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Contents at a Glance:

Arbitration Watch:
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1. Yemen found to have breached BIT in dispute with Omani construction company, By Luke Eric Peterson

An ICSID tribunal has held that the Republic of Yemen breached its obligation to provide an Omani construction company with "fair and equitable treatment" in a ruling handed down on February 6th, 2008. Unless the Yemeni Government should move to annul the award, it must pay the investor roughly 25 Million USD (including certain legal costs and interest).

(A copy of the heretofore unpublished award has been obtained by ITN and made available on-line in the ITN documents centre.*)

The Omani firm, Desert Line Projects (DLP), had accused the Yemeni Government of failing to pay for certain road construction undertaken, and of coercing the Omani

firm into an unfavourable settlement agreement - pursuant to which it waived half of an amount which had been awarded to the firm in a local ad-hoc arbitration in Yemen.

DLP also alleged that its executives and officers had been subjected to harassment and threats by third-parties, as well as by the Yemeni military.

The ICSID tribunal's award is notable for several reasons, including the jurisdictional holding that the claim could be heard notwithstanding the fact that the claimant had not obtained an "investment certificate" – a jurisdictional requirement imposed by Article 1 of the Yemen-Oman bilateral investment treaty.

Ultimately, the tribunal was satisfied that DLP's road construction project had been solicited and approved by the Yemeni President himself, and that it would offend notions of good faith to imagine "that he offered his assurances and acceptance with his fingers crossed, as it were, making a reservation to the effect 'that we welcome you, but will not extend to you the benefits of our BIT with your country.'"

In such circumstances, and given the strategic and financial importance of the investments, the tribunal held that it would be extraordinary to deprive the project of BIT protection "due to the failure to have obtained some unspecified stamped or signed form from a governmental subdivision."

The award is also notable for finding that Yemen had exerted undue coercion upon the claimants in order to have them sign a settlement agreement which offered them only half of a sum which had been awarded to them in an earlier domestic arbitration with the Yemeni Government. The ICSID tribunal held that the investor did not freely consent to the settlement agreement – given the coercion and pressure it endured – and that Yemen's actions violated the obligation to provide "fair and equitable treatment", as well as to refrain from illegal or unjustified measures against Omani investors.

The ICSID tribunal ruled that the settlement agreement was not entitled to international effect, thus paving the way for the claimants to recoup the remainder of the amounts owed to them as a result of the domestic arbitration process in Yemen.

Notably, the claimant also sought "moral damages" for the harm sustained to their reputation, their credit, their business opportunities and the physical stress and anxiety inflicted upon company executives.

The ICSID tribunal observed that BITs "primarily aim at protecting property and economic values", but they do not exclude, in exceptional circumstances, the order of compensation for moral damages.

Indeed, in the circumstances of the case, the tribunal held that Yemen had acted maliciously – particularly with respect to the physical duress exerted on company officials – and ought to be liable for injuries suffered, whether physical, moral or material. While not awarding the large sum requested by the claimant, the tribunal did award DLP 1 Million USD in compensation for moral damages.

Hamid Gharavi and Raed Fathallah acted for the claimants, whilst Rodman Bundy,

Loretta Malintoppi and Charles Claypoole acted for the respondent.

* The award is available on-line here:
http://www.iisd.org/investment/itn/documents.asp

2. Blocked eco-tourism project in Costa Rica parkland leads to BIT arbitration,
By Damon Vis-Dunbar and Luke Eric Peterson

A German investor who was denied a permit to develop a residential property development project on Costa Rica's Pacific coast has registered a claim at ICSID.

The German investor, Marion Unglaube, purchased land in Playa Grande that was later turned into a national park. This coastline is one of the few places that the endangered leatherback turtles lay their eggs.

The planned development, including houses, hotels and a market, was billed as an eco-tourism project that would "be turtle friendly." According to the claimant, all required permits for the project were acquired before the project was blocked in 2003.

"The result is a de facto expropriation of the land on which the project was to be built," said counsel for the Marion Unglaube.

The claimant is seeking damages for a host of alleged breaches to the Germany-Costa Rica BIT, including fair and equitable treatment, full security and protection, national treatment and most favored nation treatment. The claimant will also be making use of what it characterizes as an "umbrella clause" in the treaty: a provision that sometimes allows investors to bring claims for breach of contract or other undertakings before an investment treaty tribunal.

Damages have not yet been quantified. An email inquiry to the Costa Rican Department of Foreign Trade, seeking comment on the investor's claim, had not been answered at press time.

Counsel for the claimant tells ITN that Marion Unglaube is not the only investor to have been affected by restrictions on property development in the area around the Parque Nacional Marino Las Baulas de Guanacaste. More than 50 other properties are alleged to have been affected; however it is unknown how many of these are foreign-owned.

The Unglaube case has certain echoes of an earlier ICSID arbitration against Costa Rica - the Compania del Dessarollo De Santa Elena (CDSE) case – which arose out of the expropriation of land adjacent to the Santa Rosa National Park in Costa Rica. Although the Costa Rican Government conceded that it had expropriated the property in question, its compensation offer was deemed inadequate by the US investors.

Following pressure from the US Government, Costa Rica consented to an ICSID arbitration in order to determine the appropriate amount of compensation to be paid.

(At that time, there was no US-Costa Rica BIT protecting the investment in the CDSE case, or providing Costa Rica's consent to arbitrate disputes with US investors).

3. Tribunal appointed to hear NAFTA claim over thwarted garbage site in Canada, By Luke Eric Peterson

ITN can reveal that a tribunal has been formed to hear a claim brought by a US investor, Vito G. Gallo, against the Government of Canada. Mr. Gallo initiated a NAFTA Chapter 11 arbitration after the scuttling of his plans to use a former open-pit mine as a disposal site for non-hazardous household and commercial waste from the City of Toronto.

