producing recycled paper products, such as paper towels and toilet rolls, using imported used-paper products (eg shredded office paper). Although the company obtained a license from the Polish Agency for Foreign Investments to operate its investment, Saar Papier soon ran into difficulties with the Polish environmental authorities, who, in 1991 halted the import of used paper from Germany, citing Polish environmental protection laws which prohibited the import of "waste".

Saar Papier challenged this decision by launching its first arbitration under the terms of the German-Polish BIT, alleging that the Polish actions violated investor rights contained in the treaty - including those which forbade expropriative measures taken without an offer of compensation.

A 3 member tribunal convened under the UNCITRAL rules of arbitration found in favor of Saar Papier, ordering the payment of 2.3 million Deutsche Marks (approx 1.2 million Euros). The tribunal's award was subsequently enforced by the German Federal Supreme Court. A tersely worded ruling of the German court has been published; however the initial arbitration award remains confidential.

Following on the heels of its successful claim, Saar Papier launched a second investment arbitration seeking further damages for a subsequent time period during which Poland continued to block Saar Papier's operations. However, sources familiar with the case indicate that the second arbitration tribunal ruled in favor of the Polish Government in June of 2001 - a fact confirmed by the Polish Treasury Ministry.

Polish officials also confirm that a third arbitration has been mounted in relation to Saar Papier's investment in Poland, this time by Lutz Ingo Schaper, a partner in the Saar Papier enterprise. Efforts are under way to uncover further information about this third claim.

Although parties to investor-state arbitrations can move to have the proceedings opened to the public and the media, most such proceedings occur in-camera. In the case of so-called ad-hoc arbitrations (which are not held under the auspices of an arbitration centre) it may be difficult to ascertain where the tribunal is meeting, who the tribunal members are, and the subject matter of the dispute.

INVEST-SD News Bulletin's information about the case has been pieced together through interviews with the parties or their legal representatives, following the discovery of the proceedings in German

courts. Investor-state arbitrations which manage to avoid publicity may come to public attention at a later date if a party attempts to challenge the arbitration tribunal's decision - or to enforce its ruling - in a public court.

Requests for release of the awards in the two earlier arbitrations have been submitted to a former counsel for the investor and to the Polish Treasury Ministry; however neither party has indicated a desire to release copies of the arbitral decisions.

Sources:

INVEST-SD Interviews

3. Loewen NAFTA arbitration against the United States not fully resolved,
By Luke Eric Peterson

A major arbitration against the United States under the North American Free Trade Agreement (NAFTA) has gone into extra innings.

Earlier this summer a tribunal at the Washington-based International Center for Settlement of Investment Disputes (ICSID) handed down an award dismissing the claims of Raymond Loewen and The Loewen Group (TLG).

The Loewen arbitration had arisen out of a challenge to a Mississippi court ruling which had imposed an unprecedented financial penalty upon the Loewen Group, a Canadian-owned funeral home operator operating in Mississippi.

Loewen had argued that a (US) $500 million jury verdict in its commercial dispute with a Mississippi-based competitor, Mr. Jerry O'Keefe, and a subsequent requirement that a bond of $625 million be posted in order to mount an appeal, both violated various rights and protections for foreign investors contained in Chapter 11 of the NAFTA.

But, in June of 2003, the arbitral tribunal handed down an award which held that it no longer had jurisdiction to hear the case, due to the fact that TLG had filed for bankruptcy and had restructured its assets into a US corporation.

In so doing, the tribunal held that TLG had undermined its arbitration claim by running afoul of the NAFTA rule requiring that a "diversity of nationalities" be represented in arbitrations. With the US Government as the respondent in the case, a US investor - as TLG was now determined to be - would have no right to arbitrate under NAFTA's Chapter 11.

Having dismissed TLG's claim the tribunal went on to note that - had it retained the jurisdiction in the case - it would have dismissed the claim on its merits, by virtue of the failure of TLG to exhaust its domestic legal remedies. Specifically, the tribunal held that TLG should have appealed initially to the US Supreme Court in an effort to right the alleged wrongs perpetrated by the Mississippi justice system.

Although recourse to investor-state arbitration under the NAFTA does not ordinarily require that investors exhaust their domestic legal remedies - the tribunal held that investors will have a duty to do so where they are alleging that they have been mistreated at the hands of the courts in the host government.

However, no sooner had the funeral home case been lain to rest by the tribunal, than it would be partially disinterred by a request from the US Government for a supplementary decision in the case.

In a brief 3-page letter to the tribunal on Aug.11, 2003, counsel for the US Government observed that the tribunal had dismissed the claims "in their entirety", but had not stated expressly that Mr. Loewen's individual claim under NAFTA's Article 1116 - as a shareholder of The Loewen Group - was likewise dismissed.

While the US Government portrayed this oversight as a "minor" point, it nevertheless requested that the tribunal clarify - through a supplementary decision - its ruling, in order to put the matter to permanent rest.

Meanwhile, counsel for Mr. Loewen in a submission to the tribunal in September of 2003, disagreed that this was a "minor" point; on the contrary, they argue that "the tribunal completely overlooked his (i.e. Mr. Loewen's) Article 1116 claim, and that upon this being recognized, he is entitled to ask the tribunal to return to the merits".

Arguing that Mr. Loewen's claim ought not succumb to the same jurisdictional hurdle which felled TLG's claim (i.e. the company had switched nationalities), counsel for Mr. Loewen emphasized that he has been, and remains, a Canadian citizen and, as such, is deserving of relief under the NAFTA.

Should the tribunal determine that it does indeed have jurisdiction to hear Mr. Loewen's claim, his lawyers say that the tribunal should revisit its earlier-stated views on the relative merits of the case - in particular, the view that the Loewen dispute ought to have gone to the US Supreme Court before ending up in NAFTA arbitration.

Lawyers for Mr. Loewen insist that affidavits were put before the tribunal which showed that The Loewen Group had taken outside legal advice following the Mississippi jury verdict, and that outside counsel had warned that the likelihood of obtaining Supreme Court review was 'extremely remote', and that pursuing such a course of action might jeopardize its chances with the Mississippi Supreme Court - and even invite sanctions to be visited upon its attorneys.

But in the latest submission to the tribunal on Dec. 19, 2003, The US Government rebuts Mr. Loewen's submissions. Lawyrs for the United States maintain that Mr. Loewen is seeking "reconsideration of an issue already decided" and that this is contrary to the rules of arbitration in the case. Moreover, the US has submitted that, even if the tribunal were to reconsider the claim on its merits, it would find that the evidence did not show that the Loewen Group had no viable option for appeal in the US legal system.

Counsel for Mr. Loewen will have one further opportunity to put forward written arguments to the tribunal on this question, and then the tribunal will consider the matter.

INVEST-SD News Bulletin will continue to monitor further developments. However, this much seems clear: earlier reports of the Loewen arbitration's demise have been somewhat premature.

Arguments continue before the tribunal on the question of a supplementary decision - and what that would entail. Moreover, even if the tribunal should side with the US Government and declare that its earlier award also served to dispose of Mr. Loewen's personal Article 1116 claim under NAFTA, the door may be open to a further challenge to the tribunal's award. Lawyers for Mr. Loewen hinted at such a prospect in their September submissions to the tribunal - observing that, as matters presently stand, "the Award would be imperfect and liable to be set aside in appropriate judicial proceedings."

In other words, after a long journey through the Mississippi court system and on to international arbitration, the Loewen case could yet land back in US Courts should Mr. Loewen wish to try his luck again in the US court system - this time with US laws which provide, in exceptional circumstances, for the setting aside of international arbitration rulings.

Sources:

INVEST-SD Interviews

Case documents available on-line at: http://www.state.gov/s/l/c3755.htm

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Negotiation Watch
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4. Investment treaty negotiation round-up

A survey of recent international news coverage finds announcements about bilateral investment treaties negotiated between the following nations: India-Sudan (signed), Thailand-Papua New Guinea (under negotiation), South Korea-Oman (signed), Belgium-United Arab Emirates (signed), Spain-Equitorial Guinea (signed), and United Kingdom-Vanuatu (signed).

Sources:

"UK/Vanuatu IPPA agreement to set standards for investor protect", Dec.30, 2003, Asia Pulse news wire

"Spanish Foreign Minister on Tour in Malabo", Nov. 22, 2003, Panafrican News Agency (PANA) Daily Newswire

"U.A.E and Belgium sign initial investment draft agreement", Nov.18, 2003, The Emirates News Agency.

"India, Sudan agree to Cooperate in fight against terrorism", Oct. 22, 2003, BBC Monitoring International Reports

"A new frontier in Aisa", by Soonruth Bunyamanee, Bangkok Post, Oct.23, 2003

5. Updated list of US bilateral investment treaties available on-line

An up-to-date listing of bilateral investment treaties concluded by the United States with various foreign governments - including the legal status of such agreements - is available on the website of the US Department of State at: http://www.state.gov/e/eb/rls/fs/22422.htm

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INVEST-SD Bulletin is produced By Luke Eric Peterson in Boston, Massachusetts for IISD.

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