Three arbitrators have been appointed to hear the case: Canada's nominee, J. Christopher Thomas, a Canadian lawyer and arbitrator; the claimant's nominee, Jean Gabriel-Castel, Professor-Emeritus at Toronto's York University; and Juan Fernandez-Armesto, a Madrid-based arbitrator and professor, as the chairperson of the tribunal.

Mr. Gallo's business plan called for the disposal of waste in a man-made lake at the mine site, and periodic withdrawal of waste-water for treatment. However, following a change in government in the province of Ontario in 2003, Mr. Gallo alleges that he was unable to renew a water removal permit which had been issued under the previous administration. Subsequent to this, he alleges that the province passed legislation which imposed a blanket ban on the mine site as a garbage disposal site.

In March of 2007, Mr. Gallo filed a formal Notice of Arbitration, following an earlier warning of his intent to file suit against Canada under Chapter 11 of the NAFTA.

According to a spokesperson with Canada's Department of International Trade, a first meeting of the arbitrators has yet to take place. As such, no timetable has been fixed for the filing of legal pleadings in the case. The proceeding will operate under the UNCITRAL rules of arbitration. The Government of Canada makes it a policy to release all documents related to ongoing NAFTA Chapter 11 arbitrations on its website. ITN will continue to monitor the progress of this case.

In addition to the Gallo arbitration, a number of investment claims have been threatened against the Government of Canada in recent years. Currently, the Department of International Trade lists 7 NAFTA Chapter 11 arbitrations as "active" on its website; these include the Gallo case; Chemtura/Crompton; Mobil Investments/Murphy Oil' GL Farms and Carl Adams; Gottlieb Investors Group; Merrill and Ring Forestry Group; and a threatened claim by Clayton/Bilcon (see later item in this newsletter).

ITN has reported on each of these cases periodically. A search of the ITN archive (www.investmenttreatynews.com) will generate further information about each claim.

4. Tribunal selected in German firm's arbitration over Ghanaian cocoa processor,
By Damon Vis-Dunbar

A troubled cocoa processing partnership between the government of Ghana and a German firm has brought the parties to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID).

The German company, Gustav Hamester, entered into a joint venture in 1992 with Ghana's cocoa regulator, Cocobod, to create Ghana's largest cocoa processor, West African Mills.

According to the claimant, it invested money, management and expertise toward modernizing a cocoa processing factory in the town of Takoradi, while Cocobod committed to supplying the factory with cocoa beans. Following a change in government in 2001, the claimant holds that Cocobod broke the agreement by halting the supply of beans.

The Ghana press reports that the West Africa Mills Company shut down production in 2003, sparking protests from the 300 employees of the company. These press reports also suggest that the dispute centered on the price of the cocoa beans: Cocobod had been supplying beans at a certain price, and then raised the cost.

Gustav Hamester is arbitrating under the terms of the Germany-Ghana bilateral investment treaty. The claimant has not quantified the amount of damages it is seeking.

The claim was registered with ICSID in September 2007, and a tribunal consisting of Toby Landau, Bernardo Cremades, and Brigitte Stern (as President) will hear the dispute.

It is unknown precisely how many BIT arbitrations Ghana has faced in the past; however one BIT claim, by the Malaysian firm Telekom Malaysia was brought to arbitration in recent years under the UNCITRAL rules of procedure. That claim, which pertained to a 30% stake in Ghana's largest telecoms company, was settled in 2005.*

*See: "Telekom Malaysia settles its $170 Million international arbitration against the Government of the Republic of Ghana," Herbert Smith press release of June 15, 2005

5. US investor threatens Canada over quarry project rejected on environmental grounds,
By Luke Eric Peterson

Members of a US family, and their business corporation, have signaled their formal intent to pursue an arbitration against the Government of Canada, following the rejection of a proposed basalt quarry to have been located in the eastern Canadian province of Nova Scotia.

The investors, the Clayton family, and their Delaware-based corporation, Bilcon, filed a Notice of Intent with the Government of Canada on February 5 of this year. This Notice sets in motion a 90 day waiting period before the claimants can file the Notice of Arbitration, which will lead to the constitution of an arbitral tribunal.

The claimants allege that an environmental review of their proposed project dragged on for an "unreasonably long time" - five and a half years - while other projects were reviewed, and ultimately approved, in much shorter time frames. Further, they claim that the review process was carried out in a biased and politically-motivated fashion. Alleging a failure of due process and the rule of law, the US investors accuse Canada of violating several commitments contained in NAFTA Chapter 11, including the obligations to provide National Treatment, Most-Favoured Nation Treatment and Fair and Equitable Treatment.

In their Notice of Intent, the claimants allege that they have suffered at least $188 Million (US) in damages.

The proposed quarry project had attracted considerable attention from environmental and community groups in the province of Nova Scotia, with the Sierra Club of Canada and others opposing the project during the environmental review process.

Briefly Noted:
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6. Zurich event to discuss investment treaty arbitration on March 7

An all-day conference on investment treaty arbitration will take place on March 7th in Zurich. The event is organized by the Swiss Invest Forum, an organization which operates on a commercial basis to promote cross-border investments. Prof. Pierre Tercier and Prof. Gabrielle Kaufmann-Kohler co-chair the event.

For more information click here

7. British Institute to host annual London conference on investment treaty law on May 9

The British Institute of International and Comparative Law (BIICL) is to host its annual public conference on investment treaty law on May 9th, 2008. The BIICL's Investment Treaty Forum will offer an all-day event with panel discussions on the theme of post-award remedies in international investment treaty arbitration.

For more information click here

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